The Challenge of the Commons: Beyond Trespass and Necessity†

INTRODUCTION: HOME, THE COMMONS, AND THE OTHER

Colonists settled three towns on the Connecticut River early in 1637. Owing to the “condition of these several plantations in these beginnings,” necessity constrained them “to improve much grounds belonging to the several towns in a common way.” Common cultivation alleviated necessity; common lands served as platform for common cause. On January 14, 1638, the freemen of those towns, hoping to constitute “an orderly and decent Government,” voted to “associate and conjoin our selves to be as one Public State or Commonwealth . . . [and] enter into Combination and Confederation together . . . ”

In this setting, “Commonwealth” was at the same time a metaphor of state, a principle of economic organization, and a description of everyday life. In its constituting moment of self-governance, the Connecticut assembly looks the picture of an early modern Enlightenment project par excellence, an actual rather than metaphorical Rousseauian social contract, and taking the venture a step further, a commonwealth literally grounded in the commons. This vision of origination persists in shaping American self-image; the New England town green and town hall meeting occupy iconic status, informing areas of contemporary public life from the placement of parks to the conduct of democratic discourse and electoral deliberation.

However, the record of these same residents provides another founding picture of the commons. Eight months earlier, on May 1,
1637, settlers voted that the three towns would levy ninety men, now called “soldiers” rather than citizens, each armed, to prosecute “offensive war against the Pequoitt [sic],” native inhabitants of the region whom they aimed to dislodge.\footnote{Order of the Generall Corte att Harteford (May 1, 1637), \textit{in Conn. Colony Records}, \textit{supra} note 2, at 9–10 (requiring each of the ninety men to carry “1 lb poudre, 4 lb of shott, 20 bulletts; 1 barell of Powder from the Rivers mouth, [a light] Gunn if they cann”).} After several English assaults including a massacre of native villagers, Pequot refugees fled the area.\footnote{A \textit{Brief History of the Pequot War}, \textit{supra} note 1, at 8 (describing the massacre at Mystic, Connecticut in which the colonists burned alive at least 500 Pequot villagers).} The colonists divided some survivors among other native tribes allied with the English, sold others into slavery, forbade further utterance of the Pequot name or reference to Pequot identity, and claimed Pequot lands as their own.\footnote{\textit{Id.} at 19 (citing the Treaty of Hartford of Sept. 21, 1638, requiring “that none should inhabit their native Country, nor should any of them be called PEQUOTS any more”; \textit{id} at 21 (“And thus the Lord was pleased to smite our Enemies . . . and to give us their Land for an Inheritance”).}

These two episodes from the Connecticut colony point to the simultaneously utopic and dystopic foundational work of the commons in the United States. The idea of the commons is central to the United States project, and tensions within it reflect tensions that stretch from the foundation of the republic up to the present. On one hand, the North American continent was taken as refuge for dissenters, object for ambitions, outlet for the poor and desperate; the putative commons was a canvas for the European political and economic imagination and setting for novel common schemes. Conscious of the contingency of their history, U.S. citizens still refer to the United States as the “American experiment” and ordered liberty, to this day, is itself considered an intentional common project. Here, in the legal imagination, “the commons” assumes a constructive role. On the other hand, the same United States history tells of a settler colonialism in which “the commons” plays an indispensable, destructive role,\footnote{“Settler colonialism” describes an imperial formation distinct from the “de-development” typical of colonialism. Donald Denoon, \textit{Understanding Settler Societies}, \textit{18 Hist. Stud.} 511 (1979). Though also premised on exogenous domination, settler colonialism “seeks to replace the original population of the colonized territory with a new society of settlers . . . .” Tate A. LeFevre, \textit{Settler Colonialism, in Oxford Bibliographies} (May 29, 2015), http://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0125.xml. Because “the colonizers came to stay,” in settler colonialism, “invasion is a structure, not an event.” Patrick Wolfe, \textit{Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event} 2 (1999).} as the myth of a great North American wilderness was crucial to resolving some of the ethical quandaries inherent in violently expropriating land from native inhabitants. In parallel with these formative visions, “the commons” gives name to the setting for pragmatic challenges related to a continent of resources and conditions of normative pluralism. The treatment of that putative wilderness in law and policy shape the present day, leaving doctrines
that condition approaches to smaller-scale commons and leaving the United States government, in its public lands, the single largest landowner in the United States.

This Report describes meeting the challenge of the commons in the contemporary U.S. legal context. It first gives a general background before analyzing a couple of exemplary hypothetical problems. The picture thus revealed shows several features. Themes from the Connecticut colony story—attempts at common projects, tales of trespass, and assertions of necessity—recur. This snapshot of the commons in the United States also shows, amidst thriving dominance of an ideology of private property and its enabling doctrines, the working of pragmatic and creative alternatives.

I. General Orientation

A. The Violence of the Commons

1. The North American “Commons” as Problematizing Agent in European Legal Thought

Peoples native to the Americas held and managed land and resources according to their own notions of socio-spatial organization, processes of governance, and practices.8 The New World and its inhabitants sparked the imagination of the Old. Legal thinkers and jurists came to the North American context with baggage—ideologies that favored private property holding,9 political theories of sovereignty,10 and legal precepts like first-in-time doctrines of appropriation11—that left them particularly challenged by the fact of native peoples.


10. See Jonathan Elmer, On Lingerling and Being Last: Race and Sovereignty in the New World (2008) (arguing that the logic of sovereignty of early modern Europe—based on a trope of personification—was a racialized logic with contradictions revealed in the New World).

11. William Blackstone, Commentaries on the Laws of England 408–09 (W. Maxwell ed., 1865) (1765–1769) (with mankind’s increase, conceptions of more permanent domination became necessary, lest the good order of the world continually broken “while a variety of persons were striving to get first occupation of the same thing, or disputing which of them had actually gained it”).
After the founding of the United States, the new U.S. courts had to deal with competing land claims, arising out of competing chains of title, based in turn on conflicting doctrinal treatment of native Americans as landholders. Before then, some European legal thinkers had already responded to the challenge of the New World “commons” with novel approaches. John Locke looms large in later thinking on the commons. Locke, a creature of colonial context, proposed that investing one’s labor supported a superior claim to common resources—as long as one’s labor matched his European conceptions of cultivation. Although Lockeian notions would sound in some later schemes by which “commons resources” were apportioned in the United States, proponents fall conspicuously silent regarding a context in which labor-based doctrines for land claims might have most unambiguously applied, namely, regarding land worked under the American system of chattel slavery. Locke’s devotees may imagine the colonial encounter as the conflict between a private property regime and a commons, but recent scholarship finds it was more a matter of European commons versus native commons.

2. Genocide and the Commons

Genocide figures in the treatment of the commons in the United States in several ways. Settler populations’ expropriation of land and resources (some of which in notable ways had been managed in common by the indigenous peoples) and the reduction of common

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12. See Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823) (regarding title descended from transfer by deed from native Americans versus title descended from treaty between the native nation and the U.S. government, finding natives’ “right of occupancy,” held by virtue of first possession, subordinate to the U.S. government’s “right of dominion,” held as successor to European powers which had engaged in “discovery” of the continent).

13. Locke, as a secretary to the Council of Trade and Plantations (1673–1674) and a member of the Board of Trade (1696–1700), was in fact, “one of just half a dozen men who created and supervised both the colonies and their iniquitous systems of servitude.” Martin Cohen, Philosophical Tales 101 (2008); see also James Tully, An Approach to Political Philosophy: Locke in Contexts 128 (2007); J. Farr, “So Vile and Miserable an Estate”: The Problem of Slavery in Locke’s Political Thought, 14 Pol. Theory 263 (1986) (arguing that Locke’s property theory regarding unenclosed land was intended to justify the displacement of Native Americans).

14. “Though the earth, and all inferior creatures, be common to all men . . . . Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.” John Locke, Second Treatise of Civil Government ch. 5 § 27 (1690), https://www.marxists.org/reference/subject/politics/locke.


16. See, e.g., Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (May 20, 1862) (according land title to a settler who worked the land for five years and had never taken up arms against the United States).

17. Greer, supra note 15.
holdings to private property had genocidal effect.\textsuperscript{18} Sometimes settlers killed indigenous people outright in order to expropriate land.\textsuperscript{19} Cultures were also eradicated with the change in land tenure regime and, with the material basis of their lifeways eliminated, indigenous people perished in large numbers.\textsuperscript{20} Seizure of the commons served as incentive or justification for some of the colonists’ genocidal acts. Portrayal of the natives’ extinction—later portrayed as tragic, or even inevitable—abetted colonial land claims.

This, however, is not the end of the story. Many perished, but indigenous people also survived. Some fled before the advance of colonial settlers. Other tribes reached agreement with the federal government to “reserve” lands for tribal collective ownership, holdings on which their governance and resource-management practices were legally recognized as sovereign. And, importantly, many indigenous people adapted, assimilating into the new land tenure regime and the dominant culture.\textsuperscript{21} The fact of survival defies the myth of native extinction.

The myth of native extinction\textsuperscript{22} plays a key role in the regime of settler colonialism.\textsuperscript{23} The myth of extinction in some senses created the American commons as a discursive object. It served to legitimate takings by state, local, and federal government and by individuals in successive waves of settlement. It establishes the idea of an unpopulated blank slate and thus perpetuates a sense of \textit{terra nullius} as well as a sociopolitical vacuum, rightfully or at least unavoidably.

\textsuperscript{18} See, e.g., Patrick Wolfe, \textit{Settler Colonialism and the Elimination of the Native}, 8 \textit{J. Genocide Res.} 387 (2006) (identifying settler colonial “logics of elimination”); LeFevre, supra note 7 (“This new [settler] society needs land, and so settler colonialism depends primarily on access to territory.”).

\textsuperscript{19} See, e.g., William Apess, \textit{Eulogy on King Philip, as Pronounced at the Odeon, in Federal Street, Boston} (1836), in \textit{William Apess, On Our Own Ground: The Complete Writings of William Apess, A Pequot}, 275, 278–302 (Barry O’Connell ed., 1992) (detailing decades of murderous and treacherous acts towards Massachusetts natives whose assistance had been key to Pilgrims’ and Puritans’ survival, culminating in “King Philip’s War” 1675–1678).

\textsuperscript{20} See, e.g., Brian W. Dipple, \textit{The Vanishing American: White Attitudes and U.S. Indian Policy} (1982) (arguing that white settlers, having killed Indians upon arrival on the east coast of North America and pushed survivors farther west, created a conscience-soothing myth that Indians are a vanishing race, doomed to extinction anyway, that eventually shaped federal policy).


\textsuperscript{22} Settlers’ imagination of unclaimed space on a continent that had clearly been populated gave rise to the figure of the vanished Native, the Indians who “perhaps tragically, were removed from the area, or died out, or ceased to be ‘really’ Indian, or simply disappeared at some point between the appearance of the ‘last’ one and the present moment.” Wolfe, supra note 7, at 4.

\textsuperscript{23} Id. at 2 (“Settler colonies were [are] premised on the elimination of native societies.”).
filled by the social processes and political schemes of settler colonists. The myth of native extinction also stimulates development and application of legal doctrines relevant to *terra nullius*.

The work accomplished by the myth of extinction in the imagination of a commons is ongoing. In the late 1830s, two hundred years after the colonization of Massachusetts began, William Apess, a Pequot minister and activist, pointed out the hypocrisy of settler nostalgia and lamentation over supposedly past tragedies during an ongoing land struggle in his state: “Let the children of the Pilgrims blush while the son of the forest drops a tear and groans under the fate of his murdered and departed fathers. . . .”24 Logics of the empty space still redound to the disadvantage of native descendants and still legitimate chains of title in settlers’ descendants.

3. The Legacy of History

This history has two formative bearings on our discussion of the commons. First, the formation of “settler common sense,”25 the “commonsensical background”26 through which European law and legal categories become the normalized structures of everyday life, was (and is) crucial to the project of settler colonialism. In the settler imaginary, a putative commons loomed large; treatment of “the commons” figured in epistemologies of colonialism. The conceptual categories of “commons” and private property derive from European legal traditions; our employing them in this discussion of the North American space is itself a reflection of settler-colonial logics.27

Second, processes of myth making and lawmaking are mutually constitutive and ongoing. Just as the myth that America was a wilderness props up settler colonialism, in turn, doctrines that arose from the presumption of a wilderness and unclaimed land and material resources more generally framed (and continue to frame) treatment of open-access resources and commons in U.S. law. In U.S. property theory, the commons has come to figure in tragic aspect.28 The potential for creative or life-sustaining uses of the commons in contemporary life is predicated upon, and framed by, its freighted history.

25. Mark Rifkin, *Settler Common Sense: Queerness and Everyday Colonialism in the American Renaissance*, at xvi (2014) (describing “the ways that legal and political structures that enable non-native access to Indigenous territories come to be lived as given, simply the unmarked, generic conditions of possibility for occupancy, association, history, and personhood”).
26. *Id*. at xviii.
B. Legal Categories that Correspond to the Convivial Commons

Mattei and Quarta, in a survey instrument for the International Academy of Comparative Law, developed in conversation with work by legal scholar Stefano Rondotà, have produced a portrait of the commons that I characterize as “the convivial commons.” In their view, any given physical space, regardless of the number of users, may be defined as a commons; neither is the defining diacritic “whether the ultimate legal title on the premises is private or public.” Rather, characterization as a “commons” depends on “whether the space fosters a generative collective activity or is run on a model of exclusion—extracting profit and rent.”29 They define a commons as “anything a community recognizes as capable of satisfying some real or fundamental need outside of market exchange.”30 Mattei and Quarta propose that commons institutions allow a community access to resources, facilitate “pervasive decision-making,” and tend to “counteract the profit motive, inequality, and shortsightedness.”31 They “function through a direct legal empowerment of their members in common pursuit of a generative meaning or task, and they respond to real human needs for participation, security, and sociability.”32 In short, Mattei and Quarta’s notion of a commons is institutionalist, based on uses, and imbued with a certain ethos.

In the United States, myriad property forms are managed by institutional arrangements that could correspond to this notion of the commons. Some examples would be worker cooperatives, community gardens, conservation trusts, some public lands, particularly national parks but also including state and municipal parks, the spaces or resources of some nonprofit organizations, the navigation servitude, air space, some cohabitation spaces such as co-housing or graduated-care elder housing, and some Native American tribal reservations. My emphasis on property forms is intentional. Unlike Mattei and Quarta’s notion, for the most part, “the commons” derives its significance in U.S. legal thought as an ontological category, not as a set of practices with an ethical dimension.

Moreover, in the United States, “the commons” per se exists as an analytic category but not as a juridical category. There is no standard legal definition of a commons. Mattei and Quarta relate an example of a 2011 court case in Italy in which the Corte di Cassazione applied the concept of the commons in finding a fish valley in the Venetian lagoon “a commons, not simply a public property,”

30. Id. at 1.
31. Id. at 2.
32. Id.
because of its connection with Italian constitutional values, thereby
denyng a claim by a private company. In U.S. law, by contrast, in
most cases characterizing a space, project, or enterprise as a com-
mons does not exert a conventional legal effect. Except in specific
categories (such as those examples outlined below), those using a
space as a commons (in the sense expressed by the Survey’s intro-
duction) and wishing to establish a superior claim, would stand sur-
est chance of success under U.S. law by establishing a claim based in
private property doctrines (such as adverse possession or servitudes).
Constitutional rights could be invoked for some uses (e.g., assembly),
but not others (e.g., dwelling).

C. Past Concepts of the Commons

Different portions of the area that became the United States
were colonized under British, Spanish, and French authorities.
Notions of the commons, sources of law, and practices pertaining
thereto, reflected these different legal traditions in various regions
of the country, as well as those of settlers’ countries of origin (for
immigrants not from the colonial powers), enslaved populations, and
native inhabitants.

After the establishment of the United States, the government
developed federal doctrines and government policy to deal with vast
stretches of territory not reduced to private holding. A few examples
of conceptions of the commons from this complicated, rich, and messy
past are given below.

1. New England—Native

In 1620, Pilgrims landed on the coast of Massachusetts in an
area inhabited by the native Wampanoag, horticulturalists who sup-
plemented their crops with fishing, hunting, and gathering, and for
economic and cultural purposes used some lands and resources as a
commons. The way a part of the Wampanoag nation known as the
Mashpee tribe managed the complications of land tenure into the
age of colonialism lends one view to how their version of the com-
mons fared. After a generation of encroachment (but otherwise rela-
tively peaceful coexistence), in 1665, the Wampanoag reserved
twenty-five square miles of land, in the form of a deed from tribal
leaders to the tribe itself. Plymouth Colony confirmed the deed
in 1685.

In the interim, during “King Philip’s War” (1675–1678) between
the Wampanoag and allied forces and the colonists and their allies,
over 40% of the Wampanoag population were killed and large

33. Id. at 4.
34. See Greer, supra note 15 (summarizing British, Spanish, and French com-
mons doctrines and practices contemporary with their respective New World colonial
experiments and their importation to different regions of the New World).
numbers of healthy men and boys, sold into slavery. The Mashpee were one of three tribes, out of an original sixty-nine tribes of the Wampanoag nation, to survive into the following century. In 1725, Plymouth Colony instituted a proprietary system of land control in the area of the Mashpee, with tribal members becoming “proprietors,” or collective owners, of the land. After Plymouth Colony irritated the Mashpee by appointing three “guardians” over the tribe and its landholding, the Mashpee dispatched delegates to London to share their grievances with the Crown, and subsequently in 1763, Plymouth Colony acknowledged Mashpee as a self-governing district.

In 1822, the U.S. federal government designated the Mashpee as a tribe in occupation of a reservation. In 1842, the Massachusetts state legislature approved the division of Mashpee tribal lands among tribal members into individually owned parcels, inalienable to anyone other than Mashpee proprietors. Ignoring the Trade and Intercourse Act of 1790, which required federal approval for Indian land agreements, an 1870 act of the Massachusetts state legislature authorized (without federal approval) conveyance of the remaining acres in tribal ownership, abolished the Mashpee district, and created the town of Mashpee in its stead. In 2007, Mashpee Tribe became a federally recognized tribe, authorizing it to acquire land on a collective footing; in 2012, Mashpee Tribe filed a Land in Trust application for an “initial reservation” with the Department of Indian Affairs and in 2015, after the U.S. Department of the Interior approved the application, the Tribe began (re)acquiring tribal lands.35

The Mashpee are but one example. There are 562 federally recognized Indian Nations in the United States, each with its own conceptions of the commons and each, in relation to settlers and the U.S. government, with a different history of land expropriation, tribal reservation, and group recognition. A few generalizations may be made about legal doctrines bearing on the commons that the U.S. applied, and applies, to descendants of the native inhabitants of the continent. Beginning in 1828, as a matter of policy, the U.S. government increasingly pressured eastern tribes to abandon land and move west in forced migration. The government subsequently embarked on a military campaign that ran until 1887 to relocate tribes to reservations, established through treaties that required natives to trade large tracts of land for the continued right of self-governance. In 1887, Congress passed the General Allotment Act of 1887 (also known as the Dawes Act), which mandated the forced conversion of communally held tribal lands into parcels for individual Indian ownership. More than 90 million acres—nearly two-thirds of

reservation land—were classified as “surplus” and given to settlers, most often without compensation to the tribes. (The federal government ended the allotment policy under the Indian Reorganization Act of 1934 and since 1934, the Department of the Interior has taken about 9 million acres, or about 10% of the total amount of land lost to tribes under the Allotment Act, back into trust status.) Today, tribes hold more than 50 million acres of land, approximately 2% of the land area of the United States. Title to most tribal lands is held “in trust” by the United States for the benefit of current and future generations of tribal citizens. Reservation lands today are made up of such “trust” lands (held for the benefit of a tribe or an individual), and of parcels owned by tribes and individuals.37

2. Colonial Spaces and Practices

European colonists replicated some forms of common landholding from their home countries and created anew some common cultivation practices. In the early colonial history of New England, for example, common cultivation was the typical method for turning meadows and forests into fields and pastures, and rights to lands thus improved were held in common by settlers of the jurisdiction.38

Such holdings survive in many New England towns. Nearly a century after establishing New Haven colony and managing its “common and undivided lands” through meetings of all settler interestholders, colonial New Haveners designated a small Committee of Proprietors “to guard the public interest on common lands.”39 Anne Calebresi (descendant of a colony founder and current member of the Committee) avers, “Up until the time they chose five people, [the Green] belonged to the entire community. It did not belong to the government. It did not belong to the Crown.” Her sense of its status hearkens to Rondotà’s sense of a commons, neither private nor public. A detractor, objecting to the Committee’s self-selecting membership and closed deliberations, critiques her position as “patrician,” belied by the preservation of nearby green spaces “owned by the little people and managed by their democratic government.”40

37. Federal policy towards Native Americans and their lands summarized from id. at 2–6, 13–14.
38. See, e.g., Order of the Generall Corte (Feb. 15, 1643), in CONN. COLONY RECORDS, supra note 2, at 100 (owing to the “[c]ondition of these severall Plantations in these beginnings wherein we are,” colonists found that “necessity constraynes to improve much grounds [sic] belonging to the several Townes in a common way”).
40. Anderson Scooper, Comment to Bass, supra note 39 (Jan. 21, 2017, 12:34 a.m.).
In some domains, custom yielded commons usage, even where it did not transform legal title, for example regarding the right to range over unenclosed rural land for the purposes of hunting.\textsuperscript{41} In other domains, recognition of legal title in the public and commons usage co-emerged. At English common law, a navigation servitude afforded any member of the public the right to travel by vessel on, or to fish in, a body of water that was subject to the ebb and flow of the tides. In the U.S. context, the extension of the servitude beyond tidal water to all waters that are navigable in fact is attributed to a series of Supreme Court decisions from the 1800s,\textsuperscript{42} although in my reading, some colonial-era documents evidence a more general notion of the navigation servitude in North America predating those decisions.\textsuperscript{43} In the United States, the navigation servitude is currently well established and commonly interpreted to extend, via the notion of public trust, to the bed of navigable waters, and to extend to any member of the public the right to fish in navigable waters as well.\textsuperscript{44}

As with the navigation servitude, early in the period of European settlement, many significant transport routes assumed commons status. Notwithstanding the development of some toll roads and canals, European settlers treated most major

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\item McConico v. Singleton, 9 S.C.L. 244 (1818) (“[T]he right to hunt on unenclosed and uncultivated lands has never been disputed, and . . . has been universally exercised from the first settlement of the country up to the present.”). A large number of state legislatures have codified this right in so-called “posting laws,” which permit anyone to hunt on rural land unless “No Hunting” or “No Trespassing” signs have been prominently posted. See, e.g., Fla. Stat. §§ 588.10, 810.09; N.D. Cent. Code § 20.1-01-18 (2002); McKee v. Gratz, 260 U.S. 127, 136 (1922) (Holmes, J.) (“[W]ith regard to the large expanses of unenclosed and uncultivated land . . . it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.”).
\item The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (holding that the admiralty jurisdiction proper to federal courts under U.S. Const. art. III, § 2 extended beyond tidal water to all waters navigable in fact); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (invalidating the monopoly charter granted by the N.Y. legislature to operate steamboats between New York and New Jersey and establishing that Congress has plenary authority, under U.S. Const. art. I, § 8, cl. 3, to legislate on the subject of commercial navigation); Penn. v. Wheeling & Belmont Bridge, Co., 54 U.S. (13 How.) 518 (1851) (holding that federal courts, on the authority of the Constitutional Commerce Clause alone, without additional implementing legislation, could issue an injunction directing a low-lying bridge be raised in order to prevent interference with navigation on the Ohio River).
\item E.g., the General Court of Connecticut, stating a rule that towns within its jurisdiction had the authority to parcel out or dispose of their own lands, specified “the libertyes of the great River [i.e., the Connecticut River] excepted.” General Court of Connecticut (Oct. 1639), quoted in Original DISTRIBUTION OF THE LANDS IN HARTFORD AMONG THE SETTLERS, at ix (Conn. Historical Soc’y 1922) (1639), https://archive.org/details/collectionsofconn14conn.
\item See, e.g., Collins v. Gerhardt, 211 N.W. 115 (Mich. 1926) (holding that plaintiff, who owned land on both sides of a stream accessible by a vessel no larger than a canoe, had no grounds for a trespass action against defendant wading and fishing in the stream, because “[i]t is immaterial who owns the soil in our navigable rivers. The trust remains”).
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roads between towns, for example, as a privileged land use benefitting treatment as a commons. The logic guiding treatment of roads and navigable waterways eventually extended to the skies. In the United States v. Causby, the Supreme Court held that federal statutes, together with administrative regulations developed pursuant to them, had the effect of making the upper air, above the prescribed minimum altitudes of flight, a public highway. The decision has been held to supersede state law on the matter, so that liability for entry into the airspace thereafter became a matter of federal law.

3. Public Lands

Charters of seven of the thirteen original colonies included lands extending from the Atlantic to the Mississippi River. After the war of independence, these states agreed to cede lands west of the Allegheny Mountains to the newly formed federal government, largely with the notion that the government would sell the lands at auction to repay Revolutionary War debts. These lands formed the foundation of the “federal public domain,” lands from which new states were eventually carved, parcels sold, and tribal reservations, national parks, and other collective holdings, established. To facilitate the land sales that had justified transfer of the territories to federal authorities, Congress adopted the Land Ordinance of 1785, establishing a system for surveying the lands into townships of thirty-six square miles. One square mile (one “section”) of each township was to be reserved for territorial governments to raise

45. Whereas there is a desire of or [sic] neibours [sic] of Harteford that there may be a publique highway for Carte and horse upon [sic] the * upland betweene [sic] the said Harteford and Windsor as may be convenient, it is therefore thought meeet that Henry Wolcott the younger and Mr. Stephen Terr[e] and Willm Westwood and Nathaniell Warde shall consider of a fitting and convenient high way to bee marked and sett oute, and bridges made over the swampes, and then itt being confirmed by the Courte, the inhabitants of Harteford may with making a comely and decent Stile for foote and fence upp ye upper end of the meadow....

Order of the Generall Cort at Harteford (Apr. 5, 1638), in CONN. COLONY RECORDS, supra note 2, at 17–18.


47. The seven states were, namely, Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia.


enue, through sale or rent, to support public education.\textsuperscript{50} Thus, even as originally envisioned as completely parceled plots, the lands would materially support a public good.

The federal public domain expanded enormously over the course of the nineteenth century, with the Louisiana Purchase of 1803, by which the United States acquired most of the land from the Mississippi River to Montana; the Treaty with Spain in 1818, which added Florida and western Louisiana; the annexation of Texas in 1845; the Oregon Compromise of 1846 with Britain, securing what is now Washington, Oregon, and Idaho; lands ceded by Mexico at the close of the Mexican–American War, conceding California, Nevada, Utah, Arizona, New Mexico, and Western Colorado; and “Seward’s Folly,” the purchase of Alaska from Russia in 1867. In total—once native title was extinguished\textsuperscript{51}—these acquisitions added 1.4 billion acres of land and resources to the United States territory, as part of the federal public domain.

Although public supporters actively promoted settlement,\textsuperscript{52} the land auction scheme lagged, defaults were common, and Congress dropped the price. The Preemption Act of 1841, until its repeal in 1891, awarded 160 acres (provided native rights were already extinguished) to any settler that inhabited and improved the land, constructed some kind of dwelling, and agreed to pay the minimal price of $1.25 per acre.\textsuperscript{53} Congress effectively dropped the price further with the Homestead Act of 1862, which gave title to 160 acres to any settler on unsold survey land who inhabited and cultivated the land for five years, without any further payment except minimal filing fees; subsequent homestead acts increased a possible homestead claim to 640 acres.\textsuperscript{54}

By the end of the nineteenth century, public opinion about parceling the federal public domain began to shift. The age of Horace Greeley waned and the age of the Transcendentalists, and then

\textsuperscript{50} Id. at 378. Another initiative following this impetus was the Morrill Act of 1862, 7. U.S.C. § 301, which set aside large tracts of federal public lands for each state to sell or otherwise to use to establish a university; succeeded by the Morrill Act of 1890, 7. U.S.C. § 321, extending provisions for establishing agricultural colleges to the former Confederate states (which, having been engaged in insurrection when the first Act passed, had not benefited from it).

\textsuperscript{51} By decision of the U.S. Supreme Court, native title could be extinguished only by treaty with the federal government or by conquest (presumably also by the federal government, although in actuality this was accomplished through a variety of hands). Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{52} One recurrent exhortation captures some of the spirit of the settlement movement: “Go west, young man, go west.” Josiah Bushnell Grinnell, Men and Events of Forty Years 87 (1891) (attributing this as advice he received from New York Tribune editor Horace Greeley, who popularized similar exhortations in his newspaper between its founding in 1841 and his death in 1872).

\textsuperscript{53} Preemption Act of 1841, 27 Cong. ch. 16, 5 Stat. 453.

John Muir and Aldo Leopold, ascended. Yosemite Valley, the first instance in the United States of federal lands being set aside as park land for public use, was secured in 1864 as a permanent trust; Yellowstone, the first “national park,” was reserved from further homesteading in 1872; and other future national parks followed in protection. Congress authorized the President to reserve areas of the public domain as forest reserves in 1891, created the National Park System in 1916, and finally closed the remaining public domain from further private entry (except for prospectors pursuing mineral claims) with the Taylor Grazing Act of 1934.

As a “past concept of the commons,” the federal public domain stands as a paradox. Its formation was (for the most part) intended as a temporary measure, a means to the end of paying off Revolutionary War debts. It faltered as a source of quick revenue, but survived both in fact and in form through waves of systematic parcelization and intensive settlement. Lands of the federal public domain, especially in the national parks and monuments, now survive as a beloved testament to trusteeship, the most ready argument for the commons for many citizens, and an inspiration for their relationship to future generations. They may be a snapshot taken after the depopulation of lands by genocide and sequestration, but they are one of the pictures America most loves of itself.

55. See, e.g., Ralph Waldo Emerson, Nature (1836) (breaking with a utilitarian view of uncultivated land and landscapes, and dividing the ways humans use “nature” for their basic needs: basic material sustenance (“commodity”), delight (“beauty”), communication with each other (“language”), and understanding of the world (“discipline”)); Henry David Thoreau, Walden, or, Life in the Woods (1854); John Muir, Our National Parks 2 (1901) (proposing that “going to the mountains is going home; that wilderness is a necessity; and that mountain parks and reservations are useful not only as fountains of timber and irrigating rivers, but as fountains of life”); Aldo Leopold, A Sand County Almanac (1949).

56. An Act Authorizing a Grant to the State of California of the “Yo-Semite Valley” and of the Land Embracing the “Mariposa Big Tree Grove,” 13 Stat. 325 (June 30, 1864) (securing Yosemite as a trust, under federal management); An Act to Set Apart a Certain Tract of Land Lying Near the Head-Waters of the Yellowstone River as a Public Park, 17 Stat. 32–33 (March 1, 1872) (reserving Yellowstone as the first “national park”). See also An Act Authorizing the Governor of the Territory of Arkansas to Lease the Salt Springs, in Said Territory, and for Other Purposes, 4 Stat. 504–5 (Apr. 20, 1832) (setting aside the medicinal springs of Hot Springs, Ark., as a public reservation, a precedent for later acts to secure portions of the federal public domain for public purpose).


59. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (June 28, 1934) (regulating grazing of privately owned animals on public lands and, in effect, reserving all federal public lands not already designated as national park or monument, national forest, tribal reservation, or prior railroad grant lands from further parcelization or sale as private property).
D. The Commons in Contemporary Scholarly Debate

The commons figures in U.S. scholarly debate in two lines of work. One treats the commons as the site of “collective action problems.” This scholarship begins by defining taxonomic categories defined by access. “Communal ownership” means “a right that can be exercised by all members of the community,” or, stated conversely, a right that “the community denies to the state or to individual citizens the right to interfere with any person’s exercise of community-owned rights.” Other scholars have refined this terminology into “open access property,” a scheme of “universally distributed privilege,” and “commons property, resources that are owned or controlled by a finite number of people who manage the resource together and exclude outsiders, what Carol Rose calls ‘commons on the inside, private property on the outside.’” Elinor Ostrom refers to the former as a “common-pool resource.” Any setting in which a resource is “non-excludable” (and therefore, a public good), so the theory goes, is susceptible to collective-action problems. Rational, self-interested individuals will not necessarily form a group that acts rationally in the group’s interests. “Rational, self-interested individuals will not act to achieve their common or group interest” absent “coercion or some other special device to make individuals act in their common interest.” This commons is, in most of this scholarship, treated as prone to tragedy.

The second line of scholarship treats the commons as the situs of public trust, a doctrine to be expansively employed in the public interest. In a seminal article in this line, Professor Joseph Sax argued the public trust doctrine could be employed as a tool for environmental protection, introducing new forms of public participation and judicial oversight to counterbalance state and local legislatures captured by developers. This scholarship has had great influence in

64. The reference is, of course, to Hardin, supra note 28. For broader consideration of private property, state-owned property, and public rights, see Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986). For a more extended discussion of lines of argumentation running from the work of Mancur Olson, through Hardin’s article, and continuing in the work of Elinor Ostrom, see Monica E. Eppinger, Cold-War Commons: Tragedy, Critique, and the Future of the Illiberal Problem Space, THEORETICAL INQ. L. (forthcoming 2018).
turning the focus of public trust doctrine from the narrow concern of public access to commercial navigation, to a doctrine about the preservation of natural resources.66

II. The Commons in Action

A. Preface

The following analyses of hypothetical commons disputes take into account three significant factors that condition the legal treatment of property in the United States: 1) the decision, at the founding of the United States as an independent polity, to adopt English common law doctrines in substantive areas such as tort, contract, and property; 2) legal epistemology that privileges case law precedent (commonly characterized as a “common law” system, as opposed to a “civil law” system); and 3) the institutionalization of federalism. These factors determine source-of-law questions.

- Case law figures differently in U.S. property cases than in, say, constitutional law cases. Because many doctrines invoked in property cases are ancient, more often than not, prior case law serves to illustrate doctrines rather than to establish initial precedent. As a practical matter—although the writings of jurists in U.S. court decisions are treated, at best, as persuasive—“Restatements” (the work of jurists organized under the aegis of the American Law Institute that summarize or “restate” doctrine in a given subject matter area) are informative and often used as a reference.

- Although the U.S. federal government is the largest single holder of property in the United States (for historical reasons outlined above), federal law typically only governs property questions where the U.S. government is the property holder. Otherwise, property in the United States is, for the most part, an object of state law and local (city) ordinance. This means for any commons question below, there are fifty

Kundis Craig, A Comparative Guide to Western States’ Public Trust Doctrines, 37 Ecology L.Q. 53 (2010) (finding that, even when invoked to preserve natural resources more generally, nearly all decisions enforcing public trust doctrine involve resources that have some connection with navigable water).

different bodies of state statute that could apply and multitudes of local ordinances. Which body of law applies is determined by the locus of the property. Likewise, each jurisdiction has its own courts that interpret legislation or that articulate common law doctrines.

The discussion below, rather than reviewing the doctrine of all fifty states, gives the doctrine that tends to be the most widely accepted; except as noted, citations to case law are illustrative rather than precedential. Two doctrinal points bear noting. First, as a general matter, in analyzing property questions, logics of exclusion figure only second to the cult of possession in U.S. law. Second, the supposition of a binary divide between public and private pertains not only to the conceptualization of space under property doctrines, but suffuses other relevant areas of law (such as torts). If the commons, as outlined in the introduction to Mattei & Quarta’s Survey, is neither public nor private, it is in important respects epistemically homeless in U.S. legal doctrine.

B. Housing

The following hypothetical may illustrate treatment of necessity, housing, and the commons:

Four adults, desperate to find a home at an affordable cost, together with their families (including several children) inhabit homes in a development project suspended due to delayed authorizations. The four friends and their families work on both the buildings and the land to enhance their living conditions (for instance, by painting the walls and adding a little garden). After a couple of months, the legal manager of the land discovers them and brings legal action against them.

1. Disposition of the Case

a. Analysis as to Trespass and Necessity

Trespass to land was redressed by the common law tort action of trespass \textit{quare clausum fregit}, codified now in state legislation. Under this doctrine, a party who trespasses land intentionally, whether or not he or she causes harm, is subject to liability.\(^{67}\)

One may claim necessity as a defense to trespass. The doctrine of private necessity excuses trespass to prevent harm to oneself, land, or chattels.\(^{68}\) Necessity has been found to encompass demand

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67. \textit{Restatement (Second) of Torts} § 158 (\textit{Am. Law Inst.} 1965).
68. \textit{Id.} § 197.
for shelter. One case that figures in discussion of necessity doctrine deals with a trespass that did not occur. In Minnesota, a farmer refused overnight accommodation to a cattle and fur buyer who had fallen ill while visiting the farmer on business. The buyer did not overstay his welcome in trespass; rather, sent out into a cold night by horse-drawn carriage and directed towards the nearest town seven miles distant, he was found the next morning by the roadside, nearly frozen to death. The appellate court found the farmer and his son possibly liable in damages for injuries the buyer had suffered as a result of exposure to the elements and remanded the case back to the trial court for a jury to determine if defendants were aware of the plaintiff’s “serious condition” when they refused him overnight accommodation. Contemporary commentators assume that if the buyer had trespassed, for example, sheltering overnight in the farmer’s barn, his trespass would have been excused under private necessity doctrine.

Public necessity analysis: If the use were in pursuit of a public good, for example using vacant premises to provide volunteer healthcare to irregular migrants, the same analysis applies in regard to trespass as in the previous hypothetical concerning housing, but here the defense the defendant would assert is public rather than private necessity. The doctrine of public necessity excuses trespass to land for the purpose of averting an imminent public disaster, which is construed either as to protect against a public enemy or to prevent or alleviate effects of a public disaster. (A “public enemy” need not be a person; water during a flood has been characterized as a common enemy.) If the defendant trespassed out of public necessity, unlike private necessity, she owes no compensation even if the property was harmed. The public necessity defense would only apply if the defendant could demonstrate she commandeered the building to avert an imminent threat to the public—for example, preventing or alleviating a deadly epidemic. Providing basic health care for individuals would be found neither sufficiently public nor sufficiently imminent, and if that were the purpose established by the finder of fact at trial, the defendant would lose her case.

Final analysis on private necessity: A situation that gives rise to necessity is imagined as an “emergency” and the privilege must be exercised “in a reasonable time and in a reasonable manner.”

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69. Depue v. Flatau, 111 N.W. 1 (Minn. 1907).
70. Restatement (Second) of Torts § 196 & cmts. a, b.
72. Surocco v. Geary, 3 Cal. 69 (1853) (trespass by the Alcalde of San Francisco, who destroyed plaintiff’s house in attempt to halt the progression of a fire in the city, excused without obligation to compensate the homeowner under public necessity doctrine).
73. Restatement (Second) of Torts § 197, cmt. a to subsec. 1.
in a crowd convicted of stealing groceries, over defendants’ objections that they were denied the right to present the defense of “economic necessity.” Moreover, entry into a dwelling without permission is treated with a higher degree of disfavor than entry into fields, yards, or other forms of real property. Even if a privilege of private necessity is recognized, the trespasser is liable for damage to the property. Analogizing to the doctrine of affirmative waste, a property owner could claim damages even for “improvements” to the property.

b. Analysis as to Adverse Possession

A squatter may acquire legal title, and therefore right to occupy land as its new true owner and no longer be considered a trespasser, through adverse possession. The families appear to have met four of the five conditions they must satisfy: their occupation is actual, open and notorious, exclusive of the true owner (i.e., holder of legal title), and hostile, that is, without permission of the true owner (otherwise phrased as “adverse as to claim of right”).

However, their claim would fail on the fifth condition, continuously possessing the property throughout a statutorily-defined period. Adverse possession ripens into ownership by lapse of time, and each state establishes by legislation its own statutory period during which title holder to the land may contest an adverse possessor. From the point of view of the adverse possessor, this amounts to a statutory period for establishing an adverse possession claim. Ten years is typical, although some jurisdictions require twenty years or more. Given that the families have only occupied the housing for several months, there is no state in which the statute of limitations would have run and therefore the families cannot (yet) establish ownership of the property through adverse possession.

75. Restatement (Second) of Torts § 197, cmt. h to subsec. 1.
76. See, e.g., Vincent v. Lake Erie Transp., Co., 124 N.W. 221 (Minn. 1910) (excusing a ship owner from docking without permission during a storm, but requiring the shipowner to compensate the dock owner for harm thereby caused by his ship in the course of the storm).
78. The possession must be sufficiently obvious to put a reasonable owner on notice that his or her property is being occupied by a non-owner (although the adverse possessor need not demonstrate that the title holder actually knew about his or her use of the property). William B. Stoebeck & Dale A. Whitman, The Law of Property § 11.7, at 856 (3d ed. 2000).
82. See, e.g., 2016 Ariz. Rev. Stat. § 12-526 (setting ten years as the limit for a landowner to bring an action against a party in adverse possession).
If the families had occupied the housing longer, for the duration of their jurisdiction’s statutory period, and satisfied the other elements of adverse possession, it would then make a difference who held title to the housing development:

- If the title holder were a private party, and the families openly lived in the housing for the statutory length of time provided in their jurisdiction, they would likely succeed in their adverse possession claim.
- However, if the owner of the property were a public authority, such as a city or state housing authority, their claim would likely fail. State legislation has typically adopted the common law principle that *nullum tempus occurit regi*, “no time runs against the king.” In its original meaning, it meant that the Crown was not subject to statutes of limitations, meaning that the Crown could proceed with actions that would be barred if an individual were to bring them.83 In U.S. adverse possession doctrine, in most states the *nullum tempus* principle immunizes state-owned property from a party claiming in adverse possession.84 The exemption of a state from its statutes of limitations has been upheld as constitutional.85 Unless they were in one of the minority jurisdictions where *nullum tempus* has been abolished, an adverse possession claim by the families against a state title-holder would fail.
- Likewise, some states exempt charitable organizations from adverse possession claims.86 In such a jurisdiction, if the title holder were, say, a nonprofit housing advocacy group, the families’ claim would fail even if they satisfied the other elements of adverse possession.

83. 2 *Henry de Bracton, De Legibus et Consuetudinibus Angliae [On the Laws and Customs of England]* 157 lines 33–35 (c. 1235) (“Et hæc locum habent inter privatas personas: inter regem et privatas personas non tenet istud quia rex parem non habet, nec vicinum, nec superiorem.”) (“These rules [regarding adverse possession] apply only to private individuals; between the king and private persons they do not apply, for the king has no equal, no neighbor, no superior.”).
84. See, e.g., 2016 *Ariz. Rev. Stat.* § 12-510 (barring the application of the statute of limitations to the state, including when bringing an action against an adverse possessor of land); but see *Mt. Code Ann.* § 27-2-103 (clarifying that the legislatively provided statute of limitations applies to the state, the same as it would to a private party).
86. See, e.g., 2016 *Mo. Rev. Stat.* § 516.090 (exempting from statutes of limitation, in the state of Missouri, claims to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use or any lands belonging to the state, and expressly including lands of public utilities and rural electric cooperatives).
c. Alternative Courses of Action

If the development is a public project, the families would have been well advised to file suit for a writ of mandamus, requiring the housing authority to finish the construction (provided the families could show a claim to the housing stock or otherwise establish standing). If the housing development is a private project and the families could establish standing, they could sue for a writ of mandamus to speed up the permitting processes.

If the development is the project of a private landowner, the families do not have the same tools to force the developer to complete the project. However, the families still have some tools by which they can exert leverage over the developer. Some states have an “abandoned housing act,” in which suit can be brought against a property owner by a community organization; the effect is similar to that of adverse possession, but the timetable is sped up. In some states, if a property is found to be a “nuisance,” a community organization can also bring action to have title and control transferred to it, whereupon it could finish the development and either retain title and lease the property to the families or it could transfer title to the families. The threat of either such action itself creates leverage for the families in their efforts to persuade the developer to finish the housing project. Property taxes (which are generally a state and local matter under U.S. federalism) also function to exert control on a private property owner. Taxes are assessed and due, regardless of whether the property owner has put the property to profitable use or not. The property tax burden forces the owner to take action, such as finish the housing development and render it operational, or suffer loss.

d. Conclusion

The families will be found liable for trespass and will not be able to maintain a claim in adverse possession. The manager will succeed in his action to remove the families.

87. See, e.g., Mo. Rev. Stat. § 447.620, The Abandoned Housing Act (permitting a qualified neighborhood association to petition a court to grant it possession, and then title, of a vacant property that meets certain conditions).
88. See, e.g., Mo. Rev. Stat. § 82.1025ff. (statutory nuisance provisions, permitting a qualified property owner or neighborhood organization to enjoin a property owner to abate a nuisance or be assessed monetary damages, potentially resulting in judgment liens and forced foreclosure sale of the property); Mo. Rev. Stat. § 441.500 (receivership, permitting a qualified neighborhood organization to petition a court to award it temporary possession to abate the nuisance and, failing owner action to retake possession within two years, to transfer title). See Dana Malkus, Sean Spencer & Peter Hoffman, A Guide to Understanding and Addressing Vacant Property in the City of St. Louis 21–27 (2018), http://www.risestl.org/what-we-do/public-documents/vacancy-guide/ (describing legal options available to individuals and community organizations wanting to put vacant properties to more efficient use or otherwise alleviate problems associated with vacant properties in the city of St. Louis, Missouri).
Independent of the trespass action against them, if they could establish standing, the families could pursue legal action to order administrative action necessary to complete the development.

2. Discussion of Doctrine

Since at least the time that Holmes occupied the bench, the doctrine of necessity and its limits has been an area of active debate among legal authorities and scholars in the United States.89 Regarding one telling point in the hypothetical above, the law is silent: the fact of improvement or amelioration by the families. So oriented is U.S. law towards exclusion that even the imaginative hypotheticals of judicial and scholarly authorities (such as those cited in the previous footnote) contemplate only destruction or harm to property in the case of uninvited entry, not amelioration or improvement.

Holmes suggests, “[t]he alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though the act done in furtherance of it may cause more harm than good to the plaintiff.”90

Neither the U.S. Constitution nor U.S. legislation provides a guarantee of housing, food, or water. Legal doctrine against trespass is robust. Courts in England—not binding in the U.S. context, but treated as informative—have found that homelessness is not immediate, but rather ongoing, and thus does not qualify as a “necessity” for defense in a trespass action.91 Similar analysis would control for

89. See, e.g., Spade v. Lynn, 52 N.E. 747, 747 (Mass. 1899) (Holmes, J.). See also, e.g., Jules L. Coleman, Risks and Wrongs 282 (1992); Stephen D. Sugarman, The “Necessity” Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency, 5 Issues In Legal Scholarship art. 1 (2005) (offering a more expansive reading of the privilege to excuse a defendant from a claim for compensation in the instance of private necessity, but still discussing the doctrine only in the narrow situation of rescue from an emergency); Mark A. Geistfeld, Necessity and the Doctrine of Strict Liability, 5 Issues In Legal Scholarship art. 5 (2005) (calling differences in rules governing public versus private necessity “puzzling”); George C. Christie, The Unwarranted Conclusions Drawn from Vincent v. Lake Erie Transportation, Co. Concerning the Defense of Necessity, 5 Issues in Legal Scholarship art. 7, at 23 (2005) (“In almost every urban area, however, there are people on the brink of starvation, often through no fault of their own and many homeless people desperately in need of shelter. I do not think that society could tolerate their taking and consuming the food or goods of others. . . . [T]here is no general public recognition of the moral legitimacy of squatting, that is, the entry of homeless and needy persons into vacant dwellings. In short, although our society recognizes a moral obligation on the part of those who have to help those who have not, it is not at all clear to me that the way our morality enforces this obligation is by giving the destitute a privilege to take and consume.”).


trespass to alleviate other “ongoing” conditions, such as to grow food, even if such conditions were life-threatening, if they did not seem to implicate some element of urgency. In the United States, the act of pulling down a house in order to stop the spread of fire, even without the homeowner’s consent, is excused by the privilege of public necessity. Until homelessness is considered a matter in which parties hold a “common interest,” it is likely that the law will excuse trespass to tear down a home to save other buildings from fire as a matter of public necessity, but not excuse entry into unused dwelling spaces to save individuals from homelessness.

3. Policy and Social Context in Regard to Housing

Such is the strength of the ideology of private property, and the dominance of the right to exclude, that in the United States, people priced out of housing markets and into homelessness do not routinely shelter in vacant buildings (as envisioned in the hypothetical), as they presume title holders to be armed with legal doctrines to facilitate evictions. Instead, one growing trend for those needing shelter is to set up tent encampments in cities on common (i.e., city-owned) land. This use of commons property is far from the cooperative conviviality envisioned in Mattei and Quarta’s scholarship discussed in the Introduction to this Report, but more often exists as a shadow version of a private-property regime, with the desperate scrambling separately for survival in a personal space that each individual or household carves out from the commons, but without necessarily coordinating for common effort or mutual thriving. Cities seeking to evict tent encampments may bring a trespass quare clausum fregit action as outline above, or charge criminal misdemeanor trespass. An increasingly common siting for such tent encampments is on public land under highway bridges.

Some courts have proved sympathetic to necessity claims by homeless tent dwellers against cities that move against them, although the law thus far has not moved doctrinally in their favor. Recent years’ experience in the city of Des Moines, Iowa, demonstrates both sides of this movement. Homeless camps in Des Moines have apparently existed at least since 1983, when Drake University Professor Dean Wright began keeping records on the city’s homeless population, although Professor Wright did not himself observe any homeless camps until 2001. In 2008, homeless people began constructing on public land “hooches,” small structures made of plywood. After one caught fire, the City brought legal action

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92. See Taylor v. Inhabitants of Plymouth, 8 Metch. (Mass.) 462, 465 (1844); Print Works v. Lawrence, 23 N.J. Law 590, 613 (1852).

93. The following material about the Des Moines situation is summarized from City of Des Moines v. Webster, 861 N.W. 2d 878 (2014).
in November 2008 to dismantle a campsite, removing eight individuals from city land in the process. In spring and summer 2011, the City spent $25,000 removing twenty abandoned campsites, removed two structures and three individuals from an active campsite on a levee, and contributed $165,000 in an effort to secure housing for the homeless.

In March 2012, a group of homeless people erected and began inhabiting a new campsite on the southwestern bank of the Raccoon River, underneath the Martin Luther King Jr. bridge (referred to in this Report as the “MLK Campsite”). On December 7, 2017, the City amended city code provision section 102-596 prohibiting “encroachments” on city land, to add “tent or other material configured or used for habitation or shelter” to the list of prohibited items and uses. The City also amended section 102-615 to allow for immediate removal without notice of an encroachment that “unreasonably endangers the safety of persons or property” and to limit the scope of appeal against any encroachment removal action. On January 17, 2013, the City posted notices informing the occupants of the MLK Campsite that they were in violation of the newly amended city code and advising them to leave by January 29, 2013, or be subject to “forcible removal and/or arrest.” MLK Campsite occupants were given until January 28 to file an appeal with the city clerk, and timely appeal was filed.

At a January 31, 2013 hearing before a city Administrative Hearing Officer, counsel for the MLK Campsite occupants argued, based on the Restatement (Second) of Torts section 197 formulation of private necessity doctrine, that his clients occupied the city land out of necessity due to lack of suitable housing. He presented evidence that a local homeless shelter exceeded its 150-bed capacity by an extra thirty persons during a January cold snap; that even if admitted to the shelter, Campsite residents would not be given adequate sleeping facilities but rather would be provided plastic chairs in which to spend the night sitting upright; and that the homeless shelter facility offered no storage space for its residents’ belongings. The City explained its action by reference to alleged complaints by other users of the same commons space, specifically users of a recreational trail that passes under the bridge, testimony from the Fire Marshall about fire hazards posed by the MLK Campsite, and testimony from a deputy building official in the City’s Community Development Department who opined that the homeless’ Campsite dwellings should be subject to city housing codes, which their tents and structures would fail to meet. The Administrative Hearing Officer ruled against the City on February 11, 2013, relying on a version of necessity doctrine developed in criminal law. The City petitioned the district court (under Iowa Revised Civil Procedure 1.1401) to find that the Administrative Hearing Officer exceeded her jurisdiction or otherwise acted illegally, to annul the defense of necessity, and to allow the City to remove the MLK Campsite. At an August
30, 2013 hearing, the City disputed that appellees proved the defense of necessity, since there was no emergency when the appellees first built their structures in the warmer months of 2012. In answer, appellees raised the lack of reasonable alternative living arrangements and claimed their right to survive outweighed the City’s property rights. When the district court upheld the decision of the Administrative Hearing Officer, the City appealed to the Court of Appeals of Iowa.

The Court of Appeals adopted Restatement section 197 to guide its analysis of necessity, reading it to allow trespass “in an emergency situation when such entry is reasonably necessary to prevent serious harm.”94 The Court accepted evidence that appellees would not have been turned away from the homeless shelter the previous January, but declined because it was less comfortable than their dwellings at the MLK Campsite. Restatement section 197 suggests that to determine “reasonableness,” probable advantage to the trespasser from entry must be weighed against the probable detriment to the possessor of the land or others properly upon it.95 The Court found that factors weighing against a finding of necessity—the fire hazard posed by the Camp residents’ heating methods, threat to their lives in the event of a fire, and the threat to firefighters’ lives in such an event—more weighty than “individuals’ desire not to attend the crowded homeless shelter, the desire to sleep in a familiar place and not on a hard plastic bench, and the desire to keep their possessions.”96 The Appeals Court adds that cold weather is not an emergency as anticipated by examples explaining section 197, such as a violent storm. It concludes that the district court erred in upholding the Administrative Hearing Officer’s finding that the defense of necessity applied, reversing the district court’s decision. While sensitive to the public policy arguments raised, and acknowledging homelessness as a local and national problem, the court restated judicial reluctance “to rewrite the law” or “substitute our views of public policy . . . in this instance, to change the City of Des Moines’ policy concerning the encroachments of the homeless persons residing within its borders.”97

Encampments on common public lands, typically under highway bridges, have become a familiar site across the United States, as have their demolition and re-emergence. (In 2017 alone, authorities demolished such encampments in Knoxville (Tennessee), Seattle (Washington), Salem (Oregon), and Indianapolis and South Bend (Indiana). Police in major metropolises like Los Angeles reported more frequent and widespread use of criminal citation for minor

94. Id. at 885.
95. Restatement (Second) of Torts § 197, cmt. c to subsec. 1 (Am. Law Inst. 1965).
96. City of Des Moines, 861 N.W. 2d at 885.
97. Id. at 886.
offenses as a technique of clearing occupants from public common lands.\footnote{98 See, e.g., Gale Holland & Christine Zhang, Huge Increase in Arrests of Homeless in L.A.—but Mostly for Minor Offenses, L.A. Times, Feb. 4, 2018.} Legal pleading has thus far not succeeded in establishing the necessity defense as a matter of course for those charged with criminal or civil trespass while seeking to eke out a place to live. However, the conclusions of the Administrative Officer’s and district court hearings in Des Moines, and the sympathy expressed by the Iowa Appeals Court, heralds change. A growing wealth gap and housing affordability crisis, and an ongoing failure to provide affordable housing, promises future movement through city policy and local legislation, although as the Des Moines experience also shows, that movement could be in the direction of more restrictive city ordinances against using public commons property for shelter.

C. Territory

It also may be helpful to consider issues arising in protecting the commons against environment threats through a hypothetical:

Yellowriver is a small village sitting within a large and remote forest area. The government grants to Gold Masters Corporation permission to dig seeking for gold in order to develop a nearby mine. Aware of the high polluting risks of gold extraction to the nearby river, villagers erupt in protest and attempt to stop the project by legal means. Do they have any available action to protect the river—either as individuals or as an endangered community?

1. Summary

The Yellowriver villagers may seek an injunction under nuisance doctrine, enjoining Gold Masters Corporation from the conduct that the villagers anticipate will result in the pollution of the river. Their action will likely succeed, with only two major uncertain variables clouding the prospects of their success. The first variable affecting the vindication of their right is the anticipatory nature of the action they would bring. If the pollution had already occurred, they would have a very strong claim. Because the pollution has not already occurred, the prospects of their success in preventing it are somewhat less certain. The second variable is that courts disfavor granting injunctive relief as compared with awarding damages (meaning, monetary compensation for damages a plaintiff has suffered). If the pollution had already occurred, the villagers would have a very strong claim for damages and would also have a good chance of securing an injunction against Gold Masters Corporation enjoining conduct resulting in further water pollution. Insofar as the pollution
has not yet occurred, the likelihood of their securing an injunction will depend in part on their establishing certainty of high probability of water pollution from the corporation’s anticipated mining activity.

The villagers may also seek an injunction or other administrative action against the government, requiring the government to revoke the permit it issued to Gold Masters Corporation. Their success in this suit will depend entirely on the legislation under which the government issued the permit.

2. Analysis as to Nuisance

Injunctive relief is considered an “extraordinary remedy.” A court may issue an injunction if the plaintiffs can show 1) that the plaintiffs’ legal right has been violated;\(^99\) and 2) that the legal remedy (meaning monetary compensation for damages they have suffered) is inadequate.\(^100\)

1) Here, the plaintiffs can show a legal right at stake, specifically their right to the use or enjoyment of their land.

a. The suit one may bring in defense of use or enjoyment of an interest in land is a nuisance action. “An invasion in one’s interest in the use or enjoyment of land resulting from another’s pollution of surface waters, ground waters, or water in watercourses or lakes may constitute a nuisance . . . ”\(^101\)

b. The actions available to the villagers are private or public nuisance. They may bring suit under either or both.

A “private nuisance” is any nontrespassory conduct that interferes with another person’s use or enjoyment of his or her own land.\(^102\) The pollution of water is recognized as one form of conduct that may result in a private nuisance.\(^103\) Any villager who holds an interest in land and who suffers significant harm from the water pollution interfering with his or her use or enjoyment thereof has a cause of action in private nuisance.

A “public nuisance” is a nontrespassory conduct that causes “unreasonable interference” with a right common to all members of the public.\(^104\) The defendant will be held liable if his or her interference with the public right is intentional, or if the interference is unintentional and either negligent, reckless, or abnormally dangerous.\(^105\)

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99. Restatement (Second) of Torts ch. 48, scope note to the topic (at 558).
100. Id. at § 938.
101. Id. at § 832.
102. Id. at § 821D.
103. Id. at § 832.
104. Id. at § 821B.
105. Id. at § 821B cmt. e.
Any public official having the authority to represent the village or representative of the general public as a citizen in a citizen’s action or as a member of a class in a class action may maintain a public nuisance action seeking to enjoin the conduct anticipated to result in water pollution. The pollution of water is one form of conduct that may result in a public nuisance, when there is interference in a right common to all members of the public. In the absence of a particular state statute that calls for a different rule, the rules for private nuisance also apply to public nuisance arising from water pollution.

The defendant in a nuisance action will be held liable if his or her interference with the use or enjoyment of land (or, in the case of public nuisance, the interference with the public right) is intentional and unreasonable, or if the interference is unintentional and negligent, reckless, or abnormally dangerous. An act is considered “intentional” if the perpetrator knows that invasion in another’s interest in the use and enjoyment of land, or interference with a public right, results or is substantially certain to result from his conduct. An act rises to the level of “unreasonableness” if the gravity of the harm outweighs the utility of the actor’s conduct. The law “does not concern itself with trifles,” and therefore a plaintiff must show “significant harm” in order to maintain a private or public nuisance action. However, harm does not have to have occurred already to support a nuisance action; a “threatened tort” may be sufficient. Interference could be found to rise to “significant harm” here if the anticipated pollution were to make river water unpotable, kill fish in the river, make a public beach unsafe for bathing, etc.

2) The test for the appropriateness of issuing an injunction, as opposed to merely awarding damages, is to compare the probable consequences of a granted injunction with the probable consequences of alternative remedies.

Assuming that the mining activity is substantially certain to result in significant interference with their enjoyment of the river

106. Id. at § 821C(2)(b) & (c).
107. Id. at § 832.
108. Id. at § 821B cmt. e.
109. Id. at § 822.
110. Id. at § 825.
111. Id. at § 826.
112. Id. at § 81F cmt. c.
113. Id. at § 933(1).
114. Id. at § 934(1).
and that, absent action by the court, the activity will be ongoing and result in continuing harm, the plaintiffs will likely succeed in showing that monetary compensation would be an inadequate remedy.

3. Conclusion

Any villager holding an interest in land whose use or enjoyment thereof is substantially certain to suffer interference by the water pollution can bring a private nuisance action. Any public official representing the village, or private citizen representing citizens in a citizens’ action or as a member of a class, likewise can bring a public nuisance action against interference in a right common to the village public. If either the private or public nuisance plaintiff can show likelihood of pollution of the river resulting from the activity for which Gold Masters Corporation received the permit, they will likely succeed in securing an injunction stopping Gold Masters from pursuing its planned mining activities.