

# Beneath the City: The Forest! Civic Commons as Practice and Critique

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[T]he price which has been paid for the compulsive power of the absolute dominion trope has been a heavy one, a maddeningly persistent tendency to suppress and to deny the collective and collaborative elements, the necessity of mutual dependence, inherent in social endeavour, and a consequently enormous distortion in our common capacities to understand and regulate our social life.<sup>1</sup>

Law, through the participatory practices of the commons and its articulations in legal language ... operates as both theoretical and embodied critique.<sup>2</sup>

## Forests: charts and future histories

In 2017 we could, as critical law scholars, have been recovering and celebrating the Charter of the Forests, signed in 1217, two years after Magna Carta. There has, instead, been almost total silence. The anniversary of Magna Carta received some recognition (albeit much

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<sup>1</sup> Robert Gordon, 'Paradoxical Property', in John Brewer and Susan Staves (eds), *Early Modern Conceptions of Property* (Routledge 1995).

<sup>2</sup> Vito de Lucia, 'Law as Insurgent Critique: The Perspective of the Commons in Italy' (*Critical Legal Thinking*, 5 August 2013) <<http://criticallegalthinking.com/2013/08/05/law-as-insurgent-critique-the-perspective-of-the-commons-in-italy/>> accessed November 2017. See further Vito de Lucia 'Re-Embodying Law: Transversal Ecology and the Commons', in Ruth Thomas-Pellicer, Vito De Lucia and Sian Sullivan (eds), *Contributions to Law, Philosophy and Ecology Exploring Re-Embodiments* (Routledge 2016).

from an American-inspired celebration of constitutional ‘roots’); but the anniversary of the Forest Charter, so significant for protecting access to the forests under common rights, has been virtually unnoticed. It is the argument of this paper that critical law scholars, and all those interested in developing and promoting alternative property practices, should recover and celebrate the Charter—not simply for what it stood for historically, but for its relevance today as a signifier of counter-practices and counter-narratives to the dominant narratives of property, specifically the dominant-narrative of private property framed through ownership.

Recognising the relevance of 1217 in 2017 requires both some knowledge of legal history and then an analysis of that history in terms of contemporary significance. Legal scholars, tending to work within one paradigm of expertise (as legal historian, property lawyer, theorist etc) are not very adept at crossing over and gathering together material and analysis which asks within a broader and more critical framing: how and why is this relevant today? Or rather: how can this be used to advantage in helping us to understand and engage with our present condition? A historian will track 1217 forward and find it increasingly, in practice, marginal to contemporary economic, social and political circumstances in this country. Forests have ceased to be central to our lives: they are now, on the whole, little more than pleasant places to walk in.<sup>3</sup> Of course, woods have an economic value and there are still people for whom hunting rights are important; we are, however, increasingly, orientated towards an urban existence with forests and other rural landscapes generally encountered and valued as places of retreat and escape.<sup>4</sup> Doctrinal

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<sup>3</sup>This is, of course, not true of the political situation regarding de-forestation (in the modern sense) on other continents which threaten the survival of local populations; neither is it true in terms of the global significance of de-forestation for environmental sustainability and climate change. And a strong environmental argument is emerging in this country which argues for the need to extend, as well as protect, woodland. See eg Woodland Trust, ‘Charter for Trees, Woods and People’ (2017) <<https://treecharter.uk/>> accessed November 2017.

<sup>4</sup>A public right of access to woodlands for recreational purposes has been a highly contentious issue both at local and national issue. See the Woodland Trust work on promoting public access to woodland: Woodland Trust, ‘Position statement: Access to woodland’ (2014) <<https://www.woodlandtrust.org.uk/mediafile/100034294/access-position-statement-1013.pdf>> accessed November 2017.

lawyers will point out, anyway, that the administrative framework designed for governance of the forests in 1217 was repealed in 1971, and replaced by the Wild Creatures and Forest Laws Act of the same year. Those rather quaint forest courts, the roles of vergers and other forest administrators, which can still be traced in the last forest jurisdictions (the New Forest, Epping Forest and the Forest of Dean) are no more than the last vestiges, the few remaining traces, of the once grand scheme of 1217 designed to protect commoners' rights through allowing a level of participation in the governance of the forests. Quaint, but hardly relevant, surely, to contemporary political struggles over space—especially urban space? This is, however, to keep to too narrow a frame of reference; a focus on the doctrinal and immediate material inheritance of 1217. A critical framing draws back and re-configures the history within the context of contemporary struggles over access to land, and of conflicting accounts of the practices of property (and people).

'Forests', as understood within the context of the charter, were not woods, let alone wildwoods; they were those areas of wood or heath land which had been enclosed by royal decree (forested) since the Norman invasion and were then maintained and managed as royal hunting grounds. These were, quite simply, amongst the earliest acts of land enclosure: not for domestic or agricultural purposes, but for the pleasures (and consequential consumer benefits) of the hunt. Customary rights to use the land to gather produce or graze animals, practices often economically critical for subsistence agriculture, had been simply ignored, denied or removed. This was a wholesale loss of access to resources which had been relied on 'since time immemorial'. In contrast, the 1217 Charter recognised these customary rights as ones which should not have been, could not have been, ignored and denied in law by forestation. The royal fiat was revoked, and the forests re-opened to the practices of common rights. 1217 was a recovery and a recognition that forestation had been illegal and that the pre-existing rights could not be revoked. It was also a guarantee that the forests would remain open to commoners practicing their common rights, and so a framework of forest governance was put in place as a protection of those rights against any future attempt at abuse. Royal power had been overcome by the argument that pre-existing common rights,

recognised in custom and therefore in law, could not be obliterated by royal fiat.

I have, of course, over-drawn the triumph of 1217. Historians will point out, correctly, that the arguments concerning the legal recognition of pre-existing customary rights—that is the practices pursued ‘as of right’ by commoners—were essentially a political argument concerning the issue of final authority: who had the authority to make, or recognise, or change, the law? How much authority for law should be ceded to the King (under the system of law imported into England under the ‘Norman yoke’)? For the Barons in 1215, and now for the commoners in 1217, this was the critical question—and it was, of course, answered by deals and compromises made between the different powers of (and sources of) authority. To evoke law’s recognition and defence of pre-existing commoners’ rights developed through custom and practice against royal power has both a material and a rhetorical aspect to the argument. It does not matter so much whether this was a ‘real’ and valid argument in law, and therefore binding on the King (the old question: is custom law?); but rather that the rhetoric of the argument in defence of customary rights worked—it was recognised, it had affect. For pragmatic and political reasons it was a good compromise for a weakened King who required the support of the populace (or at least, that they not be in open conflict), and it designed a series of compromises encoded in a pattern of governance for which the people themselves had to take responsibility for policing the forests. The forests remained, but now tempered by the presence and practices of commoners’ rights. I might have over-drawn the victory—but a victory it was, and remains, so long as we can understand the potential of its implications.

When the Diggers, in the revolutionary period of the seventeenth century, evoked rights of commons to access and use land (often heath land) for collective subsistence farming, they looked back to the triumph of 1217, and to its recognition of customary common rights, as part of the continued struggle against control over access to land, and the divisions and exclusions from property created by the privileges of private property and the presumptions of ownership as a right, rather than as a value founded in use. For Gerrard Winstanley, it was the ‘Norman yoke’ which had imported the law through which land was withdrawn from being

available to meet the needs, or recognise the rights, of common people, This law was still to be resisted in the name of old(er) rights, and resistance was strengthened by being able to evoke and celebrate the Charter of 1217. Not so much for what 1217 had been, but rather for what it represented: the continued struggle for recognising and protecting the practices of the commons against the privileges of power.

In the seventeenth century, patterns of enclosure and privatisation were already forming the landscape within which Winstanley and others were struggling to access the resource of land for use rather than through individuated ownership. By the late eighteenth century another great radical, Thomas Spence, faced with the overwhelming privatisation of land, formulated a plan for local communities to hold all land (through local councils) for the use of all in the community (managed, again, through the local council). Land could be rented out, and the rent (or 'dividend') shared amongst the local community.<sup>5</sup> His scheme for local ownership of land in order to protect rights of use inspired many later thinkers and political activists: from Ebenezer Howard's scheme for a collectively owned 'garden city', to Henry Hyndman's scheme for 'land nationalisation' under and through a state which represented and defended the rights of all to the use of basic, fundamental, resources.

Two tropes are evident from this brief encounter with the radical history of opposition to framing relationships to land solely through (private) ownership. The first is the focus on collective access and use in which ownership is only to be resorted to as a positive strategy in as far as it protects collective access and use. In as far as (private) ownership threatens collective access and use, it is to be resisted and modified.<sup>6</sup> The second is the problem of how (and

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<sup>5</sup> He seems to have developed his plan for land reform following the attempt, in 1771, to enclose his local common (Town Moor in Newcastle). He published the pamphlet *Property in Land Every One's Right* in 1775, and then reissued it in later editions as *The Real Rights of Man*.

<sup>6</sup> And hence the thread of collective access and use to 'common land' which is still woven into contemporary land law is manifested as an act of registration of (common) land which, irrespective of ownership, then guarantees and protects access and use until (if) de-registration. Ownership is over-laid with the protection of the common, and the 'owner' of the land prohibited from limiting or restricting

where) common rights are to be grounded, managed and protected: this is a juridical question, but it is also a governmental one which presents, initially, as a spatial question. Spence's scheme was focused on local communities and a locally embedded pattern of governance, accountable to the local community: small, tight, local units. Hyndman, however, represented the more modern approach of organisation at state level, ie nationalisation, through a wider frame of democratic accountability—a 'public' for all, rather than a localised collective. This, as the following centuries and contemporary politics evidences, became a crucial political (and thereby also juridical) issue: the question of the state as 'owner' or rather as caretaker of public goods, including local assets.

For the moment, what is important is simply to recognise the presence and history of a counter-narrative to the dominant narrative of private property based on the fulcrum of ownership rights. This counter-narrative rarely appears, even as a trace, in texts on property law, which presume the evident centrality of private property and ownership as if it is all there is.<sup>7</sup> Such texts reproduce a political and juridical ideology which in turn reproduces the belief that this is all there is, or could be, to the practice of property. Alternative property practices (hereafter 'APPs') are simply not recognised: either conceptually within the register of property thinking, or in an interrogation of examples of APPs as counter-practices, whether historical or contemporary. Recovering the

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(let alone ending) rights of access and use (now contained in The Commons Act 2006).

<sup>7</sup> Of course, this has had to be amended in countries where indigenous property forms (and rights) are slowly, and successfully, being asserted; however, too often this 'surplus' or 'supplement' to standard property forms are kept aside or introduced as addendums, rather than used to question and re-think the partiality of the orthodox account of property. It does not help that so much American (and other ex-colonial property literature) is accessed through Blackstone's account of property in law (see eg Margaret Davies, *Property: Meanings, Histories, Theories* (Glasshouse 2007), who begins with the words 'I cannot help it ...' and then quotes Blackstone, as if it is the obvious, perhaps only, place to start ...); and the propensity in 'property theory' to follow an American account of 'property theory' as if it is not saturated in its own political history and context. Thus, for instance, at a recent Property Law Conference (2017) held at William and Mary University USA, the title for one of the sessions was: 'Challenges to the Western Idea of Property', as if there has been, and is, only *one* idea.

history of a counter-narrative of property enables us to be much more attentive (and sensitive) to the potential in contemporary counter-narratives and APPs. And so to the city.

### Beaches: new topographical sites

‘Beneath the city; the forest’ evokes, of course, Paris 1968 and the much favoured Situationist-inspired slogan: *Sous les pavés; la plage*.<sup>8</sup> Under the paving stones (or cobbles, *pavés* being small squared cobbles); the beach (not merely ‘sand’, but beach). The beauty of the ’68 slogan is that it carries multiple potentials. *Pavés* are small enough to be harvested and used as missiles, and are traditionally set in sand making it possible to extract them fairly easily; revealing sand after they had been lifted. But it is the *plage*, beach, which lies beneath, waiting to be revealed.

This beach is, primarily, a place carrying the promise of pleasure and leisure: an escape from the pressures of the speed, noise and dirt of city streets and factories. The temporal routines of capital pressing labour into conformity, and the spatial confines of a city designed to discipline work and enable governance of the potentially unruly, are symbolised in the layering of *pavés* (cold, hard, functional stone) over *plage* (warm, soft, shifting sand). Stone is cut into shape for function and sedimented into place; sand is still in a natural form and can flow into new shapings.

The beach as a counter-image of freedom which, set against the confines of the capital(ist)-city, renders visible and challenges temporal and spatial practices of constraint. This is a city of clock, whistle and bell; a city of people in perpetual busyness, tracked constantly by the demands of incessant time, carried through and within the limitations of ordered space. The beach, instead, is an open plateau onto which time is traced in the movement of water at an edge, and the sun across a horizon. Time slows, space unfolds. The possible becomes a potential glimpsed on the cosmic rim where land, sea and sky meet in shifting patterns of colour and depth,

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<sup>8</sup> See McKenzie Wark, *The Beach Beneath the Street: The Everyday Life and Glorious Times of the Situationist International* (Verso 2011).

stretching and opening to reach up and touch. The beach is not simply a place of leisure in which to close eyes and forget: it is also a place of opening to the promise of difference, a re-membering of different ways of living, of being alive. Not merely an escape, but a refusal based on the acknowledgment of an alternative. And it is here now—under our feet. Look down. It is within reach, it only waits to be revealed.

However, I have evoked, because of 1217, the forest rather than the beach; and the forest carries, so clearly, a rich counter-narrative of alternative property practices. Although, with more space, I could draw parallels between the topographical evocation of beach and forest; here, it is really the demand of a different way, and knowing that it is possible, that brings beach, forest and city together. The forest beneath the city: the city as forest. Another way of practicing property; of thinking and producing architectures of city.

### **Becoming city**

The city targeted in the slogans of '68 was the city of capitalist enterprise still situated in factories and workshops. This was not a pleasant place for the majority of inhabitants. It contrasts strongly with images of city as place of creativity and emancipation. There are many cities within city, co-existing in parallels which may or may not touch, recognise or fold into each other. And cities, as we know well, are volatile, subject to the pressures of internal as well as external, global, wealth. They are sites of contested and increasingly limited space, where those with wealth seek the next (creative) opportunity for regeneration; carrying forward the insidious creep of gentrification. Even more so, the pressures of property are now carried in vectors of global investment practices, impacting directly on local economies which have few resources to resist. Meanwhile, other city-sites are simply abandoned, leaving a residue of human resources, rotting homes and collapsing infrastructure. In these cities the withdrawal of 'a public' of public services is manifest; but the withdrawal is also there in the contested cities being restructured (taken over) by the global market of virtual capital(ism). However, whether as a site of contestation or of evacuation and exhaustion, what makes a pan-urban condition a specifically 'city' scenario?

In the European tradition, the city is a specific form of place making. It is more than merely a large concentration of people (buildings, infrastructure etc) in contrast to a rural environment. Cities, historically, were associated with self-governance, often of a republican or quasi-republican mode. Centres of trade, and usually networked into and through trade routes between them. Their wealthy inhabitants were patrons of arts, crafts and literary skills.<sup>9</sup> They were places of activity; of potential and growth. Two words (in various forms) are continually used when speaking of the life of cities: the civic, and the commune. The civic tends to be used in relation to the governance of cities. It extends to the city establishment and their 'public works' in relation to the life of the city, whether channelled through government structures or privately sponsored. Through such tropes as 'civic pride' the population are encouraged to feel that they have a participatory (and therefore important) role in city life. Conversely, the use of 'commune' tends to focus down on community and people, often in a more localised perspective than the more expansive 'city' or more establishment 'civic'. But commune also has a more distinctive counter-use in which it comes to connote 'the people' as a governed group, who may either organise informally or seek more formal power in group terms (rather than for individual, family or those with the privileges of high social status). Commune, in this sense, speaks of a more organic, fluid, mode of organisation which recognises and supports the values of equality and the importance of fair distribution (through access and use) of the resources crucial for life. In modern terms, the civic now tends to be associated with 'the public' and the provision of 'public services', whereas the commune may be thought through a spectrum which moves through community into communal and commons.<sup>10</sup>

The background to the modern European city is the post-war reconstruction in which not only lives and buildings were rebuilt, but the very notion of city life, and relations between government and

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<sup>9</sup> The combination of wealth, self-governance and an active intellectual milieu (on a city-scale) creates a potential, of course, for a vibrant political life including critique of the establishment.

<sup>10</sup> I argue later that distinguishing between 'communal' and 'commons' is essential. See also Anne Bottomley, 'The Curvature of the Common' (forthcoming).

the governed, were revisited in an attempt to construct a modern environment reaching for a utopian vision in a rejection of pre-war privileges. In 1945, an English film entitled *They Came to a City*<sup>11</sup> echoed the wish, demand and promise of/for a new beginning for a more egalitarian society (city) in which services for the community would be delivered through ‘the public’ service of government. Nationalisation of key resources, and the provision of housing, education and healthcare through national(ised) services, laid the foundation for this new post-war settlement. It is no surprise that this longed for utopian vision evoked, in the film, the narrative tradition of the ‘eternal city’.

This modernist dream of a state in ownership of the assets (and tax income) which could be used to develop and sustain the delivery of public services focused on the needs of the people introduced a new civic in which city, as local state, was responsible for much of the public service delivery (even if following a centralised template). However, the faith placed in public ownership of those assets and services necessary for the public good proved by the end of that century to be problematic and misplaced. If the state ‘owned’ assets, even if seemingly on behalf of the communities they represented, then the state could make decisions as to keep or sell them. And, from the 1980s onwards, for political reasons, that is exactly what the national state did. The state embarked on the dismantling of the vision of the welfare state through the mass privatisation of publicly owned assets, and the limitation or withdrawal of public services. In as far as local states, especially as cities, might try and organise against privatisation and cuts in order to defend their assets for local communities, central government found ways to dismantle them. The contemporary city is no longer a public civic, but rather a residual civic carried in and through combinations of public/private partnerships in which economic ‘realities’ and global investment wealth set the agenda.

In such circumstances, as the architecture of the city is transformed through privatisation, the commune now emerges as a

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<sup>11</sup> *They Came to a City* (1945) Basil Deaden (dir), Ealing Studios. Based on a stage play (of the same name) by JB Priestley, who adapted it for the screenplay.

potential—not so much in acts of resistance, as in developing modes for building resilience.

In Henri Lefebvre's 1968 book, *Le Droit à la ville*, he designed a demand for a 'right to the city' which was a call for the transformation, one might say the 're-humanisation', of city life.<sup>12</sup> David Harvey explains it in these terms:

The right to the city is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization. The freedom to make and remake our cities and ourselves is, I want to argue, one of the most precious yet most neglected of our human rights.<sup>13</sup>

Rather, however, than thinking in terms of 'rights' (except as a slogan), I want to concentrate on Harvey's references to 'common' and 'collective' endeavours and their potential for 'transformation' of the city. Beneath the city: the forest! An alternative city architecture grounded in (urban, becoming civic) commons.

This counter-narrative of commons, and a focus on (a) common good, has become, as the city becomes more overtly subject to (global) market rather than state forces, more necessary than ever. The potential in mobilising the practices and narratives of commons is evidenced in the number of movements and developments across different jurisdictions who/which have found potential for a new political imagination re-thinking and re-engaging with city.<sup>14</sup>

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<sup>12</sup> See further Chris Butler, *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (Routledge 2014).

<sup>13</sup> David Harvey, 'The right to the city' (2008) 11(53) NLR 23  
<<https://newleftreview.org/II/53/david-harvey-the-right-to-the-city>> accessed November 2017.

<sup>14</sup> Notable, also, are the number of scholastic collections across different disciplines which have appeared recently: see eg Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City* (Routledge 2015); Ash Amin and Philp Howell (eds), *Releasing the Commons: Rethinking the Futures of the Commons* (Routledge 2016); Samuel Kirwan, Leila Dawney and Julian Brigstocke (eds), *Space, Power and the Commons: The Struggle for Alternative Futures* (Routledge 2016).

Particularly notable in this light is the Italian *beni comuni* movement inspired by the work of Ugo Mattei,<sup>15</sup> which draws from the heritage of the commons as ‘commonwealth’ or ‘common goods’, that is those assets and resources which are necessary for the common good and therefore to which all (in a community or locality) should have (reasonable) access. Mattei was inspired to take up and develop this perspective as a result, in 2011, of the threat to privatise the water supply.<sup>16</sup> What he is attempting, through a political movement based on a demand for change in the law, is a means through which key assets and resources (those so socially critical as to be defined as common goods) now held by the state are ring-fenced from privatisation through the development of a legal definition, and a specific legal regime, to protect their status as ‘goods to be held for the common good’. This strategy recovers and develops a trope in European rights philosophy (drawing on a civilian tradition and exemplified by such theorists as Grotius and Pufendorf)<sup>17</sup> which argues that key environmental resources cannot, because of their nature or their importance to the maintenance of human life, be ‘reduced into possession’ and hence to ownership as private property. The argument, in contemporary terms, is that those resources which have been ‘protected’ as public resources held by the state for public access and use, can never be reduced to simple ownership by the

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<sup>15</sup> Ugo Mattei, *Beni Comuni. Un Manifesto* (Laterza 2013). See further Fritjof Capra and Ugo Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (Berrett-Koheler 2015).

<sup>16</sup> There is a nice echo of Spence’s response to the threatened enclosure of his local common leading to his work on the common ownership of land.

<sup>17</sup> English jurisprudence received the civilian tradition (drawn from Justinian) of a category of resources which could not be reduced into possession through Bracton (who incorporated the relevant section of Justinian into his work on English law), and then Blackstone (simply repeating Bracton). However, English jurists argued over Bracton’s interpretation, and then, more crucially, over whether the passage from Justinian had actually been ‘incorporated’ (the term used is ‘received’) into English law. Generally finding that it had not, they therefore managed to marginalise this strategy for protecting access to and use of key ‘natural’ resources. See eg, in relation to access to beaches and thereby the sea (for recreational purposes), *Blundell v Catterall* [1821] 5 B & Ald 268. For more on Grotius et al, see Robert Tuck, *Natural Rights Theories* (CUP 1979). Tuck points out (as have others) the English radical’s preference (during, for instance, the English Revolution) for recourse to the rhetoric of the loss of ‘freeborn rights’ under the ‘Norman yoke’ rather than ‘natural rights’.

state and therefore into the potential of becoming subject to privatisation.

Whilst contemporary activists in civilian jurisdictions locate a protective strategy in *beni comuni*, in common law jurisprudence constructing strategies for the protection of assets against state claims of ‘ownership’ have been developed in terms of ‘public trust’ or under a regime of ‘fiduciary obligations’.<sup>18</sup> Different legal traditions, as well as political histories, result in the embodiment of the ideas and practices of commons taking on a different shape under and through the localised framing of jurisdictional heritage and political circumstance. We have to be, therefore, careful in understanding the specific context within which commons as idea and practice are emerging as a counter-narrative and counter-practice to both the establishment of state and the enclosures of private property.<sup>19</sup> However, whatever specific form commons takes in a particular juridical/political context, clearly underlying, and linking together all the manifestations of commons, is a commitment to the value of ‘common benefit’ as opposed to private profit or state power. The value of common benefit grounds the demand ‘for the city’; and the politics of common benefit require that we practice the building and defending of commons as commoning, collaborating, together. But to successfully build scholarship exploring the potential of commons, we need to be attentive and sensitive to the processes of embodiment and/in place.

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<sup>18</sup> By analogy, the process of registration of common lands (now under the Commons Act 2006) could be used as a model for a process for registration of assets deemed to be ‘common goods’. Registration limits the use of land to allow for public access and use, whether land is owned privately or by held by public authorities; therefore even if land is privatised through sale, registration is still operative and continues to protect the land as commons.

<sup>19</sup> And therefore also, in particular, scholarship on commons which emerges from and within one context, and then produces more generalised scholarship without interrogating the differences (juridical and political) between different contexts; this can result in a rather pick and mix approach without clear differentiation. See eg Maria Rosaria Marella, ‘The Commons as a Legal Concept’ (2017) 28(1) *Law & Crit* 61. I undertake an analogous process of distinguishing different characteristics, as well as similarities, in relation to ‘co-operative housing’, in Anne Bottomley, ‘They shall be simple in their homes: The many dimensions of the idea and practices of co-operative housing’ in Anne Bottomley and Simone Wong (eds), *Changing Contours of Family Life: Caring and Sharing* (Bloomsbury 2009).

## A topographical approach to ‘commons’

The recent discovery (or recovery) of the potential in commons for alternative political and property practices has been extensive in the framing and naming of diverse collective political activities and strategies as all variations on the base theme of commons. Indeed, commons now risks becoming a fashionable cliché around which to collect what are, in fact, differing presumptions about the defining ideas and practices of commons.

In part, it is of course a strength that commons is so flexible a term (or notion) that it can be used to cover diverse ideas and practices gathered together as if they can simply hold (rather than ‘be held’) together in common. However, I think it is important to have a rather more discerning approach to the diversity of forms of common(s) in order to really explore their potential as counter-narrative for practice and critique (especially when drawing examples from across very different jurisdictional and political settings). A more nuanced approach allows us to tease out similarities, rather than presume them.

However, we should resist an attempt at a formal typology. The range of commons and related ideas and activities are not easily (let alone definitively) distinguishable one from another: rather there are forms, shapes, which fold around, and unfold out of, repeated themes. We can think of this as a terrain, and embark on a topographical encounter with (the) many commons made evident through contours of collaboration and use. A topographical approach recognises similarities rather than focusing on differences. Further, a typological construction works only in one register and requires distance, whereas a topographical approach works through and across a number of registers, recognising both dimension and volume, and thus emerges through immersion.

Attempting a typology would be to try and force commons into (onto) a flat one-dimensional plane, which would be to deny the much more varied (complex and multi-dimensional) existence which clusters around (is gathered into) commons. Commons emerge and cohere within and through co-ordinates of ideas and practices, places and people, the material and the virtual, the legal and extra-legal. The features of commons are such that, to do justice to the fullness of their potential, we need to trace them topographically (with a

light touch and modest intention), rather than assert a simplistic (and brutally imperial) one-dimensional act of mapping through typological distinction and differentiation. Rather than definitions and mapping, this is a process of tracing trends and patterns.<sup>20</sup>

To return, then, to the forest. That is, forest understood (or experienced) as wildwood, rather than enclosed wood. Forest as wildwood is a familiar topographical feature in the European (and subsequently colonial North American) imagination. The expansive forest is figured as dark and dangerous; a place of being hidden; of loss and recovery; of being tested; of survival at least, and at best of journeying into strength and wisdom. The forest, in the European imagination, is the wild wilderness which we both seek to escape, and escape into to seek. More prosaically, the forest figures as a place and source of sustenance: food, and the resources to provide shelter and warmth. This is a resource open to all, whether for scraping a living, or for recreation and renewal. Played across these different registers, the idea of a commons of interests in both keeping the forest open, and in sharing the use of the resources of the forest, emerges. However, it is cross-hatched with other registers.

For some, the scale, the topography, and the (seeming) antiquity of the forest conjures an image of ‘wildness’ as a form of wilderness: of nature untouched, untroubled and not reduced to such human artifices as enclosure into property and law. This is an image of ‘wild commons’: of land and resources found in, or ceded to, nature rather than formed in or by human intervention. Wild commons precedes the social, let alone the legal. In as far as they are colonised by human activity, it can only ever be in terms of a limited use, a kind of bare licence to use to the extent (spatially and temporally) that is necessary—no more. It is an itinerant and transient form of colonisation, tempered both by the acknowledgment of the wildness, which will always return, and the

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<sup>20</sup> Of course, my approach to commons is framed by my training as a legal scholar within the common law, and specifically as a property law scholar; and my contouring of the commons by my heritage of the politics of commons in this country. For further on a topological approach, see eg Anne Bottomley ‘... and if, in time, equity... An Exploration of the Time(s) of Equity Diagrammed through Image’ (2016) 10(2) *Polemos* 357 and Anne Bottomley, ‘The Curvature of The Commons’ (forthcoming).

commons, in which access to the resources of the wild cannot be denied to others, and within which developing a sustainable use of resources (for future use) requires not simply consideration, but also compliance through co-operation. For some, of course, the wild commons is only authentic when left alone, without trace of human colonisation. It exists only as a potential, one which can never be reduced into a resource as property, or as a lost history from which traces might be recovered and from which something might be patched back together in semblances of recovery.<sup>21</sup> Within this framing, the only human activity which can acknowledge and uphold the existence of wild commons is one which protects through constructing boundaries around them, and thereby refusing, policing, access to them. The wild, in this sense, is an ecology of common(s) to (and for) itself.<sup>22</sup>

It is no surprise that commons, as the state of nature, was understood in so much European political philosophy as simply being in a state-of-waiting to be made into, reduced into, property by the inventive intrusion of the human. But this did not, of course, explain, or justify, why human intervention could not construct a property regime of resources ‘being in, and for, common’, shared and distributed through networks of use and need, rather than reduced to a regime of private property as ownership. Some natural resources seem(ed) particularly designed to be thought of and used ‘in and for common’, collective, purposes. This logic of the ‘commons of common treasury’, or common goods, was reinforced by the recognition that these resources were all, together, fundamental to sustaining human life. The logic of the ‘common

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<sup>21</sup> There is a variation of ‘wild commons’ found in attempts to create and inhabit an out-law bubble carved out from a jurisdiction by either forcing a space open for the ‘wild’ to emerge through common effort (eg through occupation), or by, again by common effort, simply inhabiting abandoned spaces or resources. The point here is an attempt to carve a space ‘outside’ and live as if ‘out-law’. It can be, in any one instance, transient and itinerant (‘pop-up commons’), or it can be part of a much more concerted effort to develop resilience and stabilise a ‘wild common’ as an alternative to conventional property (and socio-economic) practices. Here ‘wild’ connotes not pre-law, but rather ex-law; and not ‘nature’ as a natural untouched state but rather as a chosen, ecological, design.

<sup>22</sup> Aspects of a ‘wild-commons’ vision of commons are visible in Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City* (Routledge 2015).

treasury' was that it formed the inheritance which allowed for bare life, under a guardianship of responsibility for the sustenance of future lives.

Both wild commons and the common treasury require acts of lawful authority (which may be no more or less than recognised custom and practice) in order to be recognised and preserved from the colonisation of unrestricted exploitation or enclosure. All commons, even seemingly wild commons, require some form of acknowledgment and protection in and by law. In a contemporary, environmental and ecological context, they require management: as a sustainable resource per se, and, ergo, between competing (spatial and temporal) demands emanating from different interest groups invested in some way with/in the common resource. Here, across a number of academic disciplines and special interest advocates, the focus is firmly on sustainable management and the governance structure required to deliver this. Both wild commons and the common treasury will, in practice, be 'managed commons', even if the form this management takes is one of a light touch. In this sense, even wild commons are not (or no longer) outside of law, but rather encased and carried within law. The law is required to protect their specific regime of being commons, that is as resources to which access and use by those who, as a grouping, do not claim ownership, or depend upon permission, nevertheless have (habits and expectations defined as) rights.

Recognising that both wild commons and the common treasury are (now) all managed commons maintained within and by a legal regime leads to the question of the protection of both the commons as resource and the commons as practices of use and access. One conventional strategy to protect both has been to place the resource under public authority management, often by conveying the resource into public authority ownership, to hold on behalf of either a specific grouping of a broader public. The theory behind 'public authority commons' is that it is simply a protective manoeuvre for placing the resource under the authority of an agency which/who will control the resource 'on behalf of' the public. However, contemporary patterns of privatisation of public assets by public authorities has evidenced just how fragile public authority commons are in practice. The use of an ownership model for the protection and management of these forms of commons has rendered

them vulnerable to being treated as ownership-property carrying rights of exclusion and alienation. So-called public ownership becomes visibly little more than a variant of private ownership. Therefore, public authority commons, in order to maintain their inheritance as ‘common property’ grounded in use-value, require protection from the potential abuses of expropriation or alienation; otherwise they become little more than indulgences (permissions) lent to the public until the public authority chooses to withdraw them.<sup>23</sup>

There are a number of ways to construct protection of commons against either private rights or public authority, which coalesce around two basic strategies. The first is to divide or limit ownership so that a guardianship model replaces absolute dominion, and the owner is not only limited in acts of dominion (eg disposing of the asset), but also tasked with obligations in relation to the maintenance of the resource. The juridical possibilities in common law to achieve this build on the trust as a property form, and the potential of fiduciary obligations as ways in which to hold owners, including local authorities, to account.<sup>24</sup> The doubled move is to both bind the owner, and to maintain the asset as commons (for now and into the future). This is the momentum behind the deployment of ‘public trust’ doctrine in, for instance, the United States, and the

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<sup>23</sup> See (n 15) and discussion of *beni comuni* movement above.

<sup>24</sup> Both derive from the equitable jurisdiction within common law. The trust model is based on ‘split title’ (or fractured dominion), in which ‘ownership’ is divided between managers of the asset and those ‘holding benefit’ in the asset. It is the latter who not only hold the former to account, but also instruct them (within any specific terms of the trust). This is framed, in common law, as a property relation. However, the development of this model has been curtailed in England by an orthodox insistence on requiring those who hold the benefit (beneficiaries) to be actual people, with legal capacity, or a group incorporated with legal personality. Strategies have been developed to circumvent this limitation, usually through statutory amendment allowing for trusts without ‘beneficiaries’ (that is those who hold the status and rights of property owners under the trust), eg through registration as charities (which allows for the incorporation of ‘land trusts’ in England and Wales). Analogous legal forms which allow for assets to be held for the benefit of a group, or a more generalised public, are found in law originally developed for friendly societies and co-operatives based on a business enterprise rather than property holding model, and now contained (in a much changed form) in the Co-operative and Community Benefit Societies Act 2014, discussed below.

attempts to develop fiduciary obligations binding the Crown in, for instance, Canada.<sup>25</sup>

The second strategy is to ‘wrap-up’, or over-lay, ownership with use-rights sufficiently strong to act as a trump in order to modify and limit the power of ownership as dominion. This is the basic strategy used in England for the recognition and protection of commons against the logic and rights of ownership, and is achieved through the mechanism of registration (and public record) of commons as both place and activity (that is place as both site of, and resource for, activity).<sup>26</sup> ‘Registered commons’ may be owned by a public authority or by a private individual: in both cases, the fact of registration limits rights of ownership in favour of the protection of commons as rights of use. When an English (or Welsh) lawyer hears the term commons this is the first thing they (we) think of: the registered protection of use rights in a particular place as commons. These are pro-active commons, constructed through the activity of a particular form of intervention—commoning making commons. Crafted out of the wild by collaborative activity for shared benefit, we can think of them as ‘constructed commons’, as well as registered commons. Under the 2006 statute (carrying forward earlier law), commons may become registered voluntarily (by the owners),<sup>27</sup> or applied for by an ‘interested party’. It is these applications which are, unsurprisingly, contentious. Originally designed to be a mechanism allowing for the recovery of ‘lost commons’, in other words the recognition and protection of commons and common rights derived from a ‘time immemorial’ and subsequently lost, denied or threatened, English law allows for the recognition and protection of modern, contemporary, ‘new commons’. This is because the criteria for recovering contested lost commons was set as requiring either

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<sup>25</sup> See eg Anne Bottomley, ‘Washed Up on Seashores (As if in Bottles): Access to Beaches (and Law) across the Caribbean Archipelago’ (forthcoming). The link between commons as ‘common goods’ developing in contemporary Italian jurisprudence, and ‘public trust’ has already been made, see (n 15) above.

<sup>26</sup> Now under the Commons Act 2006.

<sup>27</sup> This does happen. The Open Spaces Society designated 2017 as a year to push for, and persuade, voluntary registration by owners. See <[www.oss.org.uk](http://www.oss.org.uk)> accessed November 2017.

historical evidence of rights, or evidence of actual use, as if ‘by right’,<sup>28</sup> and dating back at least 20 years before the application.

Registration as a process of recognition and protection has been increasingly used to protect assets which hold value as/for community use, inscribed in the terms ‘community benefit’ or ‘community value’. In England and Wales, it is possible, under the Localism Act 2011, for a local grouping to apply for the listing of an asset of use-value to the community (whether owned by a public authority or privately). This is particularly valuable when they fear that the asset is to be withdrawn, closed down, or redeveloped (usually through sale and privatisation) for other uses. The registration of the asset as being recognised as having community value does little more than freeze any decision to dispose of the asset for a period of six months, during which time the group have the potential to find a mode of incorporation (for instance as a ‘community benefit society’ under the 2014 statute),<sup>29</sup> and raise the money which would allow them to buy the asset and manage it for community benefit.<sup>30</sup> This form of ‘active commoning’ requires not

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<sup>28</sup> Case law has determined this to mean access and use which are not a consequence of rights arising from ownership, or from a permission given by those with ownership rights or control over the resource. ‘Of right’ means ‘as if’ one already holds commons rights. Thus a right is obtained by use, under the fiction that it was ‘as if’ already in existence. A process designed as evidential, becomes a process for achieving a legal status. In a series of cases at the turn of the century, this expansive interpretation of the law was deployed to protect land held by local authorities which had been accessed and used by the public for recreation for more than 20 years, without local authority permission, from attempts to enclose and then privatise the land. See eg *R v Oxfordshire County Council and Others ex parte Sunningwell Parish Council* [1999] UKHL 28, [2000] 1 AC 335; and *R v City of Sunderland ex parte Beresford* [2003] UKHL 60. However, this expansive approach has recently been curtailed by *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another* [2015] UKSC 7, and *R (on the application of Barkas) v North Yorkshire County Council and another* [2014] UKSC 31. This is returned to below. (The Newhaven case concerned, inter alia, the registration of a beach to which the public had been denied access, after many years of use, by the private owners.)

<sup>29</sup> See (n 24) above.

<sup>30</sup> Six months is not very long, and registration does not guarantee success in protecting the asset unless a means can be found to protect it through ownership (essentiality as an asset of an enterprise). However, registration can protect an asset by acting as a signal to potential purchasers that this property and its use are

only a recognition of community use-value, but a willingness to act collaboratively to reveal, protect and deliver that value. This must, I think, therefore be included in the geography of commons.

Scotland (a very different juridical and political regime) has very recently introduced a registration process for a category of ‘Common Good Property’. The Community Empowerment (Scotland) Act 2017 recognises as ‘common good property’ property held by local authorities which has ‘strong historical and emotional value to local communities’, as well as ‘practical use and financial value’, and should therefore receive protection from the potential of withdrawal or disposal. Local authorities must establish, maintain and publish a register of such property (with local consultation to make sure that no property is omitted). Registration protects property by imposing a form of public guardianship or trust on a local authority. Again, this process of registration requires a degree of, emergence of, a community consciousness of commoning, a ‘becoming commons’, through recognition of collective use-value and the need for collaborative practices. Registration over-lays ownership as absolute dominion and produces, instead, a modified form of ownership carried in the recognised need to protect group (as ‘community of interests’ or as ‘local public’)<sup>31</sup> use-value.

### **Distinguishing commons from communal property**

I have stretched commons to cover legal forms and APPs which are not usually, in this jurisdiction, associated with the term. This is because I do not think it useful to restrict our understanding of commons to a legal definition (or form). To do so tends to keep us within one terrain, most obviously that of property law, rather than moving transversally across law and gathering together similar forms and practices. This becomes crucial when thinking and practicing

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contended, and then act as a motor to local groupings to ‘become communities’ through coalescing around the defence of the use-value of the asset.

<sup>31</sup> It really ought to be ‘and’ here, rather than ‘or’. There are two aspects which carry rather different groupings. The first is the activities of a group who take on the function of establishing commons, the second is the wider group for whom this activity is undertaken. It is a function of commons that they look outwards and hold open, rather than inwards and establish boundaries of privilege.

law strategically. Commoning as a socio-political practice or principle might be recognised and protected through the strategic use and development of a number of legal forms and processes,<sup>32</sup> which may be drawn from different law ‘fields’ as they appear in the academy. Further, strategic lawyering may involve blending or hybridising (folding together, assembling) legal forms and processes to create new potentials. This means that an examination of law relating to commons has to begin with specific (practical) case-studies, and then consider the ecology of the processes of becoming commons, of which one dimension (one ecology) is the selection of appropriate legal tools.<sup>33</sup>

Some distinctions must, however, be drawn between common(ing) and related, but crucially different, activities. Most importantly, we should distinguish between common(ing) and practices associated with shared use through shared ownership, which would define as ‘communal’ or ‘collective’ forms rather than the more specific commons. Communal or collective property usually connotes shared use derived from shared ownership, and therefore the asset as a resource is limited in use to a specific grouping claiming rights arising from ownership. Based in ownership, rather than use, this is inward looking (towards each other) and a variant of private property.<sup>34</sup> However radical it may be as an alternative property practice, it is crucially different from commons and commoning which derive rights from use and value property

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<sup>32</sup> See, for instance, (n 28) outlining the expansion and then contraction of case law relating to registration of commons.

<sup>33</sup> The term (and conceptual use of) ‘ecology’ here is drawn from Guattari, see Felix Guattari, *The Three Ecologies* (Gary Genosko (tr), Continuum 2000). See further Peg Rawls (ed), *Relational Architectural Ecologies: Architecture, Nature and Subjectivity* (Routledge 2013).

<sup>34</sup> For a fuller discussion of communal and collective rights, see eg Alison Clarke, ‘Integrating Private and Collective Land Rights: Lessons from China’ (2013) 7(2) J Comp L 177; Alison Clarke, ‘Property, Human Rights and Communities’ in Ting Xu and Jean Alain (eds), *Property and Human Rights in a Global Context* (Hart 2015); Alison Clarke, ‘Land Titling and Communal Property’ in Warren Barr (ed), *Modern Studies in Property Law Vol 8* (Hart 2015); Alison Clarke, ‘Comparative Property Law: Collective Rights within Common law and Civil Law Systems’ (2013) 1 Hanse Law School Series.

only as/for use. Therefore, unlike some other authors,<sup>35</sup> I would distinguish communal forms from commoning in order to keep in focus the key characteristics of commons as premised in use-value, as well as essentially collaborative, and, usually, outward looking. However, clearly certain activities which support the life of communal living are akin to the collaborative activities of commoning, and it might, therefore, be occasionally useful to distinguish certain forms of collective and communal practices as analogous to commoning; a kind of species of ‘internal commons’.

Constructing a notion of internal commons is particularly useful when the communal group requires an ethos or discipline which requires full reciprocity between each other and, even more so, when mutual forms require protection against disaggregation. Shared, communal or collective ownership is precarious if the legal form employed allows for members to act as individuals and demutualise in order to receive their own portion of the shared property (materially or as exchange-value).<sup>36</sup> Commoning practices might make this possibility less likely, in that what is carried and amplified in these practices is not merely mutual collaboration but also reciprocal responsibility.<sup>37</sup>

The distinction between commons as use-value for community, and communal or collective ownership-value in property is sharply evidenced in the Co-operatives and Community Benefit Societies Act 2014. Under this legislation, co-operatives are designated as mutuals which can be disaggregated and the assets once held together distributed between the members,<sup>38</sup> whereas community benefit societies have their assets locked away from members (rather as

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<sup>35</sup> See eg Maria Rosaria Marella (n 19), who treats all the examples she draws from as equivalent.

<sup>36</sup> Legal forms can be assembled which guard against individual economic gain from a collective enterprise, for example in limiting access to an increase in economic (incremental) value, see eg Lilac Housing co-housing development, <<http://www.lilac.coop>> and Paul Chatterton, *Low Impact Living: A Field Guide to Ecological, Affordable Community Building* (Routledge 2014).

<sup>37</sup> See eg Maja Hojer Bruun, ‘Community and the Commons: Open Access and Community Ownership of the Urban Commons’ in Christian Borch and Martin Kornberger (eds), *Urban Commons: Rethinking the City* (Routledge 2015).

<sup>38</sup> Although it is possible for co-operatives to incorporate as ‘full mutual’ which then excludes the possibility of disaggregation (de-mutualisation).

charities have their assets locked away from trustees). The latter, then, can be more easily assimilated into a topographical account of (classical) commons than the former.<sup>39</sup>

However, it should be recognised that internal commons can contribute to producing a climate of/for commoning. There are examples of internal commons contributing to local services and activities by the provision of buildings for community use, but, more importantly, all APPs can work together to build a networked ethos which supports and promotes commoning: an environment conducive to an emerging city architecture of commons.

### **Becoming civic (as) commons**

When David Harvey refers to ‘changing the city’ as a ‘common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization’,<sup>40</sup> we can envision a potential for this change through the lens and vector of commons and, even more so, commoning. In London, for instance, the potential for using commons to build resistance and resilience has become evident.

London commons range through the conventional commons of open green spaces registered as common land, through to the proactive use of commons registration to protect the use of threatened (once) open-access assets. The strategic use of registration of commons (and village greens) has protected small, marginal, strips of land used for recreation, and has even utilised as a possible application to protect the undercroft ‘skatepark’ (an informal but well established use of the site from the 1970s) on the South Bank from enclosure and redevelopment as retail units. It is unlikely that registration would have been successful, but the threat to apply for it strengthened the hand of the defenders of the skatepark in

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<sup>39</sup> Similarly the Scottish provisions for ‘community right to buy’ introduced by the Land Reform (Scotland) Act 2003, and now extended in the Community Empowerment (Scotland) Act 2017, creates a legal form which allows for ‘community ownership’ without the ability to disaggregate either use or exchange value.

<sup>40</sup> See (n 13).

negotiations with the Southbank Centre (especially given the publicity generated), which were successfully concluded in 2014. However, the use of commons registration has been severely curtailed not only in the courts,<sup>41</sup> but also by the Growth and Infrastructure Act 2013, which excludes applications for registration of land on which a planning application (for change of use of building) has already been made.

The limitations now placed on registration of commons has resulted in the need to seek other strategies for the protection of use and assets. Of course, this does not detract from the evidence of past success in registration of open spaces, preventing enclosure and development, and that evidence, knowledge, of incremental registration of a network of spaces has not only increased awareness of the potential for active commoning, but also has increased the skills and resources necessary to embed and extend similar activities; the principles and practices of designing and building the city as commune. Added to this are the small-scale, transient commons: APPs which involve inhabiting and using a resource for community benefit, as long as the activity can be sustained or is allowed. These work within the interstices of the city, creating patterns and linkages of counter-spaces evidencing property practiced for the benefit of local groupings and communities. We could think of them as ‘itinerant commons’, mobile and fleeting, mundane utopias carrying and promoting alternative visions of city.

This developing ecology of city commons combines with another variant: the work of commoning invested in protecting and managing ‘community assets’.<sup>42</sup> Take, for example, a public house called ‘The Ivy House’ in Nunhead, South East London.<sup>43</sup> It advertises itself as ‘London’s first co-operative pub’, and the story behind its present incarnation is instructive. In 2012, the tenant-landlord was informed by the owners that the pub was to be closed and sold for redevelopment. The tenant-landlord let a group of regulars know, and they set about thinking of ways to save the pub

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<sup>41</sup> See (n 28).

<sup>42</sup> *ibid*

<sup>43</sup> See The Ivy House Nunhead <[ivyhousenunhead.com](http://ivyhousenunhead.com)>, and see ‘Public House’, Sarah Turner (dir), 2016. See Public House <[www.thepublichousefilm.co.uk](http://www.thepublichousefilm.co.uk)> accessed November 2017.

form closure. This was a popular pub locally, and also respected and valued as a music venue on London. Their first step was to have the pub listed as of Grade II architectural value; a strategy which would give it some protection against demolition and therefore be off-putting to potential purchasers. The second step was to use the recently passed Localism Act 2011 to register the pub as an ‘asset of community value’. This allowed the group six months to incorporate, raise finance, bid for the purchase of the pub and then to be in a position to run it. This was achieved (the third step) by using the Co-operatives and Community Benefit Societies Act 2014 to incorporate as a BenCom (a society for community benefit).<sup>44</sup> They succeeded in purchasing the pub, keeping it open and now running it, very much, as an asset of community benefit.<sup>45</sup>

The supporters of the Ivy House benefitted from being able to draw on an interesting architectural heritage (which helped in raising money), and in a portion of their regulars willing to become activists. They also benefitted from legislation designed by the Tory-led coalition government to build and enhance a ‘Big Society’ willing to become responsible for local assets threatened by either local authority withdrawal or market forces. They were able to inhabit this legislation to their advantage; but it cannot be denied that legislation of this kind is part of a neo-liberal agenda to ‘responsibilise’<sup>46</sup> individuals and social groupings.<sup>47</sup> This does not mean that it should, at all cost, be avoided. Rather, it has to be used

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<sup>44</sup> Legally they are not a co-operative; but the term ‘co-operative’ clearly reflects their ethos, and is a signification they identify with.

<sup>45</sup> What is very clear in so much of the appeal of ‘commoning’, is that the activists want to ‘hold’ onto (in a sense ‘freeze’) the use-value of the asset vested in the materiality of the asset as property; and are trying to fend off (postpone or lock away) the virtual exchange-value of the asset as property. This tension between material (use) and virtual (investment) logics is fundamental to any understanding of the jurisprudence and politics of property. See further Anne Bottomley, ‘The Curvature of the Common’ (forthcoming).

<sup>46</sup> A term actually used in ‘Big Society’ literature.

<sup>47</sup> Commons are also intimately linked into the Deleuzean understanding of ‘societies of control’; they are not a radical alternative but rather an opening we can work with (precariously inhabit), see further Anne Bottomley, ‘The Curvature of the Common’ (forthcoming). My approach to the potential of commons, and other APPs, is the reason for my omission of the word ‘insurrection’ in the quote taken from Vito de Lucia, see (n 2).

strategically, clear-sightedly, and with modest ambition, even as our imagination reaches well beyond what we are able to, in any immediate sense, achieve. These are mundane utopias, minor jurisprudences, and no less important for being so.

Incrementally, a network of related commons practices can produce an environment which locates and organises around city as commune, or communes. Indeed, as the commons becomes coalesced into an environment supporting and amplifying alternative property and political practices for the benefit of common use and the value of collaboration, it must begin to engage with, and seep into, the civic city, becoming a potential for civic commons. This would be—quite possibly is—the building of an alternative architecture of city within, despite global economics and the withdrawal of the (local) state.

The role of the critical scholar in such an environment of potential is one which requires, again, care and modesty. The sudden emergence of a scholastic popularity in the theme of commons risks it becoming yet another fashionable cliché unless pursued with care, and with a nuanced understanding of the intimate relations between commons, neo-liberalism and control.<sup>48</sup> Having recognised that, it is important that legal scholars understand and use the strategic tools

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<sup>48</sup>In particular, and in part following on from Luc Boltanski's critique of what he calls the 'artistic critique' of capitalism in '68 (within which he would include the use of the Situationist slogan used in this text and echoed in my title). See Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism* (Gregory Eliot (tr), Verso 2005). We should be particularly attentive to the use made of, and incorporation into, an 'alternative' ethos in new modes of capital organisation which take-over and mutate 'life-style' politics into new regimes of control, in particular in constructing modes designed to evoke acceptance of what should be, in reality, unacceptable as a form of living in city. This is evidenced in, for instance, publicity material in London advertising the marketing of small, densely built and over-priced accommodation, where there is an attempt to promote and render more palatable the negative aspects of development by the use of words (slogans) such as 'green', 'open', 'space', 'community' and even 'village greens'. More recently what has emerged are designs drawing on co-living to render acceptable tiny apartments rented at a high premium. See, for instance, The Collective, so called (or rather so-marketed as) 'co-living' in East London. An illusion of commons: communality as lifestyle brought to you by the market as the 'new normal'. See The Collective <<https://www.thecollective.co.uk/>>, and *The Guardian* pages on the 'new normal' of housing (Oct/Nov 2017) sponsored by Lloyds Bank.

available in law, and, perhaps finally, loose their fixation on absolute dominion, understanding it as a political value, rather than as a good (as in complete) description of what Gordon so correctly describes as ‘paradoxical property’.<sup>49</sup> This is embodied, grounded, critique. We cannot, of course, ignore or deny the power, in many ways the triumph, of the pattern of enclosure and privatisation carried by possessive individualism and market economics. We can, however, recover a counter-narrative of property which is part of our heritage and has never, finally, been lost or obliterated. We can and should celebrate 1217, as we seek to imagine other architectures for/of city, other modes of/for living. In the city: the forest!

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<sup>49</sup> See (n 1).