

# Introduction

Few modern publications — or indeed ideas — have been as influential for the development of law, political science, economics, or environmental studies as Garrett Hardin’s “Tragedy of the Commons,” published in 1968 in *Science* magazine. The notion of unmanaged resources being inexorably and inevitably subject to overuse and degradation, illustrated through the parable of a common pasture consciously grazed to oblivion by herdsmen, proved to be a gripping one. It has seemed to explain or justify problems and solutions from areas such as population control, ownership of and sovereignty over natural resources, pollution, and cultural and technological innovation. Furthermore, it has remained a dominant trope in many fields in and outside law since its publication. Of course, Hardin’s idea has not gone unchallenged, and recent decades have seen a bounty of scholarship dedicated to refuting or modifying the *Tragedy* thesis and identifying or advocating for countervailing and related effects. Like all ideas, the idea of the *Tragedy* has a history and a context, the exploration of which is the object of this issue of *Theoretical Inquiries in Law*.

The articles in this issue offer an historical take on different facets of Hardin’s *Tragedy* and modern commons thought more generally, with the twin aims of better understanding its context and enriching its contemporary application. The volume is divided into three segments: *Commons Thought Before Hardin*, which explores ideas about the commons before Hardin’s canonical article; *The Historical Context of Commons Theory*, which examines the intellectual and ideological context in which the *Tragedy* came into prominence; and *The Life of the Tragedy*, which explores the *Tragedy*’s career trajectory — uses and abuses — since Hardin’s paper.

Viewed together, the articles in this symposium offer insights on where the *Tragedy* came from — and where it may be going.

The *Commons Thought Before Hardin* segment opens with Stuart Banner, who claims that Hardin’s *Tragedy* did not present any new insights that were not already widely-known about the predicaments of commons. To support his thesis, Banner presents theories of various scholars and experts who observed that commonly-owned resources tend to be over-consumed and under-maintained, dating back to the seventeenth century. Banner presents key factors which he believes led to a shift in the conventional understanding of Hardin’s work as an argument for population control, while claiming that

the *Tragedy* achieved its canonical status mainly thanks to its simple name and short exposition, which involved no technical vocabulary and therefore was accessible to non-specialists.

Nathaniel Wolloch's claim is that the "tragic" aspect of the *Tragedy* — the recognition that population pressure leads to the destruction of irreplaceable natural resources — is a more modern notion which only surfaced in the twentieth century. He argues that while the idea of commons existed much earlier — and most of its problems were analyzed and addressed prior to Hardin — the emphasis was placed on maximizing the utility of natural resources, not on preserving them. He demonstrates this early concept of commons by describing the historic management of natural resources such as timber and coal. He shows that in discussions surrounding the management of these resources, the tragic aspect was unimaginable or merely seen as a danger in the distant future. In light of this, Wolloch claims, the *Tragedy* was indeed novel.

In her historiographic article, Alice Ingold critically revisits Hardin's thesis regarding the decline of the commons in the liberal era. Drawing on the works of Ostrom, Rose, and Greer, Ingold advances an unconventional narrative of the relationship between the irrigation commons and the administrative state, according to which historical commons were invoked in the nineteenth century as a bulwark against redistribution of resources by the administrative state.

Monica Eppinger frames Hardin's *Tragedy* in the political and economic context of the Cold War by analyzing the different perceptions of collectivization in the Soviet Union. According to Eppinger, the Western-liberal perception of Soviet collectivization focused on the state-induced famine — known as the *Holodomor* — in rural Ukraine, while neglecting to address the perspective of Soviets who lived in the commons of the *Kollektiv*. Thus, Western framing of the commons as a tragedy promoted privatization as the Western solution for the economies of post-Soviet countries. Eppinger argues that reexamining the post-Holodomor span of the *Kollektiv* can inform a notion of an "illiberal commons" that should be taken into consideration when analyzing commons situations.

Harry Scheiber's article proposes a critique of Hardin's *Tragedy* while referencing the problem of ocean commons, which includes both marine resources and mineral resources. Scheiber finds that Hardin neglected to address the debate that preceded Hardin's own writing on oceanic commons. It seems to Scheiber that Hardin was distracted by his own Malthusian beliefs that the issues could be solved by regulations limiting human reproduction. Scheiber explains that while Hardin's paper had a catchy title, in regard to oceanic commons, he did not offer anything novel in his famous article.

David B. Schorr argues that modern commons theory has been substantially shaped by early modern ways of thinking about the evolution of civilizations, particularly by “stadial theory” models, passed down to the twentieth century through the disciplines of anthropology and human ecology; and that it is, in fact, a series of variations on the passage of human societies from stages of “barbarism” or “savagery” to “civilization.” Schorr describes these earlier outlooks, notes the striking similarities of recent theories of the commons to the earlier models, and attempts to trace the channels of influence. According to Schorr, the stadial outlook continues to shape the discourse around property and environmental commons into the twenty-first century and thus should be accounted for.

Fabien Locher opens the *Historical Context of Commons Theory* segment by laying out the historical background to Elinor Ostrom’s perspective on the *Tragedy* and commons institutions. Her book, “Governing the Commons,” which is still widely influential, refuted Hardin’s conclusion regarding sustainable exploitation of resources and produced a set of criteria for measuring the success of forms of commons governance. This article focuses on Ostrom’s contribution to the question of the commons, delving into the research practices conceived at the Ostrom Workshop at Indiana University Bloomington during the 1980s, and referring to Ostrom’s work on urban policing, consolidation and community governance. In his article, Locher shows that Ostrom’s criticism came together in a setting of distrust of centralization, big government, and modernization — on both national and local levels of government — and thus became instrumental in the rising neoliberal paradigm.

In his article, Michel Morin lays out a critical review of Hardin’s theory, claiming that it created a conceptual confusion between bounded and boundless commons. Morin explains this by shedding light on how little Hardin referred to the works of political economists such as John Locke and Adam Smith. Morin suggests that Hardin overlooked communal norms that could have prevented an overexploitation of resources or allowed for the adoption of corrective measures. Such norms, enacted by indigenous peoples, can be found in much historical research that provides examples of commons that were managed in a sustainable way. Morin claims that this demonstrates Hardin’s disregard for indigenous communities, which was prevalent in his time.

Carol Rose explores the cognitive aspect of Hardin’s analysis of the *Tragedy*, as opposed to the actions of the players in which he was interested. Rose analyzes Hardin’s pasture and herder metaphor and shows that the cognitive states of actors in *Tragedy*-related scenarios are varied, while ascribing an important role to the question of the scale of the commons. Rose argues that participants in a “prisoner’s dilemma” — a small-scale tragic “game” analyzed prior to Hardin’s *Tragedy* — will be dominated by distrust, while midsized

commons participants like those in Hardin's grazing field are engaged and knowledgeable. According to Rose, it is in the largest-scale commons, such as environmental issues, that the participants will be most likely to exhibit the ignorance and indifference that Hardin attributed to the herder in the common pasture.

Giacomo Bonan commences the *Life of the Tragedy* segment. He evaluates trends in historical writing regarding common resources and their relation to Hardin's *Tragedy*. According to Bonan, Hardin imported his example from historical debates over the English enclosures, which led to two central approaches: a focus on the overexploitation of soil productivity and the employed workforce, and "primitive accumulation," originating in Marxism. Recently, however, the three main lines in the historiographical trends have been the neo-institutional approach; investigation of conflicts over resources due to external intervention; and investigation of those due to local conflicts. Bonan claims that although Hardin's example does not actually manifest itself in reality, his ideas are echoed in today's debates over the Anthropocene epoch.

Oren Bracha's article traces the career of the *Tragedy* in the discourse of intellectual property (IP). According to Bracha, many scholars, arguing on the basis of the *Tragedy*, have advocated for IP maximalization in an attempt to bring IP closer to classic types of property. Bracha criticizes this use by emphasizing that a key component of the *Tragedy* is the existence of rivalry in public goods, which is generally absent in IP. The implication of this understanding — often obscured in existing scholarship — is that IP rights are rendered unimportant in regard to the static use of existing information. This leaves dynamic production incentives as the key justification for IP, a justification that is unconvincing with regard to full internalization of the value of information.

In the last article of the segment, Amnon Lehavi outlines and analyzes the reemergence of the "commons discourse" in Israel through a historical and legal analysis of three case studies. The first example presented in the article is the revival of the contemporary kibbutz, and its characteristics that enable a balance between privacy and close social ties. The second emergence is common urban work spaces, described as market commodities that align economic motives with synergetic creativity. Lastly, Lehavi depicts the community villages, especially their screening mechanisms, as a political and social tool. Lehavi optimistically concludes that the diversity of setups embracing the commons attests to the potential of the "commons discourse" in Israel and beyond.

The articles collected here are the product of the conference on *The Tragedy of the Commons at 50: Context, Precedents, and Afterlife*, held at Tel Aviv University Buchmann Faculty of Law in June of 2017, sponsored by the Cegla

Center for Interdisciplinary Research of the Law, the David Berg Foundation Institute for Law and History, the S. Horowitz Institute for IP in Memory of Dr. Amnon Goldenberg, and the Paula Goldberg Foundation. *Theoretical Inquiries in Law* thanks David Schorr and Carol Rose, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue, Ruvik Danieli for style-editing the articles, and all the conference participants and commentators for a fruitful discussion. The articles published in this issue are available online on the Theoretical Inquiries in Law website (<http://en-law.tau.ac.il/til>).

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In addition to the articles devoted to the *Tragedy* symposium, this issue offers its readers two articles that were presented at the June 2017 conference on Daniel Friedmann's 2016 book *The Purse and the Sword*, at Tel Aviv University. In his book, Friedmann, a renowned private law scholar, Professor of Law (Emeritus) at Tel Aviv University and the former Israeli Minister of Justice (2007-2009), delivers a critical analysis of the Israeli legal system and judiciary — especially the Supreme Court of Israel during the tenures of its Presidents Meir Shamgar, Aharon Barak and Dorit Beinisch. Friedmann emphasizes a shift in the balance of powers between the branches of government. The two articles in this segment offer new perspectives on this matter and highlight important themes of the current Israeli judiciary and its relations with the Knesset — the Israeli Parliament — and the Israeli government.

In his article, Yoav Dotan claims that the substantial rise of judicial power in Israel took place despite the lack of any meaningful formal constitutional guarantees of judicial autonomy in Israeli constitutional law. To the question of why the executive branch grants power to the courts and maintains their autonomy, Dotan offers an additional point of view by critically discussing the development of the role of the Supreme Court of Israel in removing officials from their positions through ordinary judicial review proceedings. Dotan argues that this development, which has been apparent since the 1990s, should be understood as part of the delicate relationship between the judicial and executive branches in Israel, and should be viewed as an informal mechanism for judicial independence.

Frank Michelman offers a different reading of Israel's so-called "Constitutional Revolution" than the one presented in *The Purse and the Sword*. According to Michelman, substantive constitutional law has two functions: a "regulatory" function and a "justificational" function. Michelman applies this theoretical framework to Israel and argues that some aspects of the Constitutional Revolution can be understood as a sign and a reflection of

the pull of the political-liberal idea of the justificational burden of substantive constitutional law, in a political-cultural setting of an attachment to the idea of Israel as a member of the family of liberal constitutional states. He argues that this pull puts Friedmann in the same orbit no less than Aharon Barak.

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