

**Who May Use the King's Forest?
The Meaning of Magna Carta, Commons and Law in Our Time**

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Thank you for inviting me to speak tonight about the 800th anniversary of the Magna Carta and the significance of law for the commons. It's pretty amazing that anyone is still celebrating something that happened eight centuries ago! Besides our memory of this event, I think it is so interesting what we have chosen to remember about this history, and what we have forgotten.

This anniversary is essentially about the signing of peace treaty on the fields of Runnymede, England, in 1215. The treaty settled a bloody civil war between the much-despised King John and his rebellious barons eight centuries ago. What was intended as an armistice was soon regarded as a larger canonical statement about the proper structure of governance. Amidst a lot of archaic language about medieval ways of life, Magna Carta is now seen as a landmark statement about the limited powers of the sovereign, and the rights and liberties of ordinary people.

The King's acceptance of Magna Carta after a long civil war seems unbelievably distant and almost forgettable. How could it have anything to do with us moderns? I think its durability and resonance have to do with our wariness about concentrated power, especially of the sovereign. We like to remind ourselves that the authority of the sovereign is restrained by the rule of law, and that this represents a new and civilizing moment in human history. We love to identify with the underdog and declare that even kings must respect something transcendent and universal called "law," which is said to protect individual rights and liberties.

In this spirit, the American Bar Association celebrated Magna Carta in 1957 by erecting a granite memorial at Runnymede bearing the words "Freedom Under Law." On grand public

occasions – especially this year – judges, politicians, law scholars and distinguished gray eminences like to congregate and declare how constitutional government and representative democracy are continuing to uphold the principles of Magna Carta. More about that in a minute.

This evening I'd like to explore a richer, more complex story about Magna Carta and its meanings for us today. There are in fact *two* distinct but related stories to be told. Story No. 1 – call it “The Triumph of the Modern Market/State” – is the one that I just told. It is usually invoked by distinguished elites to celebrate constitutional democracy, its close alliance with so-called free markets, and the idea of “freedom under law.” Story No. 1 assures us that constitutional government and representative legislatures actually serve as the brave bulwarks of liberty and law, defending the rights enshrined in Magna Carta. And to be sure, the Great Chart represents a significant advance over the monarchy, tribalism, and a Hobbesian war of each against all that once prevailed in many regions of the world.

Myself, I'm more interested in the neglected side of the history of Magna Carta, a story that doesn't get told very often. Call it Story No. 2, or what I call *Law for the Commons*. This second, neglected story is less about the signing of Magna Carta 800 years ago than about the ongoing, unfinished struggle to make those principles real in people's lives. Story No. 2 doesn't have the high-minded flourishes and sanctimony of the official, mainstream story. It's more down-to-earth and more focused on ordinary people – the commoners.

Story No. 2 is essentially about the *functional legal significance* of Magna Carta in meeting people's everyday survival needs and in fulfilling human rights. It's about assuring that everyone may access the common wealth that we all inherit as human beings. Put more plainly, this story asks the question – *Who may use the King's forests?*

The commoners of the early 1200s had an answer: “What do you mean, ‘The King's forests’? They belong to us! They've been ours for centuries!” This is the forgotten legacy of Magna Carta: its frank acknowledgment that commoners have rights, too. The right to use the

forest, the right to self-organize their own governance rules, and civil liberties and rights to protect them from the sovereign's arbitrary abuses of power.

All of these preceded the very idea of written law. They were considered human rights based on fundamental needs and long-standing traditions.

We have to remember that in the thirteenth century commoners relied on forests for nearly everything. They used wood from the forest to cook their food and heat their houses. They used wild game from the forest and fish from the rivers for their dinner tables. They used acorns and plants from the forest to fatten their cattle and pigs. The forest was an entire universe, a place that may have been *owned* by feudal masters, but nonetheless a place that commoners were entitled by long-standing custom to *use*. The forest was also a place that enframed their imagination, culture and very identities.

So when King John began arrogating to himself greater and greater control of forest lands, it produced a serious squeeze not just on the feudal nobility, who of course objected and fought back, but also on commoners whose very survival was now jeopardized. Royal encroachments of forest – ruthlessly enforced by the King's sheriffs – meant that livestock could not roam the forests. Pigs could not eat acorns and grow fat. Commoners could not gather timber to fix their homes. Fruit and fish could not be taken. Boats could not navigate rivers upon which dams or private causeways had been built.

All of this (and much else) provoked prolonged and bitter civil strife in England – and was ultimately resolved with the armistice known as Magna Carta. The terms of peace were a series of legal limitations on the King's absolute power, and a series of stipulated legal rights for people, including commoners.

What's usually forgotten in the story of Magna Carta is the companion document that was incorporated into it two years later, the Charter of the Forest. This document explicitly protected the customary rights of commoners. The Charter of the Forest is a kind of human rights

convention that guaranteed commoners specific uses of the forest – the right of pannage, or pasture for their pigs; the right of estover, to collect firewood; the right of agistment, to graze cattle; the right of turbary, to cut turf for fuel; and much else. In essence, the Charter of the Forest was the first legal limitation on privatization.

Now that's a story we haven't heard much at the official celebrations of Magna Carta! Yet this recognition of commoners is truly one of the great achievements of Magna Carta. The Charter of the Forest granted commoners a formal right of access to the collective resources fundamental to human survival. It protected them against acts of state terror, as we might call it today, by prohibiting the King's sheriff from abusive arrests, mayhem and torture in the course of defending the King's arbitrary enclosures.

Unfortunately, Magna Carta did not come equipped with the means to self-enforce its principles. The sovereign could still suspend the transcendent law at will, restrained only by the social and political outcry that might result. And this is exactly what has happened over the centuries and still happens today.

In 1536, King Henry VIII eliminated Catholic monasteries in England – “a massive act of state-sponsored privatization,” as Linebaugh put it. “This opened the door for a new class, the gentry to take land and turn it to profit by means of enclosures,” he writes. The dissolution of the monasteries was “a massive act of state-sponsored privatization” that converted the English land mass into a commodity – a “disenchantment of the land,” according to one journalist of the time.

And in the seventeenth and eighteenth centuries, Parliament authorized 4,000 acts of enclosure on behalf of the rising class of gentry, allowing them to expropriate about 15 percent of all of English common lands for their private use. These enclosures destroyed many commoners' deep connection to the soil and destroyed their culture and traditions, paving the way for industrialization. A new class of people were created: wage-earners, consumers and paupers. People dispossessed of their commons who had to choose but to try to find a place for themselves in the new capitalist order.

So what became of Magna Carta principles in this new world? The supremacy of law as a written document was supposed to be a great advance in giving law greater durability and respect. But I think we overrate the power of written law. Yes, making law written and formal helps make our rules of governance seem more permanent and even timeless; certainly the champions of Magna Carta, including the King, have tried to promote that idea.

Yet in truth, when law becomes divorced from the social community that is governed by it – when active consent can be overridden by interpretations by professional lawyers, politicians and judges – it is the first step toward a new kind of tyranny. Written law opens the door to this problem because *legality* and *legitimacy* are not the same – a point made by French professor of legal anthropology Étienne Le Roy. By making law an artifact of the printed word – something that professional lawyers and jurists could look at as an “objective” and universal set of rules – written law began to create a new realm of governance that can be called *legality*. Law itself became an external object of interpretation and manipulation, something divorced from the people themselves. Law became an icon to be invoked as absolute and independent, something requiring strict obedience.

Yet at the very same time, law as a written code became far more open to word-manipulations and trickery as lawyers and judges became the priesthood for interpreting the law. The sovereign could simply claim the mantle of legality so long as it had some plausible relationships to the formal, written documents, and to hell with the “legitimacy” that must otherwise be earned. “The law” as declared by the sovereign would be sufficient unto itself. And remember, the sovereign conveniently retains a monopoly on coercive force so as to enforce “the law” as he sees it (and I do mean “he”).

This helps explain why the grand principles of Magna Carta have been an unreliable guarantor of human rights. I’ve already mentioned the King’s enclosures of Catholic monasteries in England and the enclosure movement of the seventeenth and eighteenth centuries. In our own time, we have also seen that constitutional democracy is not such a fearless defender of due process,

fairness, human rights and commoning, especially since 9/11. The sovereign in our times – the nation-state in alliance with transnational corporations – has found plenty of ways to evade the supposed constraints of constitutional democracy and judicial review. We’ve seen how the self-declared national security interests of the US Government have trumped the right of habeas corpus. Notwithstanding Magna Carta, the US military and CIA has inflicted torture on countless individuals and denied prisoners due process of law. The US has subjected many Middle Eastern regions to thousands of military drone strikes that amount to lawless, extra-judicial assassinations. One could go on. The point is that the established institutions of constitutional government and democracy have silently stood by, showing little interest in identifying and punishing flagrant abuses of Magna Carta principles.

So there is a huge amount of dissonance going on in the fact that our contemporary sovereigns, the nation-state and corporations – the market/state – love to celebrate Magna Carta. It’s as if they need to hoist a halo over themselves for their beneficent role in administering our enlightened modern order. That’s more or less what happened in Westminster, England, earlier this year when political VIPs and top business executives from Goldman Sachs, Barrick Gold Corporation and corporate law firms turned out to celebrate.... the rule of law. You could say that our fascination with Magna Carta over the centuries is mainly aspirational – or more darkly, a useful cover story. We like to reassure ourselves – or convince others – that power is indeed domesticated and does serve humanity.

In truth, of course, the neoliberal market order, as assisted by the state, has proven to be as zealous and ruthless in enclosing the commons as King John. States and the corporate sector routinely collude in using law to “legally” privatize our common wealth, seen most notably in the predations of the global finance sector. The Earth’s atmosphere is used as a free waste dump by major industries, especially those selling fossil fuels, with little action by the state. Biotech and pharmaceutical companies are allowed to convert lifeforms from genes to bacteria to sheep into private commodities via patent law. Investors and sovereign investment funds are buying up huge swaths of land across Africa and Asia in a massive global land grab, dispossessing commoners and laying the groundwork for future famines. Companies are plundering the oceans of fish and

minerals. Mining and forestry companies are ravaging Latin American landscapes through brutal neo-extractivist projects. Everything from words and colors to smells can now be trademarked, and even two-second snippets of sound can now be copyrighted.

In King John's time, enclosure was mostly about the forest. Today it's about everything, including life itself.

So, to return to the question posed earlier: Who may use the King's forests? Law today has become so captured and corrupted by the contemporary sovereign – notwithstanding constitutions, elections and courts – that there is little room for commoners to govern themselves or vindicate their rights in the face of the sovereign. The sovereign market/state insists upon controlling nearly *everything* by the logic of market exchange.

This leaves very little space – legally, culturally, economically – for commoners to use their own common wealth, or to devise their own rules for managing things. Political and corporate elites and their affiliated retainers administer a system of formalized legality that presumes a moral and social legitimacy that is fast disappearing. Legality is so often used to trump what I call “vernacular law” – the norms and values of the street, and the moral and political authority of ordinary people. The Law of the Commons once declared by Magna Carta has become primarily an instrument of market/state power, not an expression of the pre-political sovereignty of human beings. The market/state has arrogated to itself the human rights that *precede* the state, which belongs to commoners.

In the United States, as many of you know, corporations have been legally recognized as persons, with all of the civil rights and freedoms that real people are supposed to have. And yet commoners and the Earth are treated as unfeeling resources, without dignity or rights.

So why, despite these shortcomings, do I celebrate Magna Carta? Because the Charter of the Forest as incorporated into Magna Carta recognized the legitimacy of commoning. It decriminalized it and made it legal. This historical fact is important in itself. As a matter of law,

people were finally granted a significant measure of formal legal freedom to govern themselves – to devise rules that seemed fair, legitimate and effective for their circumstances.

In other words, thanks to commoning and its formal recognition by the Charter of the Forest, the sovereign could not assert absolute authority. Under a new written, formal law, the people, the commoners, retained significant moral rights, human rights and economic rights. Timeless customary rights were “guaranteed.” Or at least, the King recognized commoners’ rights. This was a significant advance in human governance.

Reinventing Law for the Commons

But here’s the challenge that I think Magna Carta leaves us with: How to re-integrate legality with legitimacy? How do we get the sovereigns of our time, the market/state, to recognize the rights of commoners? I think the answer has to do with re-integrating the idea of *written law* with the *vernacular law* of living, communities of commoners. If we wish to take Magna Carta seriously, we need to reinvent its legal structures by which we seek to fulfill Magna Carta in the modern age.

I submit that we need to reinvent a new Law for the Commons. We must draw upon the traditions of Magna Carta and state law, but deliberately carve out spaces for people to craft their own rules, rules that seem fair and appropriate to them – and yet also subject to larger principles of the polity.

In other words, people must be allowed to engage in commoning. They must be able to play significant roles in managing “their forests” themselves, and in so doing, become devoted stewards of those forests. They must be able to draw upon their own insights and imagination, and on customary social practice. They must be able to develop a sense of shared community and develop their own rituals and traditions in managing things. Law must begin to honor people’s “affective labor,” as geographer Neera Singh puts it – the subjective feelings and emotions and pride and pleasure that comes with managing one’s own commons. This will of course require that we move away from the worldview of standard economics, that human beings are simply rational materialists who are always calculating to maximize their utilitarian self-interests.

The beauty of commoning is that it is a type of law that goes beyond formal legalisms. Rather, as Peter Linebaugh reminds us, it emerges from the commoners themselves as they grapple with their evolving local circumstances. Commons-based law is an *immanent* practical reality, not a fixed and eternal *transcendental* ideal. As Linebaugh writes:

Commoners think first not of title deeds, but of human deeds: how will this land be tilled? Does it require manuring? What grows there? They begin to explore. You might call it a natural attitude....Commoning is embedded in a labor process; it inheres in a particular praxis of field, upland, forest, marsh, coast. Common rights are entered into by labor.

This is a very different ontological understanding of law itself. Law for the Commons doesn't start with glittering abstractions and written documents. It starts with gritty, particular realities as they are experienced by commoners, and it emerges from those experiences as commoners devise systems of self-governance. In making the jump to formal, written law, Magna Carta may have enshrined certain principles into the memory of civilization, and that is no small achievement. But this leap forward came at a cost: the gradual loss of the memory and practice of commoning.

It is revealing that in the years after adoption of Magna Carta, the King often had to take pains to reassure skeptical commoners and barons that he would in fact uphold his end of the bargain. To allay people's fears, the King often re-published Magna Carta with a grand public flourish as a way to reassure everyone that Magna Carta was still the law of the land. But of course, that piece of paper was only as strong as the social culture and politics that supported it -- and history has demonstrated time and again that Magna Carta as an abstraction has been of only limited value in stopping the abuses of the sovereign.

So the real challenge for our time in reviving the principles of Magna Carta, and especially the Charter of the Forest, is to devise new legal regimes to recognize and protect commoning. Law

must be crafted to support spaces for commoning. Some people might regard this as quaint and ridiculous. Commoning disappeared in the Middle Ages and is only an historical curiosity.

This is simply not true. Commoning is an ancient social form that is constantly renewing itself, and is increasingly rich and robust. It is exploding around the world. In fact, to document how pervasive commoning is, my colleague Silke Helfrich and I recently completed our co-editing of a new anthology, *Patterns of Commoning*, which will be published in October, in both German and English editions. Our book of more than fifty original essays explores the irrepressible desire of people to collaborate and share in meeting their everyday needs.

The book describes commons of indigenous agriculture and community forests, high-tech FabLabs and alternative currencies in Kenya, commons of open-source farm equipment and collaborative mapping of commons, and much else. The book also focuses on the inner dynamics of commoning as a counterpoint to the ontological premises of standard economics. In other words, human beings are not simply versions of *homo economicus*, but complex, evolving creatures rooted in very specific geographies, histories and cultures. I might add, this anthology is a companion volume to the earlier anthology, *The Wealth of the Commons*, which we published in 2012.

My work in editing *Patterns of Commoning* over the past two years got me to thinking: What would it look like if commoners could invent their own types of law, consistent with state law, to reliably protect their commons? What if there were a more rigorous Law for the Commons? I realized, of course, that there was the history of Magna Carta, but could we commoners invent new forms of commons-based law for today?

I am happy to report that there is in fact a flourishing field of legal innovation now underway in many sectors of the commons world. Some of the earliest legal hacks of state law include the General Public License for software and the Creative Commons licenses for content. Both are masterstrokes of legal ingenuity that protect shared wealth because the licenses prevent anyone from seizing shared code, writing, images or music.

But as I researched further, I encountered literally dozens of fascinating and clever legal hacks designed to protect commoners' rights. There are "biocultural protocols," for example, which are meant to protect indigenous peoples' agroecological knowledge and traditions. There are new variations on co-operative law to bring co-operative principles to finance and social services. There are new legal initiatives being created to protect the rights of local communities against hydro-fracking, GMO crops and other corporate enclosures. There are proposals for stakeholder trusts to protect commons wealth ranging from the atmosphere to minerals to groundwater. And there are new organizational forms that are being invented to host commoning, as opposed to business, bureaucratic or nonprofit activities.

With support from the Heinrich Boell Foundation, I published, just last week, a lengthy strategy memorandum outlining more than sixty examples of legal innovation for the commons. And thanks to Michel Bauwens and Stacco Troncoso of the P2P Foundation, there is also an online wiki giving people access to the dozens of examples of commons-based law. These materials are meant to provoke a new conversation about Law for the Commons. I see this dialogue stemming directly from the history of Magna Carta and drawing upon its principles of deep respect for the human rights and needs of commoners.

But like Magna Carta itself, these principles can only be actualized through political struggle. I have no illusions that we can simply declare a Law for the Commons. The very idea and its variations must first be formulated for our modern context, and then fought for. But at a time when existing regimes of law and governance are in a shambles – losing public respect, failing to meet people's basic needs, destroying the Earth – I believe that commoning and laws to enable it have a bright future. Commons can meet people's needs in fair, open and effective ways, and provide a dignity, respect and equality that the market/state order has trouble achieving. By cultivating more direct engagement with people, and demanding that they step up to responsibilities, commons also have great promise in improving ecological stewardship.

King John had to be forced to recognize the rights of commoners, let us recall – and the sovereigns of our time are equally resistant to such rights. Which is why the real challenge for our

times is to reinvent law for the commons through creative legal hacks, new social practices and political struggle. Grand legal statements can only take us so far.

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One area of law-based commoning that has particular promise is the digital realm – the world of open source software, open design and manufacturing, FabLabs and hackerspaces, the blockchain ledger of Bitcoin, and the open data networks that are transforming cities. This is the world of commons-based peer production – a place where code itself is becoming a form of law, and commoners are asserting their own sovereignty, often in defiance of the state. To discuss this further, I am pleased to present the platform to my colleague Michel Bauwens, Founder of the P2P Foundation and fellow member of the Commons Strategies Group.