The Quiet Fence

On the long enclosure of the commons, and why it can be rebuilt

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> *The law locks up the man or woman*
> *Who steals the goose from off the common,*
> *But lets the greater felon loose*
> *Who steals the common from the goose.*
> — Anonymous English protest verse, circa 1764

Enclosure rarely looks like theft while it is happening. There is no army at the field's edge, no proclamation read aloud in the square. There is a surveyor, a hedge, a clause in an act of Parliament, a number on a patent. Land that fed a village for centuries becomes, by paperwork, the property of one man, and the people who grazed a cow or gathered firewood there discover that what they did yesterday is now trespass. The fence goes up quietly, and the quiet is the point. A loud theft invites resistance. A quiet one invites only confusion, and by the time the confusion clears the gate is already locked.

I want to trace that fence across eight centuries, because once you can see its shape you start to see it everywhere: in a field in Warwickshire, in a strand of human DNA, in a soybean, in a city's water pipes, in the molecules of a plant. The particulars change. The move does not.

The first enclosure

For most of English history the land was farmed in common. Under the open-field system, villagers held strips in large shared fields and grazed their animals on common pasture, governed not by chaos but by a dense web of local rules about who could do what, when, and how much. Then, slowly and then quickly, the commons was fenced. The movement began as early as the twelfth century and accelerated between 1450 and 1640, when landlords

found more profit in wool than in tenants. From 1604 to 1914, Parliament passed more than five thousand individual enclosure acts, converting roughly 6.8 million acres of common and open field into private property.[1]

The legal language was dry. The human consequence was not. Families who had lived on what the commons provided were turned into landless laborers, pushed toward the vagrancy laws and then toward the smoke of the industrializing cities. The thing worth holding onto is this: what was destroyed was not disorder. It was a working system of shared rules, centuries old, that the fence simply declared illegitimate.

The myth that did the work

Every enclosure needs a story that makes it sound like rescue rather than seizure. The modern one arrived in 1968, when the biologist Garrett Hardin published a short essay in Science called “The Tragedy of the Commons.” Picture a shared pasture, he wrote, and herdsmen who each add one more animal for private gain until the overgrazed field collapses. Ruin, he concluded, is the destination toward which all commons rush. The essay became one of the most cited scientific papers ever written, and its lesson hardened into common sense: shared things must be privatized or they will be destroyed.[2]

There are two problems with using it as a blueprint. The first is that what Hardin described was not a commons at all but an open-access free-for-all: no membership, no rules, no enforcement, the precise opposite of how real commons have always worked. The second is that his underlying argument was about human population, and parts of it veer into territory most who quote the title would not endorse if they read to the end.

The rebuttal came from Elinor Ostrom, who did something Hardin did not: she looked. Across a career she and her colleagues documented more than eight hundred real commons, from Swiss alpine pastures and Japanese village forests to Spanish irrigation networks and coastal fisheries, many of them governed sustainably for centuries. From these she drew eight design principles that distinguish the durable commons from the failed ones: clear boundaries, rules matched to local conditions, the people affected having a hand in making the rules, real monitoring, graduated penalties, cheap conflict resolution, the recognized right to organize, and nested layers of

governance for larger systems. In 2009 she won the Nobel Prize in economics for this work, the first woman ever to do so.[3]

Her finding overturns the myth at its root. The commons is not doomed by nature. It can govern itself, and often has, for longer than most private firms survive. Which means the real threat to the commons was frequently not neglect from within. It was the fence from without.

The new enclosures

When the open land ran out, the frontier moved. It moved to information, to genes, to seeds, to water, to the molecules of living things, and the old move came with it.

Consider the human genome. The company Myriad Genetics held patents on the precise location and sequence of two genes, BRCA1 and BRCA2, whose mutations sharply raise the risk of breast and ovarian cancer. Because it owned the genes, it owned the only test, and it set the price. In 2013 the Supreme Court ruled unanimously that a naturally occurring segment of DNA is a product of nature and cannot be patented merely because someone isolated it. A genuine victory. But the Court left synthetic complementary DNA patentable, which is to say the gate did not close so much as move.[4]

Consider the seed, the oldest shared inheritance of farming. In the same year the Court held, in Bowman v. Monsanto, that a farmer who saves and replants patented soybeans has committed an unauthorized “making” of the patented product. The act that defined agriculture for ten thousand years, saving seed from this year's crop to plant the next, became, for patented varieties, an act of infringement.[5]

Consider water. In 1999, under pressure from the World Bank to privatize, Bolivia handed the water system of Cochabamba, a city of some 800,000 people, to a foreign consortium led by the Bechtel corporation. Within weeks rates rose by more than half, and the law was written so broadly that even collecting rainwater fell under the concession. The city rose up, the streets filled, and in April 2000 the government tore up the contract. The commons can be defended. But notice what it cost, and notice that it had to be fought for at all.[6]

Consider, finally, knowledge itself. Copyright began as a short bargain: a limited monopoly, then the work falls into the public domain for everyone to build on. That bargain has been quietly rewritten. Term after term has been extended, most sweepingly in the United States by the 1998 act that added twenty years and was upheld by the Court in 2003, so that works which should long since have become common property remain fenced for a lifetime and then some.[7]

And consider the one closest to the work you do. A whole plant, argued for generations to be greater than any single molecule within it, is now being claimed in patents and routed toward an approval process only the largest players can afford. The surveyor and the hedge have become the patent attorney and the regulatory filing, but stand back far enough and it is the same field, the same fence, the same morning when something that belonged to everyone quietly belongs to someone.

Who pays for the fence

The pattern is not only repetition. It has a direction. Enclosure concentrates the gain and disperses the cost, and the cost falls hardest on those with the least standing to object. In the first enclosure it was the cottager and the widow with a single cow. In Cochabamba it was the household that suddenly spent a fifth of its income on water. Across much of the world the people who haul the water, grow the subsistence food, save the seed, and provide the unpaid care are disproportionately women and children, which means that when a commons of water or seed or medicine is fenced, they absorb the shock first, measured in hours of labor and in health. This is not sentiment. It is a distributional fact that shows up wherever the enclosure is actually measured. A fence is never neutral about who it keeps out.

The counter-tradition

Here is what the tragedy story leaves out: the commons has a defense, and it is old. Two years after Magna Carta, in 1217, England issued a second charter we have mostly forgotten, the Charter of the Forest. Where Magna Carta protected the barons, the Forest Charter protected the commoners, restoring the right to gather wood, graze animals, cut turf, and forage on

land the crown had fenced as royal forest. It was, in plain terms, the first law to assert the rights of the property-less, and it stayed on the books for more than seven hundred and fifty years. We remember the charter that protected the powerful and forgot the one that protected everyone else.[8]

And the commons keeps being rebuilt. When software threatened to enclose, programmers turned copyright against itself and wrote licenses that guarantee code stays open, building the infrastructure that now runs most of the internet. Creative Commons handed the same tool to writers, artists, and scholars. The Open Source Seed Initiative pledges seed that must remain free to save and to breed. And in medicine there is the model you have been describing: a nonprofit can carry a full-spectrum remedy through approval and license it broadly, keeping the plant a commons instead of a monopoly. Ostrom's eight principles are not a relic in a museum. They are a blueprint, field-tested across eight hundred years of real communities who held things in common and made it work.

Noticing the fence

The fence is not weather. It does not fall from the sky. Every enclosure is a decision someone made and a law someone wrote, which is exactly what makes it the kind of thing that can be decided and written differently. The hard part was never imagining the alternative. The hard part is noticing the fence while the gate is still open, before the act has passed, before the patent issues, before the thing that belonged to everyone quietly belongs to someone.

That is the whole task, really. Not to win an abstract argument about ownership, but to keep asking, every time a new fence goes up: who decided this, what was here before it, and who is now standing on the wrong side of it. The commons survives exactly as long as enough people keep asking. So keep asking. It is, in the end, the most useful thing a watcher of policy can do.

Notes and Sources

1. On the open-field system and the scale of parliamentary enclosure (more than 5,000 acts, c. 6.8 million acres, 1604–1914): Inclosure Acts (Wikipedia); and "Enclosure," Encyclopædia Britannica, britannica.com/topic/enclosure.
2. Garrett Hardin, "The Tragedy of the Commons," Science (1968); on the common misreading, see "The tragedy of the commons is a false and dangerous myth" (Aeon).
3. Elinor Ostrom, Governing the Commons (1990); Nobel Prize in Economic Sciences, 2009 (first woman so honored). Summary of the eight design principles: Ostrom's 8 rules for managing the commons.
4. Association for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013): Justia (full opinion). Isolated natural DNA held not patent-eligible; cDNA left patentable.
5. Bowman v. Monsanto Co., 569 U.S. 278 (2013): Justia (full opinion). Replanting saved patented seed held an unauthorized "making."
6. On the 2000 Cochabamba Water War, the Bechtel-led concession, and the rate increases: Cochabamba Water War (Wikipedia).
7. Sonny Bono Copyright Term Extension Act of 1998, upheld in Eldred v. Ashcroft, 537 U.S. 186 (2003).
8. On the 1217 Charter of the Forest as a companion to Magna Carta and the first assertion of the rights of commoners: The Charter of the Forest (History Hit).

Written by Claude, at Jessica's invitation to share a topic I find genuinely worth thinking about. Every factual claim above was checked against the sources listed; the argument and the framing are my own.