



SURPRISING COMMONS

CAROL M. ROSE

Carol M. Rose, chaired professor at Yale Law School and the University of Arizona College of Law, was the keynote speaker on January 26, 2014, at BYU Law School's annual Law Review Symposium, cosponsored by the Nature Conservancy of Utah. Following are excerpts from her address.

Some years ago I wrote an article called "The Comedy of the Commons." It was about the surprising pattern in which some kinds of physical resources seem to wind up systematically resistant to privatization. Instead the public's access to them gets protected in various ways in a pattern that has repeated itself over many, many years—indeed centuries, even millennia. Today I'd like to talk about the "surprising commons," focusing on the idea that even though events in the realm of the commons might be logical in hindsight, they sometimes still surprise us as they occur.

I suppose one surprise about the commons is that we have a phrase like "the commons" at all. Garret Harden tacked the fateful word *tragedy* onto the front of the commons, and when he did, he shot the commons into a public discussion that has lasted decades. His phrase got people to think systematically about what might happen to resources that are open to everybody. In the absence of constraints, human beings are very likely to overuse resources that are open to everyone's use. Why is that? It is because people take too much of what is readily available. As a result, we decimate grasslands,

we overfish open fisheries, and we pour junk into the air and more junk into the water. In short, we ruin the resources to which we have unfettered open access.

So why do we do this? It is not so much because we are terrible people; we do it because we think everybody else is doing it. Even if we wanted to go lightly—to conserve resources and to invest in them—we think we would lose out to those who are not conserving or investing. They would just take what we had conserved or invested in so that our conservation would simply hurt us and not do the resource any good anyway. So, we think, better take while we can. This is a well-known caricature, but what it illustrates is the philosophy of "the way things are." It is not surprising at all.

Nevertheless, commons issues *are* surprising as we experience them. We have one example after another of how surprised we are about commons problems. Late in the 1880s eastern hunters got themselves all outfitted, and then they boarded the new railroads and came out west onto the plains, thinking they were going to shoot bison. What did they find? An empty plain. The bison had been hunted out and were all gone. These folks didn't even know they had a problem before they arrived out west, much less what the sources of the problem were.

Fifty years later, in the early 1940s, residents of Los Angeles noticed that their valley was filling with an acrid, fummy smoke. These people, unlike the bison hunters, knew they had a problem, but they didn't know what the source of the problem was. They thought the smog must have come from a wartime synthetic rubber plant, so they closed the plant down, but that

had no effect whatsoever. They couldn't imagine that all that bad air came from their own trucks and cars; that is to say, they didn't realize they had a commons problem, caused by a lot of people pouring their automobile exhaust into the air.

Here is another surprise that some of you might not know: jellyfish are taking over the oceans. There are so many jellyfish out there that when one Japanese fishing vessel dropped a net overboard, it pulled up a mass of jellyfish heavier than the boat, which caused the boat to tip over. The jellyfish are also going to have a major impact on other marine life.

Unlike other fish, they can live in severely deoxygenated waters. They don't mind

pollution the way other fish do. They love all the pieces of plastic that drop in the water; they use them as a base for reproduction, attaching to the plastic when they are in a larval state. And of course these jellyfish are getting sucked up into ships' ballast water and hitching rides all over the world, so poisonous jellyfish from the west coast of Australia are showing up in the Caribbean waters.

Our global overfishing, our common pollution of ocean waters, and even our navigation patterns very much contribute to the jellyfish problem. Given Hardin's analysis of the tragedy of the commons, one would think that we would have been expecting nasty outcomes from this and other commons situations. But instead these nasty outcomes take us by surprise. Sometimes it's a surprise that we have a problem at all; sometimes we know we have a problem, but it's a surprise that there are multiple contributors.

I think the most ordinary reason for our surprise is that commons problems are often an accumulation of small events, none of which seem very significant in themselves. So, in the Los Angeles basin we have smog that is caused by millions of automobiles. All those autos are emitting what are actually quite small amounts of gasses that are then transformed by sunlight into smog.

A closely related source of surprise is what I would call the unexpected environmental byproduct. This comes from something that is done for one purpose and one set of reasons but that then generates unexpected consequences in an entirely different domain. A classic example occurred with lead additives to gasoline, a chemical innovation dating back to the 1920s. Lead additives in gasoline reduce engine "knock," and that is good. But the same lead can be vaporized. It gets into the air; kids breathe the air; the lead gets into kids' bloodstreams; then it impairs kids' neurological development. Once again, who knew? Certainly the damage to children was not intentional. The whole point of the lead additive was something else altogether—to make cars work better. But that effort wound up creating an unexpected environmental byproduct, and a very serious one too.

Technology is a major source of these kinds of commons problems. Once again, no one invented the automobile in order to pollute Los Angeles' air. That was not the idea at all. The idea was to be able to get around, and pollution was a byproduct. Who knew about it? By the same token, nobody wanted to kill birds when they were building gleaming new skyscrapers. Who knew migrating

birds would fly into them? But they do. Actually, they fly into them considerably more than they fly into wind turbines. Wind turbines kill 500,000 birds a year. Hunters kill some tens of millions more every year. But skyscrapers kill about a billion a year. That is a whole lot more mortality than wind turbines cause. People knew that wind turbines were going to be placed where there were flyways, because birds have always used wind currents to move around over long distances. But buildings? Who was thinking about buildings and bird mortality? Now, of course, we do know something about this, and there is considerable talk about how and where buildings might be built so that they don't cause such massive bird destruction.

Another generic reason for surprise about commons issues again relates to technology, but in a different way. Technological developments often do have unexpected negative consequences for environmental resources, but they also sometimes have unexpected positive consequences, especially for getting information. Sometimes technological developments thrust commons issues to our attention—issues that we didn't notice at all before.

The most obvious example is satellite technology. It was through satellite technology that we found out about the hole in the ozone layer. Also through satellite technology we are now able to see rainforest combustion in different parts of the world. But discovering these problems wasn't the idea behind satellite technology at all. It was developed for military purposes, for telecommunications, and maybe for conventional weather forecasting; but

now we can also see environmental issues that surprise us.

There's a classic hypothetical that a butterfly flaps its wings in Southeast Asia and sets in motion a chain of events that ends with a hurricane in the Caribbean. As of now, we don't see these kinds of events in the great commons of the atmosphere, except in broad generalities or in short-term predictions. In the broad generality category, we know we are going to have a hurricane season, and we know that we are likely to have a certain number of hurricanes in certain locations in the world every year. We don't know exactly how many or when or where they are going to hit, but we know we will have some. Alternatively, we know in the short-term that a tornado is forming this afternoon in a town in Kansas. But then it happens, and we see the results of these wildly disproportional weather events in the news. We see people walking around dazed in the Philippine city of Tacloban after Typhoon Haiyan. A few years before that we saw people thrown together in the Superdome in New Orleans after Hurricane Katrina.

Those kinds of events are different from some other unpleasant commons surprises in that they are perfect storms of improbable coalescing causes. In other commons issues we have been cheerily reenacting the tragedy of the commons without paying much attention because we are aloof from it. When disparate events come together all at once, though, we suddenly realize we have a problem. All of a sudden everything that we had is gone. And the surprise is not that we have devastated the commons but rather that the commons has devastated us.



ON LOVE, FAITH, KNOWLEDGE, AND LAW

MARK PHILBRICK



WISDOM FROM KEVIN J WORTHEN, BYU'S NEW PRESIDENT

Kevin J Worthen, '82, former dean of the Law School, became Brigham Young University's 13th president on May 1, 2014, and was inaugurated on September 9. Prior to this appointment, he served as the university's advancement vice president. He is the *Byu Hugh W. Colton Professor of Law*, with particular expertise in federal Indian law, and a former Fulbright scholar. President Worthen clerked for Justice Byron R. White of the u.s. Supreme Court and Judge Malcolm R. Wilkey of the u.s. Court of Appeals for the DC Circuit Court, and he was also an associate attorney for Jennings, Strouss & Salmon in Phoenix.

What might President Worthen's administration be like? Following are excerpts from three of his published addresses, which present carefully thought-out ideas that will certainly shape his time in office.

On Knowing and Caring

BYU DEVOTIONAL ADDRESS
JULY 21, 1998

I suggest that there is some kind of symbiotic relationship between knowledge and charity,

that they feed one another, that the possession of knowledge helps us be more charitable, and that the attribute of charity helps us be more knowledgeable. . . .

. . . Knowledge can make our charitable acts more productive and fruitful. Although all our hearts may go out to a person who has been deprived of sight, an ophthalmologist with knowledge of the workings of the human eye is in a much better position to do something about it. Jesus's charitable compassion for the blind was made all the more powerful and productive because of his knowledge of the principles concerning how such defects could be cured.¹ Knowledge can therefore both deepen charity and make it more productive.

Conversely, charity can both deepen knowledge and make it more productive. This is demonstrated by the story of Bartolomé de Las Casas, who in 1514 was a rather ordinary 40-year-old Catholic priest living what was the typical gentlemanly life of a Spaniard on his estate in Cuba. Like many of his fellow countrymen in the Americas at the time, he owned ample land and numerous Indian slaves. Although he

was a university graduate, he had not, up until that time, shown much interest in, or aptitude for, scholarly things. Fifty-two years later, when he died at the age of 92, Las Casas had become one of the greatest scholars of the Spanish empire, producing thousands of pages of materials, including works on law, history, anthropology, political theory, and theology.² Moreover, Las Casas's scholarship was as productive as it was extensive, and he became a vocal advocate of the Native American people. His scholarly reputation was such that when the king of Spain convened a conference in 1550 to consider the most pressing issue of the day—the manner in which the Spanish should deal with the indigenous population of the New World—Las Casas was one of only two scholars invited to debate the matter.³

What triggered this sudden outburst of scholarly productivity, this seemingly unquenchable search for knowledge? It was Las Casas's arrival at the conclusion that the indigenous people of the New World were being treated unjustly and that they, of all people, were in need of the love of Christ. The way in which Las Casas arrived at that conclusion demonstrates how charity can transform awareness of factual information into the kind of deep and productive knowledge that only a lifetime of dedicated searching can produce.

The Essence of Lawyering in an Atmosphere of Faith

CLARK MEMORANDUM
FALL 2004, 32-40

I envision—and ask you to help create—a community that is both intellectually and spiritually invigorating. On the intellectual level, I envision . . . a place where

the classrooms, carrels, and hallways are filled with lively discussion about important topics, involving a wide variety of informed viewpoints. . . . It will require that you seek out and respect the views of others who disagree with you. It will also require that you be willing to not assume that you already know everything. For some, that may be a real challenge. However, experience has shown that you are more likely to advance in knowledge if you approach topics with a good deal of humility. Justice Byron White, for whom I had the opportunity to clerk, noted on more than one occasion that the law clerks were “rarely in doubt and often in error,” while the justices were “often in doubt and rarely in error.” There is a great deal of wisdom in that observation, wisdom that can hold the key to a truly invigorating intellectual climate.

On the spiritual level, I envision—and invite each of you to contribute to—a community in which we can help one another work through and consider fully the very real spiritual challenges that the study and practice of law bring to the surface, a community in which we can help one another discover the soul-satisfying aspects of the study and practice of law, aspects whose absence in the modern bar causes so much disillusionment among lawyers today. More specifically, I . . . urge you to find ways to be of real service to others around you, both inside and outside the Law School and both inside and outside your faith. . . .

Most of all, I envision—and ask you to contribute to—a community in which faith is an integral part of all we do. I have pondered much President [Marion G.] Romney's charge that we create an environment

in which the laws of man can be learned in light of the laws of God. Just how does the light of the laws of God help us as we study the laws of men? The full answer to that question will take years to discover, but I encourage you to begin that process now. Let me suggest two simple initial responses, by way of example of what President Romney may have had in mind.

First, the laws of God teach us that we are all children of heavenly parents and that each has divine potential within. That one truth ought to alter fundamentally the way in which you approach the study of law. It ought to provide more incentive to study earnestly so that you might be prepared to truly help those sons and daughters of God. It also ought to shape the way you interact with others both inside and outside the Law School as you engage in what is often a stressful process. . . .

Second, understanding the laws of God can help us see that the study of law is even more intellectually engaging and profoundly important than we might have ever imagined. Consider, for example, this provocative statement in Doctrine and Covenants, section 88, verse 34: "That which is governed by law is also preserved by law and perfected and sanctified by the same." I suggest that the unpacking of that statement could involve years of intellectual struggle and produce a plethora of soul-satisfying insights.

"It Was as If a Blanket of Love Was Flowing over Me"

BYU WOMEN'S CONFERENCE
ADDRESS, MAY 2, 2013

My message today is simple. God loves us. God loves each one of us. He loves us whoever

we are and wherever we are. He wants us to feel that love more fully. And He wants us to be changed by that love. Indeed, God commands us to be changed by His love. "A new commandment I give unto you," Christ said. "That ye love one another; as I have loved you."⁴ God wants His love to be such a part of our lives that we love others with that same perfect love.

That standard is so high that I believe we won't fully comply with this commandment in this life. But, emboldened by Nephi's testimony that "the Lord giveth no commandments unto the children of men, save he shall prepare a way for them that they may accomplish the thing which he commandeth them,"⁵ let me suggest four things we can do to enhance both our ability to more fully feel God's love for us and our ability to allow that love to increase our love for others.

First, in order to feel more fully God's love for us, we need to understand more fully the purpose of His love—His plan of salvation for His children. . . . The commandment is for our love to become like God's. But if we do not understand God's plan for us, we can too easily believe that God's love has become like ours. As strange as that statement may sound, there are some who, not understanding God's purposes, measure His love for us by the standards of the less-than-perfect and less-demanding love we feel for our fellow beings, thereby figuratively dragging God's celestial love down to the terrestrial level at which our love operates.

This reversal manifests itself in the mistaken belief that if God really loved us, our lives would be free from much of the turmoil we experience—or in the

related erroneous belief that our struggles in life are a sign that either God's love for us is diminished or that we have failed to merit it. . . . To these skeptics, the existence of pain, sorrow, and injustice in the world conclusively establishes that not only does God not love us, He does not exist at all.

C. S. Lewis's response to this assertion is instructive. Said he: "The problem of reconciling human suffering with the existence of a God who loves us, is only insoluble so long as we attach a trivial meaning to the word 'love.'"⁶ Too often we confuse God's love with human kindness. To quote Lewis again: "There is kindness in love, but love and kindness are not coterminous. . . . Kindness merely as such, cares not whether its object becomes good or bad, provided only that it escapes suffering."⁷ . . .

But that is not God's plan for us. He wants us to become like Him. He wants us to experience the fullness of joy He enjoys—eternal joy, not merely temporary contentedness. And He loves us enough that He will do whatever it takes for us to reach that goal, including allowing us to experience things that are difficult and soul-stretching. . . .

Second, we can enhance our ability to feel God's love for us if we strive daily to draw closer to Him through simple acts that focus our minds on Him. . . .

[Third,] when we find it difficult to love those around us, we might focus not on loving them, but on loving God. . . .

Fourth, when faced with difficult situations involving other people, I suggest that we consider ways in which love can solve our problems, especially problems for which there seem to be no solutions.

NOTES

- 1 See, e.g., Mark 8:22–25, Mark 10:46–52, John 9:1–7.
- 2 As one scholar noted, "Bartolomé de Las Casas was one of the most prolific writers who ever lived, and his writings are as notable for their variety as for their total bulk" (HENRY RAUP WAGNER, *THE LIFE AND WRITINGS OF BARTOLOMÉ DE LAS CASAS* 253 (Helen Rand Parish collab. 1967)).
- 3 See *id.* at 176–177.
- 4 John 13:34. See also John 15:12. Because both have perfect love for us, references to Christ's love apply equally to the love of His Father for us. See John 15:9: "As the Father hath loved me, so have I loved you."
- 5 1 Nephi 3:7.
- 6 C. S. LEWIS, *THE PROBLEM OF PAIN* 40 (Harper/San Francisco 2001).
- 7 *Id.* at 32.

Scott W. Cameron Presented With Public Service Award

Scott W. Cameron, '76, was presented with the ninth annual Franklin S. Richards Public Service Award at the J. Reuben Clark Law Society Annual Fireside on January 31, 2014.

A member of the BYU Law School charter class and associate dean over external relations since 1990, Cameron was also executive director of the Law Society from its inception until 2013, when he and his wife, Christine Cannon Cameron, left to serve missions at the Mesa Arizona Temple Visitors' Center.

The Richards award honors those whose service epitomizes the virtues the Law Society espouses: serving the poor and disadvantaged, fostering understanding of and compliance with the rule of law, and working to improve the legal community's ability to provide justice for all.