Throwing It Away: Marshalling Commons Theory In Defense of Disposable Communities

"Trash ... manifests our complete lack of grace, a despairing forfeiture of our receptive service to Being."[1]

What to do with the detritus, garbage, and waste from our over-consumptive life is a common problem. Not a *commons* problem, but a common problem—a communal one. We all create it together. We all add our share to the endless stream of waste flowing from our hands to its final resting place when we "throw it away." The endless hunt is for *away* that mythical space to deposit all the waste we generate. Having "thrown it away" the waste is gone, or at least "out of sight, out of mind." Problem solved. Now on to the next batch of waste, and the next, and the next. The whole system of single-use consumption relies on *away.* But there is a problem with this strategy. There is no *away.* There are only places. As Barry Commoner pointed out half a century ago, everything must go somewhere.[2]

So, we create *away* as a social imaginary.[3] For New York City, *away* was once Rikers Island,[4] it was also the New York harbor,[5] and for many years it was the Fresh Kills landfill on Staten Island.[6] When Fresh Kills closed in 2001, New York became a national leader in exporting waste. *Away* became other states.[7] In the Supreme Court's inimitable language, New York "found it necessary or expedient" to send its waste to New Jersey.[8] New York was not alone in

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[1] GREG KENNEDY, AN ONTOLOGY OF TRASH 182 (2007).
[2] BARRY COMMONER, THE CLOSING CIRCLE (1971)
[3] CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (2003)(defining a social imaginary as a broad understanding of the way a society imagines its collective social life.)
[4] Rikers Island was originally 87.1 acres. However, New York City used barge loads of waste from Manhattan to provide fill to expand the island by "reclaiming" its shoals. *Rikers Island Harbor Line: No Opposition to the Plan of Dumping Refuse There*, N.Y. TIMES (Jan. 17, 1893). The Department of Corrections forced inmates to do the hard labor necessary to expand the island to its current size of 416.5 acres. *New York City's Captive Work Force: Remembering the Prisoners Who Built Rikers,* 56 INT'L J. L., CRIME & JUST. 13 (2019). The health hazards from this practice became evident almost immediately. *Fumes a Problem at Jail: Board Finds Rikers Island Will Not Be Habitable if Dump Fires Continue*, N.Y. TIMES (Oct. 29, 1931). The waste had an unfortunate tendency to catch fire and emit "obnoxious smoke." *Rikers Island Use as Dump Denounced*, N.Y.TIMES (Nov. 27, 1938); *Rikers Island Dumping Nuisance,* N.Y. TIMES (Jul. 8, 1894); *see also* Chelsia Rose Marcius, *How Robert Moses Tried to Deal With Rikers Methane Gas Problem,* DAILY NEWS (Dec. 23, 2019).
[5] T.J. Achren, Ocean Waste Disposal in the New York Bight, IEC Oceanics Report 4460C1559 to EPA(1973) https://nepis.epa.gov/Exe/ZyPDF.cgi/94004F6H.PDF?Dockey=94004F6H.PDF (describing the practices and during 85 years of dumping waste into the New York Harbor.
[6] MARTIN V. MELOSI, FRESH KILLS: A HISTORY OF CONSUMING AND DISCARDING IN NEW YORK CITY (2020)
[7] In one memorable incident, a barge of trash originating in Islip, New York, was turned away at ports in North Carolina, Louisiana, Mexico, and finally, the nation of Belize in South America. Dick Sheridan, *Trash Fight: The Long Voyage of New York's Unwanted Garbage Barge,* DAILY NEWS (Aug. 14, 2017). The same problem exists on a global scale. The Basal Ban is an attempt to prevent Europe and the United States from turning most of Africa, South American and parts of Asia into *away* for their toxic wastes. The Probo Koala's catastrophic dumping in Cote d'Ivoire shows just how much more needs to be done. Rebecca Bratspies, *Corrupt at Its Core: How Law Failed the Victims of Waste Dumping in Cote d'Ivoire*, 43 COLUMBIA J. ENVT'L L. 417 (2018)
[8] City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

this, Philadelphia also chose New Jersey as its *away.* Objecting to this status, New Jersey responded by enacting a solid waste management law that banned import of out-of-state waste.[9] Many Pennsylvania counties adopted similar bans under the guise of flow control.[10] These refusals to become someone else's *away* threatened the stability of the entire consumption system upon which the US economy depends. It could not go unchallenged. Cases made their way through state courts and finally arrived before the highest court in the land.[11] The specific question, though not phrased as such, was whether, the various States, upon joining the Union, nevertheless retained the power to refuse to be an *away* for other States. The Supreme Court first had to determine whether the constitution spoke at all to this issue. Concluding that waste was an article of commerce despite being valueless,[12] the Court deployed the dormant commerce clause to prevent these kinds of State actions.[13] New Jersey and much of Pennsylvania were forced to remain *away.* More recently, New York's *away* for the 12,000 tons of waste New York City residents produce each day[14] has been landfills in South Carolina, Virginia, Pennsylvania, Indiana, and Ohio.[15]

There is huge profit in making waste go *away.* In 2019, Waste Management, the self-proclaimed "leading provider of comprehensive waste management" services[16] reported revenues of $15.46 billion and profits of $4.28 billion.[17] Other massive waste companies in the United States and

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[9] New Jersey Waste Control Act, N.J.Stat.Ann. § 13_10 (1974).
[10] SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, HEARING ON SENATE BILL 1194: A BILL TO IMPOSE CERTAIN LIMITATIONS ON THE RECEIPT OF OUT-OF-STATE MUNICIPAL SOLID WASTE, TO AUTHORIZE STATE AND LOCAL CONTROLS OVER THE FLOW OF MUNICIPAL SOLID WASTE, March 2, 2002. (Pennsyvlania Senator Arlen Spector describing the need for local ability to ban out-of-state waste shipments as "a much-needed relief") Empire v. Commonwealth of Pennsylvania, 546 Pa. 315 (1996).
[11] City of Philadelphia v. New Jersey, 437 U.S. 617, 618 (1978).
[12] City of Philadelphia v. New Jersey, 437 U.S. at 622-23.
[13] *Id.* at 625-28. ("The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation . . .. [It is an] attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.")

[14] Environmental Initiatives, https://www.baruch.cuny.edu/nycdata/environmental/recycling-waste.htm#:~:text=NYC%20residents%20produce%2012%2C000%20tons,of%20NYC's%20landfills%20are%20filled.
[15] Senator Chafee opened the 1999 *Hearing on Interstate Waste Transportation* with the observation that Pennsylvania, Ohio, Virginia, and Indiana did not want to become the dumping grounds for New York waste. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, HEARING ON INTERSTATE WASTE, June 17, 1999. Yet, in the three decades since that hearing, New York, and other major urban centers came to rely more and more on long-haul trucking to transport their waste large distances for disposal. This reliance means that in addition to the soil and groundwater contamination odors, methane emissions, and other unpleasant consequences at the sites of disposal themselves, our current form of waste handling is also intimately entwined with the additional environmental harms of greenhouse gas emissions, particulate pollution, and other negative impacts from the long-haul trucks themselves.
[16] WM101, http://investors.wm.com/why-invest/wm-101.

[17] Press Release: Waste Management Announces Fourth Quarter and Full-Year 2019 Earnings, BUSINESSWIRE (Feb. 13, 2000) https://www.businesswire.com/news/home/20200213005408/en/.

around the world are similarly profitable. The main strategy they employ for their part in the social imaginary of *away* is to find and make use of communities that can be considered disposable and to convert them into *away.*

In the United States, and around the world, the communities singled out for this kind of use are overwhelmingly Black and brown communities. Thirty-five years ago, the United Church of Christ's Report on Toxic Waste and Race documented that the race of a surrounding community was the most significant variable predicting location of hazardous waste facilities.[18] Three out of every five Black and Latinx Americans lived in communities with uncontrolled toxic waste sites.[19] This was not by accident, or by choice. America's complicated racial geography of largely segregated neighborhoods grows from generations of redlining and housing discrimination. Rev. Benjamin Chavis emphasized that Black and brown communities were selected to house these facilities not because they were the environmentally sound choice, but because they seemed powerless to resist.[20] He called this phenomenon environmental racism.[21]

Not much has changed in the ensuing decades. There are currently over 2,400 landfills and more than 108 incinerators in the United States.[22] Studies have continued to show that Black and brown Americans are more likely to live near a waste disposal facility.[23] As a result, they are bear disproportionate pollution burdens and suffer elevated environmental health risks, and experience noxious odors, toxic leachate, and heavy truck traffic on a regular basis. This is as true in New York City as it is elsewhere in the country.

New York City Waste Handling: A Brief Introduction

Waste handling has been a fraught issue in New York City seemingly forever. For most of the 20th century, New York City's waste handling focused around the Fresh Kills landfill in Staten Island. Fresh Kills was the largest landfill in the world.[24] From its opening in 1948 until its final closure in 2001, Fresh Kills Landfill processed virtually all of New York City's residential waste—some 29,000 tons per day at peak operation.[25] After 2001, New York City largely turned

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[18] United Church of Christ, *Toxic Wastes and Race in the United States*, Executive Summary xiii (1987)
[19] *Id.* at xiv.
[20] Rev. Benjamin Chavis, *Foreward* at 3, CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert Bullard, ed. 1993)
[21] *Id.*
[22] U.S. EPA, Landfill Methane Outreach Program, accessed at http://www.epa. gov/lmop/projects-candidates/index.html
[23] Tishman Environment and Design Center, U.S. Municipal Solid Waste Incinerators: An Industry in Decline 13-16 (2019). https://grist.org/wp-content/uploads/2020/07/1ad71-cr_gaiareportfinal_05.21.pdf
[24] Joseph Borelli, Report to City Council 3, http://council.nyc.gov/joseph-borelli/wp-content/uploads/sites/52/2017/05/Landfill-Report-FINAL.pdf. This report documented the adverse health effects Staten Island residents suffered from exposure to the Fresh Kills landfill.
[25] MARTIN MELOSI, FRESH KILLS (2020) In the two decades since its closure, Fresh Kills landfill has been rebranded as Fresh Kills, a vast urban park that is scheduled to open in Spring 2021. Robert Sullivan, *How the World's Largest Dump Evolved into a Green Oasis,* N.Y. Times (Aug. 14, 2020).

to the private sector to fill the gap left by the closure of Fresh Kills and the need to find a new *away* for New York City's waste. New York City thus invoked Barry Commoner's environmental "soft path," which "accepts the private corporate governance of production decisions and seeks only to regulate the resultant environmental impact."[26]

It is a dirty little fact that trash and other waste does not effortlessly whisk itself from our homes to the place we have designated *away.* First it must be collected, sorted, grouped, loaded, and transported. The waste transfer stations where the city's waste is shifted from collection vehicles to long-haul trucks for transport across state lines loom large as a site of contestation. They are the intermediaries between our rubbish bins and the out-of-state landfills that are the ultimate destination of New York City's waste. As such, these facilities are a crucial mid-life stage of our so-called cradle to grave waste handling system.

It is an understatement to say that these facilities are not desirable neighbors. Thousands of loud, dangerous, heavy diesel trucks criss-cross host communities at all hours of the day and night, spewing particulates, nitrous oxides and other pollutants into the air. Just as landfills have invariably been located in environmental justice communities that the broader society has agreed to identify as disposable, so too are waste transfer stations, which can be thought of as *away's* way-stations.[27] Most of the waste processed in these facilities comes from outside the host communities. These facilities are part of regional waste streams that serve the economic needs of the region and the waste industry, while concentrating environmental burdens onto the host communities.

When Fresh Kills closed, New York City became a massive waste exporter. In siting the many new waste transfer stations that the City suddenly needed in the post-Fresh Kills world, then-mayors Giuliani and Bloomberg turned their backs on equity. Instead, they allowed existing social and market forces to determine the locations of new waste transfer facilities. With no countervailing governmental pressures toward equity, it was entirely predictable that active and implicit discrimination, coupled with the low land values that flowed directly from past discrimination, would steer the overwhelming majority of these waste processing facilities into New York City's Black and brown communities, particularly in North Brooklyn, the South Bronx, and Southeast Queens. Two decades later, New York City was left with a system in which twenty-six of New York City's thirty-eight private waste transfer stations were located in four communities of color.[28] Collectively, these communities processed 73% of the City's

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[26] BENJAMIN MILLER, FAT OF THE LAND: GARBAGE OF NEW YORK—THE LAST 200 YEARS 246-247 (2000).

[27] Charles Mills theorizes that the way that Black neighborhoods and spaces are characterized by white power structures as waste spaces supports this disparity. "Since these are already waste spaces, it is only appropriate that the waste products of industrialization should be directed toward them." Charles W. Mills, *Black Trash,* in FACES OF ENVIRONMENTAL RACISM 73-91 (Laura Westra & Bill E. Lawson eds., 2001).

[28] According to City Council, the vast majority of the City's private waste transfer stations are located in Bronx Community Districts 1 and 2, Brooklyn Community District 1 and Queens Community District 12. COMMITTEE REPORT FOR INT. NO. 157-C, NEW YORK CITY COUNCIL COMMITTEE ON SANITATION AND SOLID WASTE MANAGEMENT 4 (July 17, 2018) available at https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331918&GUID=B730F207-D5EF-45B3-9F9E-9F356EFC58C0. The waste transfer stations that this project considers are in Queens Community District 12.

average daily waste.[29] This concentration of waste transfer facilities resulted in degraded air quality, excess noise and traffic, and other negative health and environmental conditions in these overburdened communities. Worse, the disproportionate concentration of waste handling activities depressed property values for existing residents, displaced other, more desirable economic activity, and inhibited community revitalization plans.

These overburdened communities did not, and do not view themselves as disposable.[30] They reject the characterization of their communities as waste spaces and have continuously fought against administrative and private decisions that co-opt them into being *away* for the rest of the City. Organizing effectively and determinedly for decades, these communities have objected to being forced into that role. Through fierce and persistent public advocacy they persuaded (forced) the New York City Department of Sanitation to enact a Solid Waste Management Plan in 2006 that committed the City to directly tackling the glaring racial disparities in which communities were asked to serve as *away's* way stations.[31] A key component of this Plan was a commitment that "responsibility for the City's waste management system should be allocated equitably throughout the City, in each of the five boroughs."[32] In his *One New York* plan, Mayor de Blasio announced a commitment to make equity "an explicit guiding principle" and the lens through which the City would view all planning, policymaking, and governing,[33] including waste handling.[34]

Community leaders from overburdened communities continued to pressure for change. In 2018, City Council responded by enacting Local Law 152, the Waste Equity Law, which directed DSNY to reduce permitted capacity at waste transfer stations in the four overburdened community districts.[35] This law grew from an explicit recognition that these neighborhoods had unfairly been turned into dumping grounds for the City's waste.[36] These same community

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[29] *Id.* at 4 (citing information provided by the New York City Department of Sanitation (DSNY).

[30] Melissa Iachan, Out with the Trash, In with the New: Challenges and Solutions in New York City's Solid Waste Management System, 30 ENV. L. IN N.Y. 23, 24 (Feb. 2019).

[31] One of the leading forces behind this Waste Equity Plan, the New York City Environmental Justice Alliance characterized the 2006 plan as a "long-term vision to mitigate the inequality, pollution, and public health impacts from years of sending more than three-quarters of the City's garbage—and hundreds of diesel trucks each day—to just three neighborhoods where residents are predominantly people of color." Memorandum of Law of the New York City Environmental Justice Alliance et al. as Proposed Amici Curiae in Opposition to the Verified Petition and in Support of the Motion to Dismiss the Complaint, The National Waste & Recycling Association et al. v. The City of New York et al. at 2, available at https://nylpi.org/wp-content/uploads/2019/04/Amicus-Executed-PDFA.pdf.

[32] DSNY, Final Comprehensive Solid Waste Management Plan: Executive Summary at 2 (2006), available at https://dsny.cityofnewyork.us/wp-content/uploads/2017/12/about_swmp_exec_summary_0815.pdf.

[33] One New York: Plan For A Strong and Just City 5 (2015)

[34] *Id*. at 176. This commitment extended to all aspects of waste generation, handling, and disposal.

[35] Local Law 152 reduced permit capacity by 50% percent in Brooklyn's Community District 1, and by 33% in the Bronx Community Districts 1 and 2, and Queens Community District 12. https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331918&GUID=B730F207-D5EF-45B3-9F9E-9F356EFC58C0&Options=ID|Text|&Search=152.

[36] See NYC Office of the Mayor, *Mayor de Blasio and Speaker Johnson Celebrate Signing of Waste Equity Legislation* (Aug. 16, 2018), https://www1.nyc.gov/office-of-the-mayor/news/417-18/mayor-de-blasio-speaker-johnson-celebrate-signing-waste-equity-legislation

leaders later promoted an additional City Council enactment, Local Law 199, which radically overhauled the City's commercial waste program.[37] This Local Law, which is still in the implementation phase, is intended to "bring[] much needed reform to an industry known for dangerous, unhealthy, and unsustainable conditions."[38] By dividing the City into zones for commercial waste processing, with only 1-3 carters operating per zone, this law is expected to halve the heavy-duty truck miles associated with collecting and transporting this waste. This in turn will reduce the pollution, noise, and safety burdens on the communities that house waste transfer stations.[39]

What made New York City's 2006 Solid Waste Management Plan, and the subsequent local laws special was the intentional use of an equity lens to identify how burdens were spread across the City. This focus on equity was a direct result of advocacy from grassroots environmental justice organizations that tirelessly documented how the truck-based waste export system systematically overburdened low-income communities of color.[40] In adopting the Plan, the City explicitly acknowledged the injustice inherent in the current waste handling system and sought to establish a network of marine and rail transfer stations to minimize the existing burdens on these communities. Plans to site one of these waste transfer stations on the Upper East Side became a flashpoint and testing ground for the City's commitment to equity. It took more than a decade, but the 91st Street Marine Waste Transfer Station finally opened in 2019.[41]

The *One New York* commitment to Vison Zero, which set a target of zero waste going to out-of-state landfills by 2030 also made a gesture toward rethinking the root problem—the single-use world that necessitates there be an *away*.[42] But, neither the 2006 Solid Waste Plan, nor Vision Zero employed a commons frame. And that is a shame—the City missed an opportunity to step outside the existing regulatory regime rooted in nuisance, and to direct its policy energy instead toward waste as collective problem that needs solving.

The Collaborative Project

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[37] Local Law 199 (Nov. 20, 2019) https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3963901&GUID=6D5F166D-1834-4EDD-BF64-DA5D1DD88C61&Options=ID%7CText%7C&Search=1574.

[38] NYC Office of the Mayor, *Mayor de Blasio Signs Landmark Legislation to Reform Commercial Waste Collection Industry* (Nov. 20, 2019) https://www1.nyc.gov/office-of-the-mayor/news/556-19/mayor-de-blasio-signs-landmark-legislation-reform-commercial-waste-collection-industry.

[39] The Jamaica community was recently dismayed to learn that the waste transfer stations are proposing an expansion, relying on a loophole in the law for stations that convert from long-haul trucks to rail as the means of out-of-state transport.

[40] Key to the adoption of this plan were WEACT, UPROSE, and NYC-EJA. Probably no single person did more to make this plan a reality than Eddie Bautista, the leader of NYC-EJA.

[41] Mallory Szczepanski, *An Exclusive Look at the 91st Street Waste Transfer Station,* WASTE360.COM (May 23, 2019).

[42] DSNY 2006 Plan, *supra* note 32.

The insights, suggestions, and proposals in this paper grow from an on-going research and advocacy project related to waste equity. This project[43] focuses on two specific waste transfer facilities in Jamaica, a neighborhood in Queens Community District 12, one of the four communities City Council identified as disproportionately impacted by private waste transfer stations.[44] Jamaica is home to both of the waste transfer stations, and thus bears the brunt of its environmental impacts. At the behest of local community groups, the project emerged to identify and try to remedy the environmental health impacts from the waste transfer stations in this community.[45] The project is a collaboration between these community groups and CUNY School of Law,[46] York College,[47] the Institute for Health Professions High School,[48] the Queens Solid Waste Advisory Board,[49] Mt Sinai's Pediatric Environmental Health Clinic.[50]

A Brief Introduction to Jamaica Queens

New York City and New York State both identify Queens Community District 12 as an environmental justice community.[51] Within the Community District, the neighborhood of Jamaica where the waste transfer stations are located has 2342 residents, 91.8% of whom are people of color, and 32.1% of whom live below the poverty line.[52] The wider Community District as a whole has a similar demographic, with 90.3% of residents identifying as Black, Latinx or Asian.[53] The area has one of the highest levels of food insecurity in the City, [54] and just

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[43] *Community-Led Investigation of Air Quality and Environmental Injustice in Proximity to Two Waste Transfer Stations in Jamaica, Queen*, http://tceee.icahn.mssm.edu/pilot_projects/awarded-pilot-projects-2/.
[44] Committee Report, *supra* note 28 at 4. Note, these communities were identified by Community Board District, rather than by City Council District. Queens Community Board 12 is represented in City Council by I. Daneek Miller (City Council District 27) as well as by Adrienne Adams (District 28) Karen Koslzowitz (District 29). The waste transfer stations are located in District 27.
[45] As of this writing I do not have permission to include their names, based on their concerns about safety.
[46] Professor Rebecca Bratspies is a co-PI on this project. She has worked closely with part-time 2L student Jill Sifah Sigman.
[47] Environmental Scientist Dr. Dawn Semple-Roberts, an Assistant Professor of Earth and Physical Science, is also a co-PI.
[48] This public high school is located nearby the waste transfer stations. Under the guidance of Co-investigator and science teacher Danielle Dubno Hammer, junior and senior students at the school have been analyzing data for this project.
[49] The main collaborators from this partner have asked to remain anonymous, citing safety concerns.
[50] Dr. Maida Galvez, founding director of the New York State Children's Environmental Health Center serves as the main PI on this project. She and her colleague Luz Gul community engagement coordinator for the Mt Sinai Transdisciplinary Center on Early Environmental Exposures have spearheaded efforts to identify health impacts associated with these facilities.
[51] DEC, Maps & Geospatial Information System (GIS) Tools for Environmental Justice, https://www.dec.ny.gov/public/911.html; New York City's Environmental Justice For All Report, EJ Map, https://nycdohmh.maps.arcgis.com/apps/instant/lookup/index.html?appid=fc9a0dc8b7564148b4079d294498a3cf.
[52] NYC EJ Map, community data.
[53] NYU Furman Center, State of the City 2019: Jamaica/Hollis QN12, https://furmancenter.org/neighborhoods/view/jamaica-hollis.
[54] Naeisha Rose, *These Queens neighborhoods have the city's highest levels of food insecurity*, QNS (Nov. 26, 2018), https://qns.com/2018/11/queens-neighborhoods-citys-highest-levels-food-insecurity/.

over 30% of households are severely rent burdened.[55] COVID-19 starkly revealed the connection between these racial and economic demographics and health outcomes in this area. Jamaica has consistently been one of the hardest hit COVID-19 areas of the City.[56] Nearly a quarter of Jamaica residents do not have health insurance. [57] The childhood asthma hospitalization rate in this neighborhood is five times the rate in wealthier, whiter neighborhoods of the City, [58] and the adult asthma hospitalization rate is double the Queens average. [59] EPA's environmental justice screen shows elevated levels of pollutants like Ozone, Diesel, $PM_{2.5}$ in this area.[60] The City Councilmember for the neighborhood, Antonio Reynoso, who chairs City Council's Committee on Sanitation and Solid Waste Management, was the prime sponsor of Local Law 199 creating the commercial waste zones.

The Jamaica Waste Transfer Stations

The project's neighborhood, Jamaica, Queens, is one of these four communities identified in the New York City Waste Equity Law as overburdened with waste transfer stations. Jamaica houses two such facilities: Regal Recycling and American Recycling Management. Both receive collection trucks with multiple types of solid waste that is then sorted, processed, and loaded onto heavy duty diesel trucks bound for out-of-state landfills. Both facilities hold permits from the State Department of Environmental Conservation, and the City Department of Sanitation. These permits impose maximum throughput limits,[61] allow 24 hour per day operations Monday through Friday,[62] and Regal is also permitted to operate 24 hours on Saturday. Other permit conditions set minimum standards for operation, safety, and environmental protection under authority delegated to the Department of Environmental Conservation by the State legislature,[63] and to the Department of Sanitation by City Council.

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[55] NYU Furman Center, State of the City 2019, Jamaica/Hollis QN12, *supra* note 53__ (defining severely rent burdened as spending more than 50% of household income on rent.).

[56] *See e.g.*, *12 NYC Neighborhoods With Covid-19 Positivity Rates Above 3%*, ABC News (Oct. 5, 2020); *Which Are the Hardest Hit COVID-19 Neighborhoods, NYC Neighborhood Opportunity Network, https://www1.nyc.gov/site/neon/programs/covid-neighborhoods.page*

[57] *NYC Health 2015 Community Health Profiles 2015, Queens Community District 12: Jamaica and Hollis*, https://www1.nyc.gov/assets/doh/downloads/pdf/data/2015chp-qn12.pdf (last visited Dec. 30, 2020).

[58] *Id.* In Queens Community District 12 32 out of every 10,000 children are hospitalized for asthma as opposed to 21 in Queens overall and levels as low as 6 in the wealthiest neighborhoods. *Id.*

[59] *Id.* This neighborhood has the highest rate of adult asthma hospitalization in Queens, affecting 231 out of every 100,000 adults compared to 141 in Queens overall.

[60] EPA, Environmental Justice Screen, EJSCREEN: Environmental Justice Screening and Mapping Tool | US EPA.

[61] American Recycling Management is permitted for 850 tons per day of putrescible solid waste, and 150 tons per day of construction and demolition debris. DEC Permit ID 2-6307-00108/00002. Regal is permitted for 600 tons per day of municipal solid waste, and 266 tons per day of construction and demolition debris. DEC Permit ID 2-6307-00008/00007.

[62] American can also operate on Saturdays, though with more limited hours.

[63] Article 27 of the State Environmental Conservation Laws

These facilities are located at the extreme end of an M-1 (light manufacturing) zone. Directly across the street is an R-4 zone, a residential neighborhood of mostly one and two-family homes,[64] and the Detective Keith L. Williams Park, a large urban park with ball fields, playgrounds, and other amenities. Close by there are more than a dozen houses of worship, numerous schools, childcare centers, and medical facilities.[65] Ordinarily, zoning would prevent the location of waste transfer stations so close to residential and park uses,[66] but these facilities received a zoning variance.

New York regulations spell out the general operating requirements for permitted waste transfer facilities. There are regulations governing leachate,[67] containment,[68] litter,[69] dust,[70] odor,[71] noise.[72] These regulations are in turn translated into permit conditions supposedly crafted to prevent the facilities from negatively impacting the health and welfare of those living adjacent to them. The permit makes operation of the facilities explicitly contingent on strict compliance with permit conditions, and all applicable regulatory and legal requirements.

Yet, even with all these regulations, these facilities are most definitely LULUs—locally undesirable land uses—that put immense burdens on the hosting community, degrading quality of life, making people sick, and lowering property values. Jamaica residents living near the facilities routinely complain that foul odors, diesel exhaust, waste blowoff and leachate, noise and disruption from these facilities and trucks disturb their quiet enjoyment of their property on a daily basis. In summer, the stench emanating from these waste transfer stations is so unbearable that residents are unable to use their backyards or open their windows. American Recycling, although technically an enclosed facility, keeps its building-sized front door open continually, allowing large quantities of dust to escape. As a result, the nearby street and trees are coated with a layer of particulate matter, as are all vehicles parked near the facility. The contrast between these grimy, smelly facilities located in an environmental justice community and the state-of-the-art waste Upper-East Side transfer facility, the one that had been subject to a decade of political maneuvering, is striking.

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[64] NYC Planning Queens Community District 12 Land Use Map, https://docs.google.com/viewer?url=https://raw.githubusercontent.com/NYCPlanning/labs-cd-files/master/landuse/qn12_landuse.pdf (last visited Dec. 30, 2020).

[65] Jill Sifah Sigman, *Waste Equity and the Law: An Analysis of the Legal Context Surrounding Two Permitted Waste Transfer Stations in Jamaica, Queens* 7 (Jan. 16, 2021) (unpublished manuscript).

[66] Under 16 RCNY § 4-32 (b) and (c) of the Siting Regulations, a facility located in an M-1 zone and less than 400 feet from a residential district or park would need a variance. Application for the variance would be governed by 16 RCNY § 4-35(b).

[67] 6 CRR-NY 360.19(b)

[68] *Id.* at 360.19(d)

[69] *Id.* at 360.19(f)

[70] *Id.* at 360.19(g)

[71] *Id.* at 360.19(i); 66 CRR-NY 362-3.5(b)

[72] *Id.* at 360.19(j)

A CUNY Law student writing about this situation commented on the fragmented nature of the legal and regulatory regime governing these facilities and the inability to take cumulative impacts into account. She wrote:

> There is obviously a huge gap between the lived experience of the Queens community members and the reduction of their experience to a series of possible legal infractions. On one hand, the silo-ing of regulation—separate provisions around noise, odor, traffic, etc.—abstractly creates more possibilities for violation and thus more possibilities for remedy. But on the other hand, it brings a kind of legal myopia to the situation, reminiscent of James C. Scott's description of the high modernist state's efforts to create legibility. . . . Further, the legal possibilities discussed here for agency enforcement and nuisance claims do not have the gravitas of the worst of the harms. The potential to litigate around the private enjoyment of one's backyard or to enforce noise regulations does not fully capture the dangerous health impacts, contamination of the earth, and disrespect for life that are at issue here[73]

These observations are salient and go to the heart of the limitations in our legal tools for siting and managing undesirable neighbors like waste transfer stations.

This paper takes up the challenge of thinking beyond nuisance and agency enforcement of permits. It asks what would happen if we used the lens, not of nuisance, but of the commons to examine and manage these facilities. Would thinking of the airshed as a commons and people who use that air for breathing as commoners give local environmental justice groups any new tools or additional traction in their struggle for waste equity?[74] This is perhaps another way of phrasing Barry Commoner's "hard path" which seeks to "confront the real source of environmental degradation . . . and debate who should govern it, and for what purpose"[75]

What Might Commons Theory Add?

Elinor Ostrom and her colleagues famously identified institutional design principles for successful community management of a commons. These design principles include: 1) clearly defined boundaries, 2) congruence between appropriation and provision rules and local conditions, 3) collective-choice arrangements, 4) monitoring, 5) graduated sanctions, 6) conflict-resolution mechanisms, 7) minimal recognition of rights to organize, and 8) nested enterprises.[76]

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[73] Jill Sifah Sigman, *Waste Equity and the Law: An Analysis of the Legal Context Surrounding Two Permitted Waste Transfer Stations in Jamaica, Queens* (Jan. 16, 2021) (unpublished manuscript).

[74] There is also a commons analysis to be done with regard to the City streets that these waste transfer stations occasionally privatize and always rely on, but that is outside the scope of this paper. A bigger question is whether commons thinking might shift the focus to ending the single-stream usage that creates the need for these *away* way stations in the first place. This paper is the first step in engaging with that question.

[75] BENJAMIN MILLER, FAT OF THE LAND: GARBAGE OF NEW YORK—THE LAST 200 YEARS 247 (2000).

[76] Elinor Ostrom, Governing the Commons 110 (1990).

While many these design criteria do not map readily onto many urban commons questions, Sheila Foster and Christian Iaioni have written extensively about how Ostrom's insights[77] about sustainable commons management might apply in the urban setting.[78] Starting from Saskia Sassen's question "who owns the city?"[79] they demonstrate how commons thinking can be adapted and deployed as a framework for addressing a host of urban challenges.[80] To that end, Foster and Iaioni identify five core design principles for managing an urban commons: 1) collective governance; 2) an enabling state; 3) social and economic pooling; 4) experimentalism; and 5) tech justice.[81] These core design principles intersect cleanly with Baewens and Niaros's tri-fold definition of an urban commons as simultaneously object, action, and governance.[82] In their view, the urban commons is a shared resource that is the object of cooperation, as well as the activity of maintaining and co-producing that resource, and the mode of governance that protects and allocates that resource based on rules and norms generated by the users.[83]

Foster and Iaioni posit the city itself as a commons— "a shared resource belonging to all its inhabitants and to the public more generally."[84] This approach recognizes that much of what gives a particular urban resource its value is the human activity and social network in which the resource is situated.[85] It draws on Jane Jacobs recognition that there is "irreplaceable social capital" embedded in urban neighborhoods.[86] Where conventional urban policy treats this value

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[77] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

[78] Sheila R. Foster and Christian Iaione, *The City as a Commons*, 82 YALE LAW REVIEW 527 (2016); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME LAW REVIEW 57 (2011); Christian Iaione, *The Right to the Co-City*, Italian Journal of Public Law 80 (2017).

[79] Saskia Sassen, "Who Owns our Cities and Why this Urban Takeover Should Concern Us All," *Guardian* (Nov. 24, 2015).

[80] Sheila R. Foster & Christian Iaione**,** *Ostrom in the City: Design Principles and Practices for the Urban Commons*, ROUTLEDGE HANDBOOK OF THE STUDY OF THE COMMONS (Dan Cole, Blake Hudson, Jonathan Rosenbloom eds. (forthcoming 2021).

[81] *Ostrom in the City*, *supra* note 80 at 6.

[82] Michel Baewens and Visilis Niaros, *Changing Society Through Urban Commons Transitions,* 5 https://commonstransition.org/wp-content/uploads/2017/12/Bauwens-Niaros-Urban-Commons-Transitions.pdf. This definition helpfully draws a clear distinction between commons and both the private and public/state forms of managing and owning resources.

[83] Michel Baewens and Visilis Niaros, *Changing Society Through Urban Commons Transitions,* 5 https://commonstransition.org/wp-content/uploads/2017/12/Bauwens-Niaros-Urban-Commons-Transitions.pdf. This definition helpfully draws a clear distinction between commons and both the private and public/state forms of managing and owning resources.

[84] *The City as Commons*, *supra* note 78.

[85] The Environmental Paradox of the City at 11.

[86] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961). Jacobs emphasized the importance of networks of residents, and the relationships they build over time, for the self-governance of urban neighborhoods. More recently, Erika Swensen and Lindsay Campbell have studied the role that these neighborhood networks play in environmental stewardship and land management. Erika S. Svendsen and Lindsay K. Campbell, *Urban Ecological Stewardship: Understanding the Structure, Function and Network of Community-Based Urban Land Management*, 1 CITIES AND THE ENVIRONMENT 31 (2008).

as subject to enclosure by private actors seeking to extract value,[87] the city as commons explicitly vests common ownership and control of that value in the community and its members. Viewed through this lens, many urban conflicts around gentrification and environmental justice resolve themselves into a tug of war between private actors attempting to capture this "unearned increment," while local residents assert a competing claim.[88]

As commoners, community members have a right to shape the city, design it, and to benefit from those choices.[89] This framing is of obvious utility to an environmental justice advocate seeking to broaden the class of users participating in creating the rules and norms governing urban resources. It offers a language for surfacing "the push and pull of entirely different competing uses"[90] by explicitly recognizing the rights that flow from uses and contributions typically obscured by an economic lens. By expanding recognition of who has a claim to the urban commons, and thus who can participate in urban resource norm generation, urban commons thinkers and environmental justice advocates converge in redefining the object of co-operation as the City itself, and expanding the actions deemed part of its coproduction.

Realizing the commoners' rights that flow from this reframing would require major change to business-as-usual decisionmaking in the City. Rather than the top-down technocratic process that gives outsized influence to real property holders and economic actors, constructing and managing the City's solid waste plan would require a more collaborative process, one designed to bring together a wide spectrum of actors to co-design and co-produce shared, common goods and services at different scales.[91] New York City's participatory budgeting process offers a model for what that might look like.

In New York City's award-winning participatory budgeting process,[92] communities speak first and last about community priorities. Through this process community members in each participating Council district directly decide how to spend a portion of public funds in the district. The process begins with brainstorming sessions that are open to all (either in person or online.) The ideas from these sessions are then sifted, winnowed, and organized by the City Councilmember's office based on levels of community support and other pre-announced criteria.[93] The final options are then returned to the public for voting. Whichever candidate

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[87] Christian Borch and Martin Kornberger, THE URBAN COMMONS: RETHINKING THE CITY 6-7 (2015).
[88] For a good non-technical description of these tensions, *see,* Jenny Dubnau, *Artwashing During a Pandemic: Should Artists Say No to Real Estate Crumbs?* HYPOALLERGIC (Feb. 2, 2021) https://hyperallergic.com/616931/artwashing-during-a-pandemic-should-artists-say-no-to-real-estate-crumbs/
[89] Right to the City Alliance, Mission, History, and Platform, https://righttothecity.org/about/mission-history/.
[90] Brigham Daniels, *Commons Storytelling*, in HANDBOOK OF THE STUDY OF THE COMMONS 102 (2019).
[91] See generally, PATTERNS OF COMMONING, (DAVID BOLLIER AND SILKE HELFRICH, eds, 2015)
[92] In 2015, New York City won the Roy and Lila Ash Innovation Award for Public Engagement in Government, and in 2018 received both the Mayor's Civics Award and the Open Data Award in the first New York City Open Data Project Gallery Contest.
[93] To be eligible, a project proposal must be for physical infrastructure that benefits the public, cost at least $50,000, and has a lifespan of at least 5 years. Participatory Budgeting, https://council.nyc.gov/pb/. Last year, $35 million in

projects get the most votes are funded. Funded projects range from a pest-proof waste management system for NYCHA houses (District 5) to playground renovations (Districts 11, 15, and 16) to water bottle refilling stations (District 22) and bus count down clocks, tree plantings, library upgrades, school bathroom renovations in multiple districts.[94] This kind of authentic participation ensures that community priorities drive spending, and give elected official a better, clearer sense of their constituents' priorities. Of the 51 council districts in New York City, 34 opted to participate in this process. Jamaica, which is in City Council District 27, voted for bus countdown clocks, beautifying a road, and various school and library upgrades.

Adapting the participatory framework to the process for developing waste policy would put communities on par with developers and commercial interests as actors holding rights that must be protected and accounted for in urban policy decisions. It would create exciting large-scale possibilities for rethinking how city spaces and resources are used, and how decisions about them are made. It would open new lines of thought that might help cities "transition to fairer, inclusive, sustainable, resilient futures."[95] More prosaically, applying this urban commons framework to the New York City's waste handling processes might allow for a more holistic vision of the Jamaica community's problem, and potentially suggest new advocacy routes for overcoming that problem.

A Proposal for Participatory Waste Management

Given that the City is currently in the process of creating commercial waste zones under Local Law 199, it might be instructive to think about how that might proceed differently. In 2015, as part of his *One New York* plan,[96] Mayor de Blasio announced the Zero Waste policy—setting a target for the City to send zero waste to landfills by 2030. To meet this goal, the New York City Department of Sanitation (DSNY) released a 2016 study of commercial waste hauling.[97] This study emphasized the outsize pollution burden created by truck traffic under the City's existing commercial waste hauling system, and proposed commercial waste hauling zones as way to halve that pollution load by eliminating millions of truck miles traveled.[98] Local Law 199 authorized DSNY to move forward with this plan to create commercial waste zones. DSNY proposed final rules for waste carters on December 16, 2020, giving the public until February 9, 2021 to comment.

Despite claims of extensive and exhaustive community consultation at every stage of this process, what these multiple government-community interactions amounted to was a largely one-way flow of information. Endless government presentations of proposed actions *to* communities,

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public funds were allocated through participatory budgeting. The priorities in each district were different, and the funds were spent accordingly.

[94] Participatory Budgeting: Winning Projects, https://council.nyc.gov/pb/results/cycle-8-results/.

[95] *Ostrom in the City, supra* note 80 at 2-3.

[96] One New York: The Plan for a Strong and Just City 173, 176 (2015) http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf

[97] Private Carting Study: Executive Summary (Aug. 17, 2016).

[98] *Id.* at 6-9.

but offered relatively narrow windows for public responses to the government's largely complete proposals. Those presentations and limited feedback windows were the sum total of community involvement. [99] Moreover, tracing the history of this plan is a story of broken links, both literally and metaphorically. New York City's websites are littered with broken hyperlinks. Error 404[100] and Page Not Found,[101] or general introductory web pages,[102] are common responses to attempts to find source documents. The City's failure to properly maintain hyperlinks obscures the process of developing these plans for all but the most determined researchers. This lack of transparency in turn breaks the links that connect affected communities with the process of civic engagement that purportedly developed this policy. It undermines the possibilities for meaningful community involvement, a core tenant of environmental justice.

A commons-based process would proceed very differently. It would still study the waste hauling companies, their routes, and the pollution the trucks generated. But a commons approach would allocate time, at the beginning of the process and at each decisional stage for communities to identify their needs, interests, and priorities with regard to waste generation, handling, and disposal. Studying communities—the daily consumption patterns, the kinds and quantities of waste they generate, and the drivers for those activities, would be as central as studying the waste hauling companies. These analyzes would be seen as inherently integrated, and the core question would be how to shift consumption out of its single-use complacency. Moreover, information would flow two (or more) ways, with local visioning sessions driving proposed City policies as well as reacting to them. In short, New York City waste policy production would look more like participatory budgeting and less like its current administrative process.

Viewing the Neighborhood Airshed as a Commons

[99] The public's opportunity to participate in decisions about the need for and location of facilities like waste transfer stations is extremely limited. When private actors seek to develop private land for locally undesirable facilities like waste transfer stations, the public's first—and sometimes only—opportunity for input happens when the permit application is put out for public comment.

[100] DSNY's resource page on Commercial Waste Zones includes a hyperlink to the final zone map, as changed by the February 2020 final rules. Yet,

[101] An example. DSNY's page introducing the Private Carting Study explains that the study was first proposed in One NYC: The Plan for a Strong and Just City. Yet the accompanying hyperlink, leads to a page that just says "Page Not Found." https://onenyc.cityofnewyork.us/plan/

[102] The DSNY rulemaking for requirements for carters operating in commercial waste zones closed on February 9, 2021. The January 26, 2021 notice of public hearing included a link to review all of the public comments. https://dsny.cityofnewyork.us/wp-content/uploads/2020/12/DSNY-Proposed-Rules-Revised-12.16.20-Preliminarily-Certified-Rules-for-City-Record-Legal-11355633.pdfHowever, that link, https://rules.cityofnewyork.us/, merely takes a reader to the general opening page for all City rulemaking. Even though this rulemaking closed less than a month ago at the time of writing this draft, the rule and its comments are not available under the Recently Adopted Rule tab, or at least not findable through the obvious search terms of "commercial waste" "waste" "zone" or "carting." Thus the public has no current access to the comments submitted as part of this rulemaking.

There is already a burgeoning movement recognizing the atmosphere as a global commons and characterizing emissions of greenhouse gases as a commons problem.[103] As Barton Thompson notes, it is a slightly different form of a commons problem because rather than taking something *out* of the atmospheric commons, people are instead putting carbon dioxide and other greenhouse gases *in.*[104] Businesses, individuals, and governmental entities across the globe treat the atmosphere as a great waste repository. Each individual adding greenhouse gases to the global atmosphere experiences all the benefits associated with the gas-producing activity, while bearing only a small sliver of the costs. Cumulatively, these individual actions have created an immense threat to the stability of the world's climatic system. As with New York City's commercial waste handling, most of the burdens associated with overuse fall on poor communities of color who have contributed the least to the creation of the problem.

This recognition of the atmosphere as a commons translates down to the neighborhood airshed at the local level. The air each of us breathes is part of that localized version of the global commons. We breathe it into our lungs and return it to the commons where the carbon/oxygen balance is continually readjusted by the respiration activities of animals and plants. Left to itself, it is a sustainable system. Use of the local airshed as a waste repository disrupts this balance, leaving community residents vulnerable to harms caused by pollution, dust, noise, and odor.

If instead we start from the proposition, recently endorsed by the United Nations High Commissioner for Human Rights, that "there can be no doubt that all human beings are entitled to breathe clean air,"[105]we might approach these localized questions of air quality differently. Every person's claim to an equal, undivided share of clean air offers a different starting place for a new way of managing the local airshed rooted in commons theory. Everyone breathes, but not everyone pollutes. By recognizing breathing clean air as a stakeholding activity, and the local airshed as a commons, actions that pollute that airshed shift from lawful activities, authorized by permits and bounded only by nuisance, to competing uses of a common, shared resource. "Breathers" can assert rights as commoners entitled to participate equally in decisions about the local airshed. This critical shift in emphasis operationalizes Julian Agyeman's assertion that "who can belong in our cities will ultimately determine what our cities can become."[106] It offers a way in for environmental justice communities that have historically been shut out of policymaking decisions that affect them.

What Does This Mean for Jamaica?

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[103] *See e.g.,* Ottmar Edenhofer, Christian Flachsland and Bernhard Lorentz,| *The Atmosphere as a Global Commons* THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET AND STATE 389 (David Bollier and Silke Helfrich, eds. 2012)

[104] Barton Thompson, *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENVIRONMENTAL LAW 241 (2000).

[105] Statement by UN High Commissioner for Human Rights Michelle Bachelet, Right to Health and Right to Clean Air in the Context of Children's Rights and Children's Environmental Health, (Nov. 1, 2018) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23810&LangID=E.

[106] Julian Agyeman, https://julianagyeman.com/research/

The story of the Jamaica waste facilities can be viewed as one of conflicting demands put on a common resource, the air. Where neighbors want clean air to breathe, and the ability to open their windows and enjoy their yards, the waste transfer facilities want the air shed to be a convenient and inexpensive disposal route for particulates, odors, and other hazards. The permit is the governance device for navigating between these conflicting demands. However, the permit is rooted in nuisance—specifically in the pre-supposition that the main constraint on the operation of these waste transfer stations is that they cannot impair "any rights, title, or interest in real or personal property held or vested in a person not a party to the permit."[107] The many specific terms of the permit are a means of fleshing out this central obligation of non-interference with quiet enjoyment of property.

Use of the airshed in Jamaica is thus allocated to the waste transfer stations as a repository for particulate matter (from both the facilities and the trucks that transport waste to and from them) and for the odors associated with putrescible waste. The guiding principle behind this allocation is nuisance—at what level does the government recognize that the activities of the waste transfer station interfere with the neighbors' quiet enjoyment of their property.

This nuisance-based vision is an impoverished vision of the conflicting claims and the stakeholders in that conflict. It does not properly account for the claims that surely everyone who breathes might make to an equal stake in the neighborhood airshed as a commons from which they draw life. This is perhaps more properly characterized a liberty interest rather than a property interest, but as the recent report by the UN Special Rapporteur for the Human Right to a Healthy Environment shows,[108] it can be thought of as a very real, legally cognizable interest that governments have an obligation to respect, protect, and fulfill.[109] Once everyone who uses the airshed commons for breathing is recognized as a stakeholder, the simplistic nuisance analysis embedded in the existing permit process will no longer suffice.

Framed in this light, Jamaica's localized waste transfer station problem signals a bigger, more complex commons asymmetry embedded in the wider system for regulating noxious uses. For example, the New York regulations governing waste transfer stations require "adequate odor controls to effectively control off-site nuisances."[110] This requirement reduces odor control to a transactional view, with the state expressly allowing odors in exchange for services provided and revenues created by the waste stations up to the point it creates a nuisance.[111] Neighbors bothered by odors from putrescible waste at the facility can complain to the agency and hope for

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[107] American Recycling Permit, *supra* note __ at 9; Regal Permit, *supra* note __ at 9.
[108] Report of the Special Rapporteur on the human rights obligations related to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/40/55 (2019).
[109] *Id.*
[110] 6 CRR-NY 362.3.5(b).
[111] A nuisance is an unreasonable interference with quiet enjoyment of property. Until and unless odors are deemed to create an interference with quiet enjoyment of property that is unreasonable, it is not a nuisance and therefore a permit violation.

an inspection, or in more extreme cases might sue under a nuisance theory.[112] However, in any such action, compliance with the permit is a defense—that is the definition of "reasonable" rather than unreasonable interference with the neighbor's quiet enjoyment. Interference that stems from conduct the agency deems to be within the scope of the permit scope likely has no recourse. And, the DEC has tremendous discretion to determine what constitutes adequate compliance with this obligation.

This framing places the burden on aggrieved neighbors to complain or to sue,[113] but gives the facility the default right to act until and unless the agency deems that such complaints stem from unreasonable conduct on the part of the facility. Charles Mills' point that communities of color are deemed waste spaces emphasizes the difficulty communities face in vindicating their rights under these circumstances. Environmental justice communities are at an extraordinary disadvantage, trying to persuade unsympathetic decisionmakers to value their concerns. Even extreme burdens on the ability to use and enjoy property are often deemed to be reasonable, when they occur in environmental justice communities, even though similar burdens would not be tolerated elsewhere.[114]

Conclusion

Framing air pollution and odor problem as a commons problem, and residents as commoners offers a way to go beyond the limitations of nuisance law and help us "see" new problems or new solutions. An individual right to breathe clean air, for example, might make each individual a claimant to a property-like right in their airshed as a commoner. It is the community's air, and all commoners have the right to use it equally. Private actors may use it for uses other than breathing only to the extent that those uses do not interfere with the common right to claim a share of clean air for breathing. This would flip our current system based on the right to pollute, and might create space for an adaptive, place-based and iterative approach to designing legal and policy innovations.

This question is much broader that one New York City neighborhood. Waste generation and disposal is a national and global problem. The United States produces more than 30 percent of the

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[112] Currently, a waste transfer station in one of the other overburdened New York City neighborhood is the subject of a nuisance lawsuit. The community was fortunate that the New York Lawyers for the Public Interest was willing to act as their lawyer. Without that vital assistance, the lawsuit would not be possible. Even with able representation, and significant data documenting permit violations, their success is by no means assured.

[113] Add here about the economic barriers, the language and class barriers. And the fear of retaliation.

[114] The saga of wealthy, white community mobilization in opposition to the 91st Street waste transfer station is a good illustration of this point. Mireya Navarro, *In Fight Against Trash Station, Upper East Side Cites Injustice,* NEW YORK TIMES (Jun. 30, 2011). Outraged Upper East Side residents overwhelmed City Council's first ever hearing on environmental justice, pointing to the negative externalities the facility would have for their community. Yet, at the time Manhattan had no facilities for handling waste generated on the Upper East Side or anywhere else in the borough. Instead, all Manhattan's waste was trucked to overburdened communities of color in Brooklyn, Queens, and the Bronx for processing.

planet's total waste, though it is home to only 4 percent of the world's population.[115] Managing and changing this system involves grappling with problem of the Jamaica waste transfer stations writ large. Moreover, air respects no political boundaries. Collective governance of air quality, like collective governance of urban commons more generally, clearly requires rethinking the law and politics of air pollution to encourage a more vibrant form of nested governance.[116] Experimentation around property rights[117] and legal regimes[118] will be a necessary feature of creating and managing a neighborhood airshed as an urban commons, within the broader context of the need for regional, national, and global management of the atmosphere.

[115] Abi Bradford, Sylvia Broude, and Alexander Truelove, Trash in America, (U.S. Public Interest Research Group Education Fund, Frontier Group, and Toxics Action Center, 2018)
[116] Blake Hudson and Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance and Climate Change,* 64 HASTINGS L. J. 1273 (2013).
[117] Nate Ela, *Urban Commons as Property Experiment: Mapping Chicago's Farms and Gardens,* 43 FORDHAM URB. L. J. 241 (2016).
[118] Foster, *supra* note __