

CHAPTER 6

HOW TO OPEN PROPERTY TO THE COMMON

For centuries the ruling powers have told us that private property is a sacred and inalienable right, the bulwark that defends society against chaos: without private property there is not only no freedom, justice, or economic development, but also no sense of self or bonds to those around us—no social life as we know it. The right to property is written into constitutions and, more important, embedded so deeply in the social fabric that it defines our common sense. Private property as we know it was invented with modernity and became for the modern era ineluctable, determining both the foundation and the ultimate horizon of political passions. Without property it seems impossible to understand ourselves and our world.

Today, however, as property is increasingly unable to support either our economic needs or our political passions, cracks begin to appear in those common sense understandings. Private property is not the foundation of freedom, justice, and development but just the opposite: an obstacle to economic life, the basis of unjust structures of social control, and the prime factor that creates and maintains social hierarchies and inequalities. The problem with property is not merely that some have it and some don't. Private property itself is the problem.

Social and political projects are now emerging that defy the rule of private property and pose instead the rights of the common, that is, open and equal access to wealth together with democratic decision-making procedures. And yet it remains extraordinarily difficult to imagine our social world and ourselves in terms not defined by private property. We have only meager intellectual resources to think outside property, let alone conceive of a world in which private property is abolished (and the socialist regimes that maintain the power of property and accumulate it in the hands of the state are a poor guide). Resources are available, paradoxically, in the tradition of property law itself. Some alternative legal traditions lead away from property and toward the common, but faced with the precipice, as we will see, fail to take the leap and end up mystifying the common.

A bundle of rights

Today's commonsense, popular understanding of property remains remarkably close to the eighteenth-century definitions of classical liberalism. "[O]wnership [*dominium*]," writes Hugo Grotius, "connotes possession of something peculiarly one's own" to the exclusion of other parties.¹ William Blackstone's definition echoes this view with added poetic flourish: "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."² Property grants a monopoly of access and decision-making to an individual owner to the exclusion of others.

First-year law students are often taught, however, contrary to the classical definitions, that property denotes a plural set of social interests: a bundle of rights.³ This line of reasoning, which is developed in the United States by the legal realists in the late nineteenth and early twentieth centuries, accepts fully the rule of property but, by undermining the grounds of exclusion and thus introducing plurality, transforms property from the inside. "[P]rivate property as we know it," writes Felix Cohen in explicit response to Blackstone's notion of exclusion, "is always subject to limitations based on the rights of other individuals in the universe."⁴ The legal realists argue, in effect, that the exaggerated individualism and the focus on exclusion in the classical definitions of private property are profoundly antisocial, that is, they fail to account for the fact that we live in society and the actions and property of each have effects on others. The argument, in other words, effectively socializes property by, first, recognizing that property is always already social, affecting others in the universe, and, second, creating a basis for those others to express their rights. Being affected is a basis for having a right. Since a coal-burning factory, for example, affects both those living around it and the workers inside, they, in addition to the owner, have rights with regard to that property. This conception preserves the rights of individual property owners, as we said, but also embeds them in a larger, plural field of often-conflicting, unequal social rights. The rights that this notion of a bundle introduces are really counterrights empowered to operate as balances or challenges within property.

The legal realists' conception of property rights is particularly powerful because it combines the pluralism of the notion of a bundle with the claim

that property implies sovereignty, a form of domination that is equally political and economic. “There can be no doubt,” writes Morris Cohen, “that our property laws do confer sovereign power on our captains of industry and even more so on our captains of finance.”⁵ Today’s captains of industry and finance, whose power has grown exponentially since 1927, the year in which Morris Cohen wrote, exert authority based on their property without even the thinnest claims to representation. The legal realists’ argument not only demonstrates how deeply economics and politics are interrelated but also blurs the traditional division of legal thought and practice between civil law and public law, bridging the gap, which stretches back to Roman law, between *dominium* (an individual’s rule over things) and *imperium* (the sovereign’s rule over society): “We must not overlook the actual fact,” Cohen cautions, “that dominion over things is also *imperium* over our fellow beings. The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of law as merely protecting men in their possessions.”⁶ Property is thus a sovereign power, not so much in the sense that it repeats the functions of sovereignty on an individual scale—I have sovereign authority over my things—but insofar as property has sovereign effects on a social scale.⁷

For the legal realists one important political consequence of conceiving property as both a bundle of rights and a sovereign power is that it counters the liberal, laissez-faire arguments for property rights free from state intervention. Coercion is always mobilized by property rights in order to regulate and suppress the rights of others, even (and especially) when classical liberal, laissez-faire advocates sing the praises of freedom. On one hand, as a sovereign power, property owners exert political coercion over those around them that is equivalent to forms of state coercion. On the other hand, the protection of property rights and the “freedom” of laissez-faire liberals require the state to wield coercive force. “In protecting property,” Robert Hale argues, “the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to employ the thing owned.”⁸ One might argue on the basis of the two primary elements of the legal realists’ argument—the recognition that property always involves economic and political coercion and the affirmation of plural social rights—that property should be abolished and a more democratic, equal management of social wealth established, something like what we call the

common. The legal realists, however, do not go that route. They mobilize the fact that coercion and state are always already involved in property rights, which undermines laissez-faire claims to freedom, in order to legitimate the actions of the state to address and protect the full plurality of other social actors whose rights are part of the bundle. It is easy to recognize how this line of reasoning paves the way a little later in the twentieth century for some of the basic tenets of the New Deal.

Beginning in the 1960s, the critical legal studies (CLS) movement revived the radical potential of the legal realists, extending both the plural, social notion of property rights and the recognition of its sovereign, coercive character. One of the core tenets of the CLS movement is that law is not autonomous from economics. Duncan Kennedy, following the legal realists, particularly Robert Hale, asserts that law dictates the “ground rules” of economic life in such a way as to empower some groups over others. In this context, the notion that property is a bundle of rights or, better, “a set of social relations”⁹ highlights the social hierarchies that are created and supported by property. A second core tenet of CLS is that law is not autonomous from politics; law is itself a political weapon. Social hierarchies—race and gender hierarchies are a primary focus of the critical race theory and feminist legal scholars who followed on, often critical of, the work of CLS scholars—are created and maintained by the Constitution, the courts, and legal practice. The CLS recognition that law, especially property law, is a weapon of power but one that is internally plural opens law as a field of struggle, one in which hierarchies can be challenged effectively.

Like the legal realists, however, CLS scholars do not extend the implications of their arguments toward an abolition of property but instead strive to reform property from the inside: they use the pluralism of property law to affirm the rights of the subordinated. This strategy is clear in some of the practical projects CLS supports. Duncan Kennedy’s proposal, for example, to create limited-equity co-ops as an alternative form of property that provides affordable housing for the poor puts the bundle of rights conception into practice by combining nonprofit ownership with limited decision-making participation by residents and attention to the interests of the larger community. In order to tame the pressures of the real estate market and gentrification, Kennedy advocates a system whereby residents who sell their property will receive only what they paid for it plus an adjustment for inflation and perhaps a fraction of the increase in equity. Affirming some rights over others in this

way serves to combat social hierarchy and blunt the power of property owners. This legacy finds resonance with a variety of legal strategies not directly associated with the CLS movement, such as the Creative Commons project, which provides an alternative to copyright and gives authors options for limited control over their cultural products, thus reorganizing the bundle of rights to creative products, and Anna di Robilant's proposal for affordable housing cooperatives and community gardens that remix the bundle of rights to promote the "equality of autonomy." In these examples and the many like them one can recognize how the assertion of plural rights serves to combat the sovereign powers of owners while maintaining the paradigm of property.¹⁰

Keep in mind, however, that the pluralism of the bundle of rights conception, especially when not complemented by the recognition that property is sovereignty, is not necessarily progressive. Some uses, in fact, point in the opposite direction. Chicago school economists, such as Armen Alchian and Harold Demsetz, accept that property is a bundle of rights but quickly add that the primary function of these rights is to guide incentives to allocate resources for the greatest productivity, to reduce transaction costs, and to internalize externalities. Plural property rights, in other words, become instruments of economic "rationality."¹¹ The notion of a bundle can even be turned around so as paradoxically to reassert Blackstone's "sole and despotic dominion" of the owner to exclude others: "one of the most essential sticks in the bundle of rights that are commonly characterized as property," writes Justice William Rehnquist in a 1979 decision of the US Supreme Court, is "the right to exclude others."¹² In these cases the bundle of rights conception is used not to attenuate but to reinforce the political and economic coercion of property ownership and the social hierarchies it creates and maintains.

Other uses of the bundle of rights, although progressive, remain primarily ethical injunctions rather than politically effective projects. "Progressive property" theorists, for example, take up the notion of plural property rights to assert the political nature of property and, in so doing, counter neoliberal, "law and economics" arguments.¹³ Property is not merely a law of things and property law is not merely a mechanism of coordination, Joseph William Singer asserts, "it is a quasi-constitutional framework of social life."¹⁴ Property law, write the authors of the manifesto-like 2009 progressive property statement, "can render relationships within communities either exploitative and humiliating or liberating and ennobling."¹⁵ In contrast to the legal realists and the CLS scholars, however, progressive property theorists give little attention

to the economic effects of property, perhaps with the fear that any engagement with law and economics will end up in the camp of their neoliberal antagonists. More important, their political vision is not grounded in the recognition that property is a form of sovereignty. As a result, the politics of progressive property is most often expressed through pallid appeals to values and ethics.¹⁶ This approach thus bears traces of the “autonomy of the political,” which we analyzed in chapter 3. In any case, these authors, despite their recognition of the plural and political nature of property, offer little help to think beyond it.

One might assume that legal scholars working with immaterial forms of property, such as intellectual property, would be the best positioned to recognize the insufficiencies of property law and the political potential of the pluralism of rights. Every time something you used to take for granted as common is made into private property—will they find a way to make the air we breathe private property next?—it provides a critical standpoint to look back and recognize the incoherence and injustice of property in general. Today the center of gravity of the property world is shifting from material forms of property, which served as the classic reference for notions of possession and exclusion, toward immaterial forms. Rights to immaterial property, such as ideas, images, culture, and code, are in some respects immediately plural and social. Making immaterial property conform to the old systems of exclusion and scarcity that were created for material property is an increasingly difficult endeavor and, ultimately, bound to fail. Immaterial property, along with the forms of freedom and cooperation opened by network culture, helps us glimpse the potential for a nonproperty relation to social wealth, that is, how we could share and manage wealth with equal access and democratic decision-making—and this can even help us to see the potential for sharing material wealth through nonproperty relations. (These possibilities will become clearer in our discussion of new forms of labor in the next section.) Several theorists of intellectual property seem to peer over the edge of property and glimpse the common, pushed in that direction by the phenomena they study, and their work is very useful, but they ultimately pull back from the precipice and find ways to express their project within rather than against the property paradigm.¹⁷

The developments of property law across the last century can appear to be moving, despite the intentions of its theorists and practitioners, beyond property and toward a theory of the common. In the 1970s, for instance, Thomas

Grey thought he recognized that the acceptance of property as a bundle of rights not only undermined the classical liberal conception of ownership as the right of an individual over things but also introduced fragmentation such that property is disintegrating and thus becoming no longer a coherent category in legal and political theory. This process, which has taken place internal to capitalist development, Grey claims, ultimately erodes the foundation of capitalist rule. Marx was wrong, he concludes, because “private property need not be *abolished* by revolution if it tends to *dissolve* with the development of mature capitalism.” We believe Grey’s intuition of the historical tendency pointing beyond property (and ultimately beyond capital) is correct, but he is mistaken to think this will proceed on its own. History has led us to an abyss, and we need a little push to leap. The establishment of the rights of the common, if they are to be realized, will be the result of struggle on a wide variety of fronts. At the end of this chapter we will investigate the terrain of struggles and propose forms of social strike. Now, however, let us investigate another avenue within legal theory that opens property toward the common in a way complementary to bundle-of-rights arguments, a stream of thought that is more prominent in Europe than the United States, and proceeds from the basis of property rights in labor.

The social properties of labor

In capitalist society the possession of private property is legitimated (at least, in principle) by labor. If one were to follow the logic of capitalist ideology, then, contemporary forms of production should undermine private property. As labor and economic production are increasingly socialized, following this logic, the individual nature of ownership should gradually be undermined. The social nature of production should imply an equally social scope of the use of, access to, and decision-making over wealth. Capitalist legal structures do not follow this path, of course, but the transformations of labor create a constant tension and provide a resource for change, pointing toward the common.

John Locke expresses the argument for the legitimation of property based on labor in its classic and perhaps clearest form: what was common becomes private when individuals add their labor to it: “The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his

labour with, and joined to it something that is his own, and thereby makes it his property.”¹⁸ One key precondition for this claim is that in the state of nature individuals encounter vacant lands (*terra nullius*—devoid of sovereignty) that are open for ownership. Locke regarded the Americas with a colonialist imaginary, for instance, as being in such a state. The second assumption is that all (or, at least, all free male citizens) own their own bodies and, specifically, their own laboring capacity. Ownership of one’s own labor is the building block. When it engages with and mixes with the common, then the common too becomes property through a logic of contagion. Labor sets in motion expansive waves of possession and property. The logic of property based on labor undergoes a series of modifications and qualifications (already in subsequent passages of Locke’s treatise and then through the ensuing centuries of capitalist thought), but it remains a basic element of capitalist common sense. If you build a house, then it should be yours. Consider, for example, how labor logic also continues to animate portions of property law: one is eligible to apply for patents when one invents or discovers a new and useful process, machine, manufacture, or composition of matter.¹⁹ Intellectual labor, at least in principle or rather at the level of ideology, legitimates intellectual property.

Despite the enduring capitalist ideology of individual property based on labor, capitalist property does not, of course, belong to those who produce it. Karl Marx was fond of remarking, especially in light of the propaganda that communism would take away what rightly belongs to people, that capital in its industrial form has already negated “individual private property, as founded on the labor of its proprietor.”²⁰ Capitalist property accrues not to those who produce but to those who own the means of production. He takes seriously and adopts the equation between labor and property promoted by capitalist ideology, in other words, to show that capital undermines its own assumptions.

We should note in passing that whereas one could imagine on the basis of this recognition seeking to establish, beyond the limits of capital, the real foundation of property in labor, Marx moves in the opposite direction: the abolition of private property requires also the refusal of work.

“*Labour*” is the living basis of private property, it is private property as the creative source of itself. Private property is nothing but *objectified* labour. If it is desired to strike a mortal blow at private property, one must attack it not only as a *material state of affairs*, but

also as *activity*, as *labour*. It is *one of the greatest misapprehensions to speak of free, human, social labour, of labour without private property. "Labour" by its very nature is unfree, unhuman, unsocial activity, determined by private property and creating private property. Hence the abolition of private property will become a reality only when it is conceived as the abolition of "labour" (an abolition which, of course, has become possible only as a result of labour itself, that is to say, has become possible as a result of the material activity of society and which should on no account be conceived as the replacement of one category by another).*²¹

The equation between private property and labor, in Marx's vision, effectively doubles the challenge: we must imagine and invent not only social bonds and social cohesion without property but also systems of cooperative social activity and creativity beyond work, that is, beyond the regime of waged labor.

Today, however, the nature and conditions of labor have changed radically from the industrial forms that Marx analyzed and even more so from the agricultural and colonial imagination of Locke. In order to investigate contemporary property relations we need first to look to today's forms of social production and reproduction. For now let us mention only two primary aspects. First, people work in ever more flexible, mobile, and precarious arrangements. Even Wall Street bankers have to be ready every day to clean out their desks by 5 p.m., but more important the vast majority work under the constant threat of unemployment and poverty. Second, labor is increasingly social and based on cooperation with others, embedded in a world of communicative networks and digital connections, which run throughout industrial arrangements, agricultural systems, and all other economic forms. Capital is valorized through cooperative flows in which language, affects, code, and images are subsumed in the material processes of production.

The fact that production in contemporary capitalist society is ever more cooperative and socialized strains to the breaking point the link between individual labor and private property promoted by capitalist ideology. It no longer makes sense to isolate the one whose labor created some thing or, as patent law imagines, some idea. The one never produces. We only produce together, socially. Wealth continues to be produced by labor, in other words, in increasingly social networks of laboring cooperation, but the concept of private property based on labor becomes merely an ideological remnant—and

the modern conceptions of property (along with, in part, Marx's own) become obsolete.

This rupture leads to two radically different developments. First, as property seems to be "freed" from any even ideological grounding in labor, the logic of private property becomes all the more absolute, a power of pure command. We will analyze in part III the ways in which finance and money have come to redefine property and how, in the era of neoliberalism, private property in its financial and monetary forms rules ever more completely over production and society as a whole. But even at such extreme points, capitalist property and value still carry the sign of labor like a birthmark. Jean-Marie Harribey, in his dialogue with André Orléan, is right to insist that even when value no longer appears in substantial, material form it is not merely a fantasy of accounting. It is the sign of a productive social network, mystified but effective, that is continually developed more intensively and extensively.²² Second, the ever more cooperative and socialized nature of production opens toward an understanding of the common. Rather than speaking of the social function of property, which seems to have flowed toward capital to the point of residing completely in finance, it would be better to speak of the social properties of labor. We are immersed in the common, cooperative circuits of production and reproduction that are both sustaining and chaotic. Try a thought experiment to follow the Lockean strain of capitalist ideology that bases property rights in production to its conclusion: if wealth today tends to be produced not by individuals but only in expansive cooperative social networks, then the results should be the property of the productive network as a whole, the entire society, which is to say the property of no one; that is, property should become nonproperty and wealth must become common.

We arrive at the same point—of the need today for a notion of right rooted in the common—if we go back and trace the developments of labor rights with respect to the state. It is sometimes difficult to remember today, when labor organizing is so brutally attacked in countries throughout the world, that in the twentieth century institutionalized labor movements, especially in the dominant countries, played a central role in stabilizing the functioning of capital and the state. The first article of Italy's 1948 Constitution declares, for example, "Italy is a democratic republic founded on labor." Labor is "constitutionalized" and made into a pillar of support. The creation and constitution of welfare policies not only served to tame markets and overcome the exclusive normative power of private property and contracts but

also sought to domesticate radical labor militancy. The welfare state aimed to treat the causes of crisis, both the objective (economic) and subjective (worker).²³ Wages thus came to be supplemented by various “indirect” incomes provided by the welfare system, including pensions, healthcare, and various other social programs. State action, especially monetary action, had to maintain “effective demand,” and economic development depended significantly on the development of the needs of workers and citizens. From these threads of public actions and social services through the course of the twentieth century was knit a tightly woven biopolitical fabric.

In recent decades, however, neoliberalism has violently attacked the social conditions of labor, reimposing the norms of the market and negating the notion that labor can have any autonomous right as the basis of the public regulation of economic development. Public law is thus ever more explicitly subordinated to private law, pulverized into thousands of subjective rights. And, similarly, all fiscal and social legislation is swept into the whirlpool of privatization, where instruments of progressive taxation are drowned; the savaging of public services becomes the rule, virtually prohibiting acts of solidarity among social groups; and the public functions of the state are subordinated to the market. The “rights of labor,” which in the welfare state were raised up to the dignity of “public rights,” with labor union bargaining supported and recognized by the state, are now degraded and translated once again into private and patrimonial law.²⁴

In response to the depredations of neoliberalism, several European legal scholars have engaged in pragmatic efforts to tether private property to the public interest and public needs. Stefano Rodotà and Ugo Mattei, for example, seek tirelessly, in different ways, to use the means provided by the Italian Constitution and the Italian legal tradition to protect natural resources (such as the national water supply) against privatization and to defend popular occupations that seek to prevent national heritage sites, such as Teatro Valle in Rome, being handed over to private interests. Their primary aim is not just to reassert the powers of public law for the benefit of social solidarity, affirming the “social functions” and general interests of law, and thus posing a definition of the “common” that is really a form of the “public.” Their aim is also to promote, from within private law, a proliferation of subjective, socially protected rights, wresting them away from a strict definition of property rights and casting them instead in the direction of social interests. Stefano Rodotà, for example, has spearheaded the promotion of the “right to have rights,” and

Ugo Mattei has insisted on the other aspect of the crisis of private law, developing the social functions of the private toward a conception of “common goods,” conceived as new categories of the “right to the common.”²⁵

These pragmatic legal projects are especially urgent as a line of defense in the context of global neoliberalism with its general ideological celebration of the rule of private property and the erosion of the powers of states. But those same conditions transform the conceptual and practical possibilities of these strategies. As the powers of states fade, in other words, efforts to pluralize and socialize the rights of property must look beyond the public to other means of support. In fact, when left legal theorists appeal to the public and state power as the centerpiece of strategies to combat the excessive rule of private property—when Rodotà, for example, speaks of “making the public public again” (*ripubblicizzazione del pubblico*)—this sounds to us, in contemporary conditions, neither feasible nor desirable.²⁶ Such state responses are even more prevalent in France and Germany, where the “institutionalist” line is still pre-eminent and the promotion of the “rights of the common” is generally conceived as an expansion and deepening of public law. Unfortunately, this spurious demand remains foundational for large segments of the socialist Left in Europe, whose imagination is fixed on state action and state power as the sole plausible defender of society.

This may be an instance, however, in which capitalist elites (or, really, their collective unconscious) have a more lucid analysis than “progressive” theorists. Above we noted that as part of the neoliberal project the institutionalized social rights and labor rights that supported capitalist rule throughout the twentieth century have been dramatically undermined. It is as if the capitalist political class, in its paranoia, were to have mistaken these “reasonable” rights, which in the past have protected it against crises, for a much more threatening right, the right of the common. This is something like the moment after the failed 1848 revolution when the French bourgeoisie saw in the

In short, the social properties of labor, on one side, unmask the illegitimate rights of individual property, affirming the social, shared right to socially produced wealth, and, on the other, they illicit the terror of propertied classes, financial elites, and neoliberal governments because behind the assertion of social rights they perceive (correctly) the emergence of a right of the common.

Third response: The common is not property

Legal projects to reform property and limit its power have certainly had beneficial effects but now we need finally to take the leap beyond. Some work within property law, as we have seen, points in this direction but pulls back at the cliff and fails to take the decisive step, maintaining in one way or another the exclusion, hierarchy, and centralized decision-making that always ultimately characterize property. If the bundle of rights theorized by legal scholars were extended equally to society as a whole, for example, quantity would pass over into quality and the internal plurality would explode the hierarchies that property maintains. Similarly, when labor is socialized and the whole society becomes a terrain of valorization, when the intelligence, corporeal activity, cultural creativity, and inventive powers of all are engaged cooperatively and together produce and reproduce society, then the common becomes the key to productivity, whereas private property becomes a fetter that hinders productive capacities. It is becoming increasingly clear, in other words, that property can and must be stripped of its sovereign character and transformed into the common.

The common is defined first, then, in contrast to property, both private and public. It is not a new form of property but rather *nonproperty*, that is, a fundamentally different means of organizing the use and management of wealth. The common designates an equal and open structure for access to wealth together with democratic mechanisms of decision-making. More colloquially, one might say that the common is what we share or, rather, it is a social structure and a social technology for sharing.

The history of property and the common is useful for denaturalizing property relations. Private property is not intrinsic to human nature or necessary for civilized society, we should remember, but rather a historical phenomenon: it came into existence with capitalist modernity, and one day it will pass out of existence. Recognizing, however, that the violent and bloody construction of private property throughout the world involved the suppression of social

forms of sharing wealth—land, most importantly—should not lead us to conceive the common in terms of precapitalist social forms or to yearn for their re-creation. In many cases the precapitalist forms of community and systems for sharing wealth were characterized by disgusting, patriarchal, hierarchical modes of division and control. Instead of gazing back prior to capitalist private property we need to look beyond it.²⁸

Today we have the potential to establish modes of sharing wealth that are equal and open, to institute a right to decide together democratically about the access, use, management, and distribution of social wealth. (Keep in mind, to avoid confusion, that this conception of the common is aimed at social wealth, not individual possessions: there is no need to share your toothbrush or even give others say over most things you make yourself.) The objects of the common have varying characteristics and to some extent our reasoning about how to share them must take different forms. Some forms of wealth are limited and scarce, for instance, while others are indefinitely reproducible, and thus managing how we can share them will face different challenges. Here is a very rough schema that gives some initial guidelines for considering the different forms of the common:

- First, the earth and its ecosystems are ineluctably common in the sense that we are all affected (albeit in varying degrees) by their damage and destruction. But we cannot have faith that the logics of private property or national interest will preserve them, and instead we must treat the earth as common so as collectively to make decisions to care for and guarantee its and our future.
- Second, forms of wealth that are primarily immaterial, including ideas, code, images, and cultural products, already strain against the exclusions imposed by property relations and tend toward the common.
- Material commodities, third, produced or extracted by increasingly cooperative forms of social labor can and should be opened for common use—and, equally important, planning decisions (whether, for instance, to leave some resources in the ground) should be made as democratically as possible.
- Fourth, metropolitan and rural social territories, both built environments and established cultural circuits, which are the fruit of social interactions and cooperation, must be open to use and managed in common.
- Finally, social institutions and services aimed at health, education, housing, and welfare must be transformed so as to be used for the benefit of all and subject to democratic decision-making.

Crucial to any understanding of the common, in all its forms, is that use of and access to wealth must be managed. Elinor Ostrom, in particular, whose work has been central in introducing so many to the contemporary relevance of the common, rightly focuses on the need for governance and institution. Ostrom convincingly reveals the fallacy of all the “tragedy of the commons” arguments, which maintain that in order to be used effectively and preserved against ruin all wealth must be either public property or private property. She agrees that “common-pool resources” must be managed but disagrees that the state and capitalist enterprise are the only means for doing so. There can be—and indeed already exist—collective forms of self-management: “a self-governed common property arrangement in which the rules have been devised and modified by the participants themselves and also are monitored and enforced by them.”³⁰ We wholeheartedly endorse Ostrom’s claim that the common must be managed through systems of democratic participation. We part ways with her, however, when she insists that the community that shares access and decision-making must be small and limited by clear boundaries to divide those inside from outside. We have greater ambitions and are interested instead in more expansive democratic experiences that are open to others, and we will have to demonstrate the feasibility of such a new, fuller form of democracy today in the following chapters.

We should emphasize that any eventual “rights of the common” must be distinguished not only from private and public law but also, as we have said, from what especially in Europe have been called “social law” and “social rights.” Social law, in fact, which does develop some functions of the common, lives in a sort of *chiaroscuro*. Bringing it into the light allows us to define better other characteristics of the common that are emerging. First, whereas social law and social rights are fundamentally static—they register legal norms that have been affirmed within the market in the guise of regulating social relationships—the common instead is fundamentally productive and does not simply regulate existing social relationships but rather constructs new institutions of “being together.” Second, whereas social law imposes a sort of “total mobilization” under public law in the service of the state, maintaining all the statist ambiguities (from the right and the left) of this tradition dating back to the 1930s, the common constructs a society of democratic cooperative relationships managed from below. Third, whereas social law assumes a mass of individuals as its object, the common lives from the cooperation of singularities, each of which is able to bring a specific contribution to the construction of institutions. Finally, whereas social law, even though it was born from labor

movements, has been transformed by neoliberalism to manage “human capital” and participate in the mechanisms of biopower that subordinate and order human actions and relationships to the rule of money and finance, the common advances without legal mediations and emerges as a multitude, that is, as the capacities of subjects to bring together their singularities in productive institutions of wealth and freedom.

The common therefore is not really a *tertium genus*, beyond private property and public property, if that were to mean it is simply a third form of property. (Indeed Ostrom’s formulation of “common-pool resources” and Ugo Mattei’s conception of “common goods” [*beni comuni*] often seem to name merely another form of property.) The common stands in contrast to property in a more radical way, by eliminating the character of exclusion from the rights of both use and decision-making, instituting instead schema of open, shared use and democratic governance.

Fable of the bees; or, passions of the common

Albert O. Hirschman traces in early modern Europe the development of an ideological support of capitalist accumulation based on the play of passions. The story begins in the sixteenth and seventeenth centuries with the realistic recognition by Machiavelli and others that humans as they really are (not as we wish they were) are driven in large part by passions that can be destructive to themselves and others. Sustainable political arrangements must tame the passions, the thinking goes, not by moralizing or imploring people to be virtuous or rational, but rather by setting beneficial passions against detrimental or dangerous ones. “It is fortunate for men,” Montesquieu writes, in one of Hirschman’s favorite passages, “to be in a situation where, though their passions may prompt them to be wicked (*méchants*), they have nevertheless an interest in not being so.”³¹ Interest, that is, the passion for acquisition, the passion for property, emerges in Hirschman’s narrative as the key virtuous (or at least benign) passion that is able to tame the dangerous ones. Interest is seen

(what is proper to a person or thing) to possession or thing owned. What it means to be human—and even what it means to be alive—comes to be imagined in terms of possessions of various types. Not only external material articles such as land or goods but also “internal” immaterial properties such as power and intelligence must become thinglike in order to obey the logic of possession. You are what you have.³²

The intellectual framework that poses interests and acquisition as an antidote to the destructive passions fades from prominence, Hirschman notes, in the nineteenth and twentieth centuries, but it remains present in the background as an anchor of capitalist ideology: the pursuit of property and accumulation are the guarantors of security, prosperity, freedom, and more. Today, however, the virtuous passions of property—if they ever really existed—have all but crumbled, and in their void the passions of the common, truly sustainable virtues, are taking root. Let us look, just as an introduction, at a few key passions.

Security (against fear)

Private property promises to connect you in community but instead merely provides shelter by separating you from others, defending you from the hordes. It will protect you from hunger, homelessness, subordination, and economic crisis, and even protect your offspring via inheritance: because you have property, others will be first to go hungry, to be homeless, and so forth. Today it's easy to see, however, that your property can't even do that. Property won't save you.

prey to crises that, through a cycle of debt and austerity, destroy the property and lay waste to the savings of the middle classes that thought they were protected. All but the wealthiest face insecurity today and for the indefinite future, and even those who have been spared so far tremble in fear at news of bank crises and stock market collapses.

The socialist tradition has long critiqued the claims that property can provide security on a social scale and has maintained instead that security can be provided only by the state. State powers to create security, however, to the extent that they ever existed, have in the era of neoliberal globalization been severely undermined. States, and socialist states in particular, wield their own weapons of fear.

Real security is something altogether different. Security, as Spinoza defines it, is hope from which uncertainty has been removed; it is confidence that our joy will continue in the future. Security is what defeats fear.³³

Today security can derive only from the freedom and cooperation of singularities in the common. We find a powerful foretaste of this real security, which neither private property nor the state can accomplish, in the forms of community and cooperation that emerge in the midst of social and ecological disaster. In recent years, for instance, from Brazil and Argentina to Spain, Greece, and Japan, people have emerged from poverty and crisis to develop solidarity economies and organize production, incomes, services, food, and housing on a local scale. Solidarity economies emphasize cooperation and self-management as an alternative to the regime of profit and capitalist control, which is not only more egalitarian but also more efficient and stable. The way people share and come together in the wake of ecological disasters also hints at the security provided by the common. "Disasters provide an extraordinary window into social desire and possibility," writes Rebecca Solnit, admiring the forms of social cooperation and solidarity, "and what manifests there matters elsewhere, in ordinary times and in other extraordinary times."³⁴ The ways that people develop security in the common in times of crisis provide a foretaste of what a society of the common could be.

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12. Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone, MIT Press, 1971, p. 258.
13. Maurice Merleau-Ponty, “Western’ Marxism,” in *Adventures of the Dialectic*, trans. Joseph Bien, Northwestern University Press, 1973, pp. 30–58, quotes on pp. 30–31 and 41.
14. Hans-Jürgen Krahl, *Konstitution und Klassenkampf*, Neue Kritik, 1971.
15. Merleau-Ponty, “Western’ Marxism,” p. 222.
16. Gilles Deleuze, *Foucault*, trans. Sean Hand, University of Minnesota Press, 1988, p. 27.
17. Deleuze, *Foucault*, p. 144.

PART II

1. Niccolò Machiavelli, *The Prince*, trans. Peter Bonadella, Oxford University Press, 2005, p. 53.
2. See, for instance, E. P. Thompson, “History from Below,” *Times Literary Supplement*, April 7, 1966, pp. 279–280.
3. W. E. B. Du Bois, *The Souls of Black Folks*, Dover, 1994, p. 2.
4. James Baldwin, “Encounter on the Seine,” *Notes of a Native Son*, Beacon Press, 1955, pp. 119–167, quote on pp. 122–123.
5. On feminist standpoint theory, for example, see Patricia Hill Collins, *Black Feminist Thought*, Routledge, 1991; and Sandra Harding, ed., *The Standpoint Theory Reader*, Routledge, 2004.
6. Max Weber, *Economy and Society*, 2 volumes, ed. Guenther Roth and Claus Wittich, University of California Press, 1978, volume 1, p. 53.
7. Weber, *Economy and Society*, volume 2, p. 946.
8. Hannah Arendt, *On Revolution*, Viking, 1963, p. 193.
9. Raymond Aron claims that Marx, in contrast to Machiavelli, imagines himself to be a “confidant of providence.” See “Machiavelli and Marx” in *Politics and History*, trans. Miriam Conant, Transaction, 1984, pp. 87–101, especially, pp. 92–93. On Weber’s banishment of the affects, see *Economy and Society*, volume 2, p. 975.
10. Michel Foucault, *The Birth of Biopolitics*, ed. Michel Senellart, trans. Graham Burchell, Picador, 2004, pp. 2–3.
11. Michel Foucault and Noam Chomsky, *The Chomsky-Foucault Debate: On Human Nature*, New Press, 2006, p. 51.

CHAPTER 6

1. Hugo Grotius, *Commentary on the Law of Prize and Booty*, trans. Gwladys Williams and Walter Zeydel, Clarendon, 1950, p. 227 For an original reading of Grotius, particularly sensitive to the colonial and capitalist relations of the modern world system, see Eric Wilson, *The Savage Republic: De Indis of Hugo Grotius, Republicanism*

- and *Dutch Hegemony within the Early Modern World-System (1600–1619)*, Martinus Nijhoff, 2008.
2. William Blackstone, *Commentaries on the Laws of England*, 4 volumes, Clarendon, 1765, volume 2, p. 2.
 3. Property, writes John Commons, is “not a single absolute right, but a bundle of rights” (*The Distribution of Wealth*, Macmillan, 1893, p. 92). For good histories of the bundle of rights conception, see Daniel Klein and John Robinson, “Property: A Bundle of Rights? Prologue to the Property Symposium,” *Econ Journal Watch*, 8:30, September 2011, pp. 193–204; and Fabienne Orsi, “Elinor Ostrom et le faisceaux de droits,” *Revue de la régulation*, Autumn 2013, <https://regulation.revues.org/10471>.
 4. Felix Cohen, “Dialogue on Private Property,” *Rutgers Law Review*, 9:2, Winter 1954, pp. 357–387, quote on p. 362.
 5. Morris Cohen, “Property and Sovereignty,” *Cornell Law Review*, 13:1, December 1927, pp. 8–30, quote on p. 29.
 6. M. Cohen, “Property and Sovereignty,” p. 13.
 7. For a recent argument that outlines this connection in the history of European political and legal thought, see Ugo Mattei: “The strong connection between the theories of sovereignty and those of property is easy to see” (*Beni comuni: Un manifesto*, Laterza, 2011, p. 43).
 8. Robert Hale, “Coercion and Distribution in a Supposedly Non-coercive State,” *Political Science Quarterly*, 38:3, September 1923, pp. 470–494, quote on p. 472.
 9. See Duncan Kennedy, “The Stakes of Law, or Hale and Foucault!” *Legal Studies Forum*, 15:4, 1991, pp. 327–366; and Stephen Munzer, “Property as Social Relations,” in Munzer, ed., *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, 2001, pp. 36–75.
 10. Duncan Kennedy, “The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society,” *Harvard Law Journal*, 46:1, 2002, pp. 85–125; “10 Years of Creative Commons: An Interview with Co-Founder Lawrence Lessig,” <http://governancexborders.com/2012/12/18/10-years-of-creative-commons-an-interview-with-co-founder-lawrence-lessig/>; and Anna di Robilant, “Common Ownership and Equality of Autonomy,” *McGill Law Journal*, 58:2, 2012, pp. 263–320, especially pp. 301–319.
 11. See Harold Demsetz, “Toward a Theory of Property Rights,” *American Economic Review*, 57:2, May 1967, pp. 347–359; and Armen Alchian and Harold Demsetz, “The Property Right Paradigm,” *Journal of Economic History*, 33:1, March 1973, pp. 16–27. On the neoliberal use of the bundle of rights conception, see Orsi, “Elinor Ostrom et le faisceaux de droits.”
 12. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).
 13. On how progressive property theory counters a neoliberal economics approach, see Timothy Mulvaney, “Progressive Property Moving Forward,” *California Law Review*, 5, September 2014, pp. 349–373, especially p. 352.

14. Joseph William Singer, “Property as the Law of Democracy,” *Duke Law Journal*, 63, 2014, pp. 1287–1335, quote on pp. 1334–1335.
15. Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler, “A Statement of Progressive Property,” *Cornell Law Review*, 94, 2009, pp. 743–744, quote on p. 744.
16. “Property implicates plural and incommensurable values” (Alexander, Peñalver, Singer, and Underkuffler, “A Statement of Progressive Property,” p. 743). Ezra Rosser argues that the progressive property school is unable to reorient fundamentally the social relations created by property so long as it is unable to address racial hierarchies and injustices. See “The Ambition and Transformative Potential of Progressive Property,” *California Law Review*, 101, 2013, pp. 107–171.
17. See, for example, Yochai Benkler, *The Wealth of Networks*, Yale University Press, 2006; and Lawrence Lessig, *Free Culture*, Penguin, 2004. See also Michele Surdi, “Lo spettro di Blanco: Una nota ad Ugo Mattei,” *Scienza & Politica*, 24:46, 2012, pp. 69–75. Surdi insists that private property becomes increasingly contradictory as it becomes no longer possession of a material good but the pretense of possession of a service. Such goods can no longer be isolated and individuated. In other words, today, confronting forms of production that are socialized, individual private property appears as merely the residue of a previous era.
18. John Locke, *Second Treatise*, chapter 5, section 27.
19. See, for example, Title 35 of the US Code, paragraph 101.
20. Karl Marx, *Capital*, volume 1, trans. Ben Fowkes, Penguin, 1976, p. 928.
21. Karl Marx, “Draft of an Article on Friedrich List’s Book, *Das Nationale System der Politischen Oekonomie*,” in Karl Marx and Frederick Engels, *Collected Works*, International, 1975, volume 4, 265. See also Roman Szporluk, *Communism and Nationalism: Karl Marx versus Friedrich List*, Oxford University Press, 1988.
22. Jean-Marie Harribey, “André Orléan, *L’empire de la valeur*,” book review, *Revue de la régulation*, Fall 2011, <http://regulation.revues.org/9483>.
23. See Antonio Negri, “Labor in the Constitution,” in Michael Hardt and Antonio Negri, *Labor of Dionysus*, University of Minnesota Press, 1994, pp. 53–138. On how the New Deal and the Keynesian state were responses to the militancy of radical labor organizing, see Antonio Negri, “Keynes and the Capitalist Theory of the State,” in Hardt and Negri, *Labor of Dionysus*, pp. 23–51; and Richard Hurd, “New Deal Labor Policy and the Containment of Radical Union Activity,” *Review of Radical Political Economists*, 8:3, 1976, pp. 32–43.
24. See, among others, Alain Supiot, *The Spirit of Philadelphia: Social Justice versus the Total Market*, Verso, 2012.
25. See Stefano Rodotà, *Il diritto di avere diritti*, Laterza, 2012; and Ugo Mattei, *Beni comuni: Un manifesto*, Laterza, 2011; as well as Ugo Mattei, “Protecting the Commons,” *South Atlantic Quarterly*, 112:2, Spring 2013, pp. 366–376.
26. See Stefano Rodotà, “La grande trasformazione sociale,” *Alfabet2*, 29, May 2013, p. 20; and Giso Amendola, “Per un costituzionalismo dei bisogni,” *Alfabet2*, 29, May 2013, p. 23.

27. See Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, International, 1963, pp. 65–66 and 118.
28. One should construct for each country and region a specific history of the destruction of common forms of land tenure and the transformation of the land into private property. Some examples of what should be a very long list include, regarding Europe, Marx's analysis of primitive accumulation, *Capital*, volume 1, pp. 871–940; and Peter Linebaugh, *The Magna Carta Manifesto*, University of California Press, 2008; regarding indigenous land tenure in Latin America, José María Mariátegui, *Seven Interpretive Essays on Peruvian Reality*, trans. Marjory Urquidi, University of Texas Press, 1971; and regarding South Asia, Ranajit Guha, *A Rule of Property for Bengal*, Duke University Press, 1996.
29. Maria Rosaria Marella provides a useful categorization of objects of legal thought of the common in “I beni comuni,” *Libro del anno del diritto*, 2013, pp. 13–16. See also, on the common as *tertium genus*, Maria Rosaria Marella, “Beni comuni: Oltre l'opposizione natura/cultura,” *Lettera internazionale*, 113:3, 2012, pp. 9–14. For a general treatment of the common, see Antonio Hardt and Michael Negri, *Commonwealth*, Harvard University Press, 2009, and for a specific focus on the metropolis as common, pp. 249–260. For a contrast between the limited nature of the earth as common and the reproducible character of immaterial common wealth, see Michael Hardt, “Two Faces of Apocalypse,” *Polygraph*, 22, 2010, pp. 264–274.
30. Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990, p. 20.
31. Quoted in Albert O. Hirschman, *The Passions and the Interests*, Princeton University Press, 1977, p. 101.
32. “The *value*, or WORTH of a man,” Thomas Hobbes claims, “is as of all other things, his price; that is to say, so much as would be given for the use of his Power” (*Leviathan*, Oxford University Press, 1998, p. 51).
33. Baruch Spinoza, *Ethics*, part III, proposition 18, scolium 2, in *Complete Works*, ed. Samuel Shirley, Hackett, 2002, pp. 188–189.
34. Rebecca Solnit, *A Paradise Built in Hell: The Extraordinary Communities That Arise in Disaster*, Penguin, 2009, p. 6. For some among the numerous examples of relative security created in the common in times of social and economic crisis, see Anne Alison, *Precarious Japan*, Duke University Press, 2013, pp. 180–206 (on life after the Fukushima disaster); and Naomi Klein, *The Shock Doctrine*, Metropolitan Books, 2007, pp. 533–561; and *This Changes Everything*, Simon & Schuster, 2014, pp. 291–448.
35. Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, Harper, 1942, p. 142.
36. Karl Marx, *Economic and Philosophical Manuscripts*, in *Early Writings*, trans. Rodney Livingstone, Penguin Classics, 1974, pp. 297–400, quote on p. 361.
37. “The ability for enjoyment [*Die Fähigkeit des Genusses*] is a condition of enjoyment, hence its primary means, and this ability is the development of an individual potential, a force of production” (Karl Marx, *Grundrisse*, trans. Martin

- Nicolaus, Penguin, 1973, p. 711, translation modified. Original text: “Die Fähigkeit des Genusses ist Bedingung für denselben, als erstes Mittel desselben, und diese Fähigkeit ist Entwicklung einer individuellen Anlage, Produktivkraft.”)
38. The literature on precarious labor in Europe (and somewhat less in North America and Japan) is enormous. For an excellent analysis of precarious work in South Africa, see Franco Barchiesi, *Prekarious Liberation*, SUNY Press, 2011.
 39. Judith Butler, *Notes toward a Performative Theory of Assembly*, Harvard University Press, 2015, p. 150.
 40. Among the many excellent analyses of the construction of institutions of the common, see Pascal Nicolas-Le Strat, “Agir en commun / agir le commun,” May 1, 2014, <http://blog.le-commun.fr/?p=738>.
 41. Duncan Kennedy, “The Stakes of Law, or Hale and Foucault,” in *Sexy Dressing Etc.*, Harvard University Press, 1993, pp. 83–125, quote on p. 85.
 42. C. B. Macpherson, *The Political Theory of Possessive Individualism*, Oxford University Press, 1969.
 43. Alexandra Kollontai, “Sexual Relations and the Class Struggle,” in Alix Holt, ed., *Selected Writings of Alexandra Kollontai*, Allison & Busby, 1977, pp. 237–249.
 44. Mattei, *Beni comuni*, p. 99.

CHAPTER 7

1. Max Horkheimer and Theodor Adorno, *The Dialectic of Enlightenment*, trans. John Cumming, Continuum, 1972, p. xvi.
2. Martin Heidegger, “The Question concerning Technology,” in *The Question Concerning Technology and Other Essays*, trans. William Lovitt, Garland, 1977, pp. 3–35, quote on p. 14.
3. Heidegger, “The Question concerning Technology,” p. 28.
4. In some respects the pessimistic anthropology of Arnold Gehlen, another Nazi, is a variant on Heidegger’s view of the relation of humans to technology. Gehlen maintains that technology, which has accompanied humanity from its origins, addresses a radical lack or insufficiency in humans, who are unable to exist on their own. See, for example, Arnold Gehlen, *Man in the Age of Technology*, trans. Patrice Lipscomb, Columbia University Press, 1980. And even when other German anthropologists contest Gehlen’s anthropological pessimism, they seldom go beyond a functionalism that refers human technology, just beyond lack and insufficiency, to some organic disposition. See, for instance, Heinrich Popitz in *Der Aufbruch Zur Artifizialen Gesellschaft: Zur Anthropologie Der Technik*, Mohr Siebeck, 1995, who constructs an “optimistic” [*sic!*] perspective insisting on the fact that the relationship of humanity to the world is already in some sense naturally determined by material or physiological predispositions. For excellent interpretations of Gehlen and these developments in anthropology, see Ubaldo Fadini, *Configurazioni antropologiche*, Liguori, 1991; and *Sviluppo tecnologico e identità personali*, Dedalo, 2000.
5. Günther Anders, *Die Antiquiertheit des Menschen*, 3rd edition, C. H. Beck, 2009.