

## Chapter 2

### Properties of Property: A Jurisprudential Analysis



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## **2 Properties of Property: A Jurisprudential Analysis**

“It is not wrong to say that the nature and intent of a society reveal themselves in the legal and customary concepts of property held by the various members and classes of that society. These property concepts do not change without an incipient or fundamental change in the nature of the society itself. The history of property relations in a given society is thus, in a way, the history of the society itself .” (Schurmann 1956: 507)

“No doubt the eighteenth century preferred rational treaties expounding the *theory* of property to historical essays describing the *theories* of property. But ... we ... know that the institution of property has had its history and that that history has not yet come to an end ... We begin with the knowledge that there must be as many theories of property as there have been systems of property rights. Consequently we abandon the search for the true theory of property and study the theories of the past ages. Only thus can we learn how to construct a theory suitable to our own circumstances” (Schlatter 1951: 10).

### **2.1 Introduction: sovereigns, commoners and the state we are in.**

In this chapter I provide the reader with a framework that enables an analytical understanding of property. I argue that property is normative protocols structuring social relations with regard to

things (that is, property relations). Given that there are, in practice, no social relations that do not involve things of some kind as their setting or as their props, property is of fundamental importance to the way in which societies, and other social groups, are organised. Property protocols refer to customs, norms, and conventions guiding people's behaviour. These protocols (often understood as patterns of duties, rights, powers, privileges and so on) define certain freedoms or limitations with regard to who may do what with any given thing or resource.

### **2.1.1 Private property and commoning under one umbrella.**

The most well-known and widespread configuration of property is private property, which, of course, characterises capitalist democracy. Private property is a particular property protocol that is generally understood as giving rise to social relations with regards to things that are paradigmatically different from the social relations with regard to things that I have referred to as commoning, following Linebaugh and De Angelis.

While it is uncontroversial to define property as social relations with regard to things, philosophical or legal accounts of property do not normally account for commoning *as* property. The commons is seen as the paradigmatic non-property case. Yet both commoning and private property concern the same subject matter: how we relate to each other with regard to things and with regard to the rest of the world. Who has access to what resource, what are those with access allowed to use the resource for, who takes responsibility for the resource, what happens to the wealth that can be generated from the resources, who can sell, buy or otherwise transfer the privilege of access to a resource and its wealth effects, who makes the decisions about

these things, how are the decision-making processes organised in cases where more than one individual holds the decision-making authority and, finally, with reference to what values are these decisions legitimised?

Once we uncover the elements which both share, these two different kinds of property can be brought together under one analytical umbrella. The purpose is to reveal the way in which each of them functions and the different kinds of social relations that they give rise to. In this way the applicability of either of the two in a given context – for instance a particular resource or class of objects – can be assessed on the same terms. A normative evaluation can start from there.

Because property in general has come to be understood as synonymous with private property, the way in which analysts are able to think about property has been greatly limited. By opening up the analytical framework of property to include *at once* commoning *and* private property, both will be seen in a new light. Moreover, given the anti-capitalist starting point of the essay, understanding commoning in the same terms as property can better facilitate a transfer of land, its resources, and the means of production and distribution, from being organised with private property rights to become organised through modes of commoning.

It should here be noted that I am in no way arguing that private property should be done away with, rather I am hoping to reveal its anatomy, so that we may assess its usefulness for different purposes and in different domains. While the idea is to better be able to *limit its range*, my account of property should not be understood as a normative exercise. While I point to certain normative implications throughout my discussion, it is not my primary objective to provide a thorough moral analysis of

property. Many of these have been provided by others more skilled in such matters. Rather, I will address the way in which property is understood to function in liberal jurisprudence. Specifically, I will draw upon James Harris's work, whose analytical approach and framework describes with most accuracy the way in which the institution of property in capitalist democracy functions legally as well as economically. His account is consistent with, and indeed clarifies, many preceding accounts of property in liberal jurisprudence on the one hand, and on the other, economic policy which implements and regulates property.

### **2.1.2 The little king of private property.**

Property, it is generally argued, distributes decision-making authority regarding the use of resources. Private property, as we shall see, distributes this authority to individuals and quasi-individuals such as firms and associations, granting them open-ended powers and privileges with regard to the use of certain resources, and legitimising what Harris calls their *self-seekingness* in this regard.

Public policy discourse has become saturated with economic reasoning<sup>30</sup>, and it is taken for granted that the primary, if not the only purpose of property is the satisfaction of individual preferences through the market. The sole function of property rights has seemingly become the “guiding [of] incentives to achieve a greater internalization of externalities” (Demsetz 1967: 347). That is, property rights are thought to maximise aggregate

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30 The law-and-economics movement has been traced back to Ronald Coase's influential 1961 article 'The Problem of Social Cost' (Posner 1983).

social wealth by encouraging people to calculate the costs and benefits of owning things. Underlying the economic approach to property rights is that “the costs and benefits of a person’s activity should rebound on him (as far as possible), and only on him (as far as possible)” (Reeve 1986: 25).

What on an economistic account is the main purpose of property – satisfaction of preferences – is for Harris the logical presupposition on which all property institutions are built. The institution of property presupposes the notion of open-ended powers and privileges which people have over things, and which authorise the pursuit of ends that are entirely justified simply by virtue of being *theirs*. It is not that Harris agrees that self-seekingness, the pursuit of self-interest, is the only motivational factor for agency, nor that it is necessarily the primary one in social or psychological terms. What Harris *does* say is that the operation of property within the law *proceeds* from the conception of property as open-ended power, and the view of the individual as sovereign. In actually existing property systems, of course, Harris recognises, these open-ended powers are always also limited: their range is not absolute. Nonetheless, it is the vision of the individual sovereign, the little king, that is at the heart of the dominant conception of private property as instituted in capitalist democracy.

What I call “economistic” refers to the science of economics that has been “detached” from further moral, political and social discussion (Sayer 1999). For what *does* concern moral, political and social questions, the economistic approach to policy *assumes* the moral and political priority of the individual over the community; the subjectivities of values (values as preferences); and the market as the primary mechanism for mediating individual preferences within society.

Sharing, on this view, leads to tragedy.

### **2.1.3 The distribution of care and the tragedy of the commons.**

The Tragedy of the Commons (Hardin 1968) is a story that has been much debated since its publication, but the terrain that it covers is not new. It can be traced back to the distribution of care, a philosophical concept first introduced by Aristotle. The distribution of care concerns who takes care of what and how with regard to goods and resources. For Aristotle, care would be most adequately administered if distributed to individuals, not managed in commons. He took note of "how immeasurably greater" the pleasure is, "when a man feels a thing to be his own" (Aristotle, *Politics*, Book 2, Part 5). Accordingly, he did not have great sympathy for commons:

"What is common to the greatest number gets the least amount of care. Men pay most attention to what is their own; they care less for what is common; or at any rate they care for it only to the extent to which each is individually concerned. Even when there is no other cause for inattention, men are more prone to neglect their duty when they think that another is attending to it" (Aristotle, *Politics*, Book 2, Part 3).

The story of the tragedy of the commons runs along similar lines. It was communicated through the imagined organisation of a fictitious pasture: if a group of herders owns a pasture in common, to which access is "open and free", there is no reason for each of the herders *not* to expand their herd. And if there is no

reason *not to* expand, they *will do so* - at least so the story goes - soon leaving them all with too little grass and space for their respective herds. The result is that the pasture becomes overused, and hence all the herders suffer: a tragic breakdown and collapse of natural resources. Moreover, if the pasture is shared between all, it opens the possibility of individual herders free-riding on the work of others. Of course such concerns also apply to the intangible realm, since complex computer programmes, encyclopaedias, journals and large-scale scientific quests in general, require a successful distribution of care, just like pastures.

If, however, the pasture is split up into exclusive parcels, the herders will each manage their respective parcel in a sustainable manner according to their own self-interest. According to the logic of the market, then, whoever cannot handle their parcel profitably will be bought out by one of the others, who has been handling his own parcel so successfully that he has accumulated an excess of wealth with which he can buy out his competitor (and subsequently - quite possibly - employ him on the basis of wage relations to do the exact same kind of work, but for less return and without the joy associated with ownership, as stated in the Aristotelian premise).

Looking at the story of the tragic commons from a different perspective, however, we may say that the herders would be better off sharing a pasture in common, since the rain, the wind and the sun do not obey human property laws. Hence the rain may fall, the wind may blow, and the sun may shine unevenly and consequently there would be a need to be able to move the herds around in a manner more flexible than what is afforded by

splitting the pasture up into exclusively owned parcels<sup>31</sup>. In other words, overuse is just one of many possible outcomes to be taken into account in the organisation of a common pasture. Moreover, the Aristotelian premise that distribution of care is better achieved when people have a sense of ownership hardly helps to make the case for a system that concentrates ownership in the hands of the few and renders the many employees – or unemployed.

Hardin's tragic story is not the only one of its kind and certainly nothing new<sup>32</sup>. Hardin complemented Mancur Olson's "The Logic of Collective Action" (1965) which reiterates the Hobbesian proposition that individuals are self-interested and will not, unless there is an external, coercive mechanism, produce common goods or achieve collective ends. Olson's and Hardin's justifications for a market economy and a central authority with powers of coercion are both structured according to what is known in game theory as an *n*-person prisoners' dilemma (Dawes 1973), and have long been refuted through many empirical examples (see next section) and on purely logical grounds (especially Taylor 1976, 1982, 1987; Ostrom in Baden and Noonan (eds.) 1998). The assumptions of the tragedy of the commons, however, run deep. The phenomenon of Free Software, for example, has been called "the impossible public

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31 The obvious reply from the privatiser to this is that such re-distribution of rain and sun can be solved by private contracts, but the question for the community of herders practising their customs in common would still remain: why split up the pasture in the first place?

32 Ostrom notes: "In 1833, William Forster Lloyd sketched a theory of the commons that predicted improvident use for property owned in common. More than a decade before Hardin's article, H. Scott Gordon clearly expounded a similar logic in another classic, "The Economic Theory of a Common-Property Resource: The Fishery"' (Ostrom in Baden and Noonan (eds.) 1998: 96.)

good” (Smith and Kollock 1999). Cooperation and commoning are still assumed to be unlikely beyond the market and the reach of a coercive authority. And care is still thought of as best distributed by enthroning little monarchs with each their private property realms, despite plenty of evidence that, while care *might* coincide with self-interest or other private purposes, it very well *might not*.

#### **2.1.4 Commons in the world.**

Elinor Ostrom, beginning with her doctoral field work in the mid 1960s (but see particularly Ostrom 1990, 2000) has unpacked the Tragedy of the Commons empirically, and thereby challenged the conventional wisdom that common property is poorly managed and should be either regulated by central authorities or privatised<sup>33</sup>. By investigating real-life commons, such as fish stocks, pastures, woods, lakes, and groundwater basins, which people have sometimes for over centuries managed and cared for in common, Ostrom has shown that:

“...there is no reason to think that the only forms of resource governance must come from individual ownership on the one hand, or from central governmental management on the other ... communities clearly refute the idea that the commons is necessarily "tragic"” (Rose 2003: 106).

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33 For her trail-blazing work to reinstate the validity of the commons as a strategy for managing natural resources, Ostrom was awarded the 2009 Nobel Prize in Economic Sciences (The Royal Swedish Academy of Sciences 2009).

Instead of corroborating the idea that human beings are naturally self-interested and therefore must be coerced to cooperate, Ostrom points to future areas of research to better understand how resources can be shared. Drawing on her research findings, she confirms that free-riding is a problem, she admits that some people do indeed seem to not naturally cooperate, but that, also, many people happily cooperate on a voluntary basis.

The real tragedy of the commons, then, is their enclosure, that is the destruction of commons by privatising forces. After all, “[t]he commons did not collapse, they were “stolen,” as common sentiment at that time expressed it” (Siefkes 2009).

Crucially, contrary to Hardin's fiction, the sharing of a pasture in real life happens *in community*. Open-access commons, of Hardin's tragic kind, are governed by only one rule: anything goes.<sup>34</sup> Anyone with access to the resource can take from and do with it what they will. Most existing commons, however, are highly *structured commons* with a set of principles, rules, norms and, in general, specific ways of living together in order *not to* face a tragedy. These community-defined rules and principles have developed over time through cooperation and in the case of natural resources, observations of the land. Communities structure commons and commons structure communities. As De Angelis notes:

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34 Hardin later admitted his original conflation of open-access commons with structured ones in personal communication with John A. Baden (Baden and Noonan (eds.) 1998: xvii). However, I am here not addressing Hardin's personal intellectual development, but the continued force of his fiction in the context of public policy.

“By assuming that commons are a free-for-all space from which competing and atomised ‘economic men’ take as much as they can, Hardin has engineered a justification for privatisation of the commons space rooted in an alleged natural necessity. Hardin forgets that there are no commons without community within which the modalities of access to common resources are negotiated. Incidentally, this also implies that there is no enclosure of commons without at the same time the destruction and fragmentation of communities” (2004: 58).

Rebuilding commons, it is implied on that view, is to rebuild communities and vice versa: the rebuilding of communities is the rebuilding of commons. In Chapter 1 we discussed the problem of virtual commons detached from real commons becoming – if we follow the money – capitalist commons. When detached from real commons, the virtual commons has no body and no connection to the land and therefore, crucially, no proper connection to social movements for whom access to and control over land as a means of subsistence and production are the most pressing concerns – and for whom a virtual commons is meaningless without having land to put their feet on.

Consider the Landless Workers' Movement (MST) in Brazil, which counts more than a million people who collectively are challenging extreme inequalities: nearly half the land is owned by just over 1% of the population (McNally 2006: 285). The MST have clear objectives aiming at a radical social transformation:

“We have three fences to cut down ... the fence of the big estate, the fence of ignorance and the fence of capital ... Our struggle is not only to win the land ... We are building a new way of life” (quoted in *ibid.*)

Opposing the state and private interest is not a peaceful affair. At least 1,684 assassinations of landless workers took place between 1964 and 1991 and MST activists are “regularly murdered by soldiers and military police” (*ibid.*). However, despite the nation state and private property *working against them*, stifling their cooperation, the MST has carried out more than 1200 land occupations, expropriated more than 50,000 square kilometres of land and established settlements for more than 100,000 families (*ibid.*). According to their slogan “Occupy, Resist, Produce”, the MST does not advocate individual ownership of land and the means of production, but supports cooperatives for agricultural production and factories, which handle meat storage, milk packaging and coffee roasting. McNally writes:

“Once land is occupied, an MST encampment is set up and organized democratically. Decisions are made collectively with a general assembly constituting the highest decision-making body ... It has established 1,200 schools and operates thirty radio stations. Finding that mainstream teachers are not adequate to the task of building a culture of liberation, the MST has developed its own teacher training programs” (*ibid.*).

If Free Software is an “impossible public good”, which only really exists because it rides on the surplus of capitalism and because it unfolds in the intangible realm where reproduction

costs are minimal and the rivalrousness of goods absent, then the achievements of the MST are approximating a miracle. Making sense of such social movements in philosophical, legal and social terms can obviously not commence from a starting point that entails the assumption that their achievements are impossible. In order to facilitate the work of these social movements and to begin creating a jurisprudential framework that can be used for an articulation of their property relations – with a view to self-legislation – we obviously need a different starting point.

### **2.1.5 Learning from property.**

My starting point is not merely that sustained cooperation, commons and community building are possible, but that they are essential. I maintain that commons continue to be under threat of enclosure. Privatisation of land, its resources and the means of production and distribution is relentless and noxious to people, their relations and the environment. The use and abuse of these resources inevitably implicate everyone, and hence decision-making powers over them should not lie exclusively with individuals or, possibly worse, quasi-individuals whose pursuit of self-interest is authorised without further justification.

But private property is also enabling. It licenses creativity and open-ended agency, potentially free from the interference of other individuals, the state or another overarching political authority. Private property goes hand in hand with the creation of a legal individual whose rights are inviolable. It sanctions life and liberty for an individual whose agency and creativity are, potentially, open-ended. It makes a person's body and her creations her own. It defines the individual's realm, in which she can build her castle or tear it down – at least theoretically, for

those who are in a position to exercise their private property rights. The question then arises, however, how big can the castle be?

I believe that there are lessons to be learned in the examination of the particular configurations of private property: understanding private property and the way it functions is indispensable to any attempt to constrain its reach, transform, or indeed, dismantle it. As we shall see in Chapter 3, the Free Software commons is in fact dependent on a particular version of private property – namely copyright – which it subverts to its own ends by using its power of decision-making to instantiate a commons that ensures reciprocity in perpetuity. As a property model, Free Software is grafted onto copyright, using the power of its enforcement mechanisms to ensure certain freedoms for all. We will understand Free Software better, when we understand it as property. And we will understand property better, when we understand it as including commons.

My discussion in this chapter will begin with a disentanglement of property *in general* and property *in particular*. I will then explain in more detail the notion of property relations as relations between people with regard to things, and property protocols as those normative codes that structure these relations. This will give us the basic structure for developing a framework within which social relations with regard to things can be understood – be they structured through law and private property rules, through the emergent customs of commoning practices, or any other property system. I begin with three variables only: the *relating subject*; the *related-to object*; and the *relational modality*, which is defined through property protocols. I examine the relational modality of private property relations in some detail, and show that it consists of several elements, which enable its functions. Changing these elements, or *reconfiguring the*

*specifications of private property* even in only small ways, can lead to surprising transformations of the kind of community that this relational modality gives rise to. Next, I discuss the ways in which *common property* forms are usually classified and distinguished from *private property*, which shows that the differences between different property forms are all differences in the configuration of, essentially, the same elements. Indeed, I conclude that property protocols, whichever way they may be expressed, all provide answers to the question of who makes (or can make) decisions over the actions of people with regard to things, and by reference to what these decisions are legitimised. I then argue that it is through the articulation of property protocols that a commons self-constitutes.

I hope to show that a property framework can be a useful toolbox for the commoner, as well as that by inscribing commoning onto the framework, new tools and perspectives for property analyses become available more generally.

## **2.2 Property in general, property in particular.**

“The distinguishing feature of Communism is not the abolition of property *generally*, but the abolition of bourgeois property” (The Communist Manifesto; emphasis added).

The way in which the term property is often used and hence understood is as an object or a collection of objects under someone’s exclusive control: “your property” is the stuff that you own, and what you own you have very special rights over. “Get off my property” shouts the landlord at stray ramblers, his

aggression warranted by his special, legally protected relation to the fenced-in ground on which he stands.

### **2.2.1 Absolute dominion.**

Underlying this sort of understanding is the conception of ownership as absolute dominion, most unequivocally expressed by Blackstone in the eighteenth century: “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” (1962: 2)<sup>35</sup>.

The dominion conception of ownership has its roots in the classical Roman concept of *dominium ex jure Quiritium* which is often described as conferring absolute rights over the object of ownership to the owner. The best-known Roman law definition describes dominium as “the right to use and abuse [consume/use up] one's own within the limits of the law” – *jus utendi et abutendi re sua quatenus iuris ratio patitur*. However, there is disagreement about whether this citation is correctly attributed to Roman law regarding property<sup>36</sup>, as well as about the extent to which *dominium* in practice amounted to complete sovereignty over something, given that laws in ancient Rome regarding the resolution of conflicts over property were very complex.<sup>37</sup>

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35 However, Frederick Whelan (1980) has shown that Blackstone's *Commentaries* are replete with examples of the limitations on absolute ownership.

36 See Shael Herman's ‘The Uses and Abuses of Roman Texts’ (1981) for a revealing discussion regarding the supposed definition of *dominium*, tracing its most likely origin to Grotius, founder of the school of modern natural law, and a Justinian article on mandate – not property.

Moreover, even during Blackstone's era "no legal system afforded protection to an unchecked dominion of a resource by an owner" (Christman 1994: 18). In fact, it is questionable whether the notion of "sole despotic dominion" by someone over some things without any kind of state intrusion or other limitations was ever instantiated to any significant degree in any system of law (Christman 1994).

No matter, however, where exactly its roots are and how exactly it is realised in practice, the conception of property as absolute power of disposal is a forceful one that has made it into one of the most important modern liberal documents of history, the French Declaration of Rights of Man:

"The right of property is that which belongs to every citizen to enjoy and to dispose of his goods at his will."<sup>38</sup>

The dominion conception, while rhetorically very powerful, invoking, as it does, deep-seated feelings regarding individuality, independence and power in the face of a world full of threats to a

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37 See Henry Maine (1861); Christman (1996); Duncan-Jones (1990). Lawson (1958) denies that absolute ownership was ever instantiated in any legal system. See also Dias (1976).

38 Herman (1981: 676) clarifies the link between property, the contract-making individual and the state which we broached above: "A freedom with unspecified content, [property in the Declaration of Rights] conformed with a post-feudal image of men as free, willing parties to a social contract, bargaining their way up and down an economic ladder. The interdependent ideas of contractual freedom and private ownership were logically anterior to the state, itself a pact of so many free wills. "The government (was) instituted to guarantee men the enjoyment of their natural and imprescriptible rights," proclaimed the Declaration of Rights of 24 June 1793. Among these rights were liberty, equality, security and private property."

mortal human body and the things it needs or wants, is nonetheless a very narrow perspective which betrays the multitude of property relations which have structured and continue to structure social relations.

However, James Harris has forcefully argued that the notion of *dominium* (which he calls “full-blooded ownership”) underlies all property institutions, in fact that it is *presupposed* by any property institution, as well as by any rules that set out to limit the realm of dominion. For Harris, even the different versions of common property (which we will encounter later) are all merely aberrations of the logically prior idea of *dominium*. Harris would nonetheless agree that in a lot of literature and ordinary parlance, property – a general term – is equated with private property – a particular configuration of property. We have seen this conflation at play the discussion of Free Software and Free Culture in Chapter 1. Such type-token conflation is arguably not very surprising given the hegemonic character of private property in contemporary economic systems. Most accounts and legal articulations of private property, however, do not actually institute it as the kind of absolute sovereignty that *dominium* posits. For example, property-limitation rules, according to Harris, characterise all existing property systems (Harris 1996: 33), and hence constrain the absoluteness of dominion. Dominion, in reality, is not absolute, it is conditional.

That is to say, not only do we need to distinguish between *property in general* and *property in particular*, we also need to distinguish between the different kinds of configurations of property that might be grouped under the term *private*. Absolute dominion might be one such configuration and its justification, if there should be any, is probably limited to a rather narrow class of objects which we might term, following Margaret Radin (1982), *personal* possessions.

### **2.2.2 The variation of property.**

There is an ancient contrast between “private” and “common” property. Plato conceived of his ideal republic as based on common property arrangements, while Aristotle, as we have seen, promoted forms of private property as a better way of organising social relations. Since their time, many arguments for and against private and common forms of property have been developed, hailed and ridiculed.

Clearly one of the major issues in political theory has been to identify and discuss the rival merits of private property on the one hand, and common (or public or state or collective property) on the other<sup>39</sup>. This is hardly surprising, given that, whatever form they may take, property institutions are fundamental to social life. The kinds of conceptions and rules that exist regarding property in any given society will structure the kinds of interactions people will have, the kinds of economic practices they will engage in, the kinds of production that will exist, the kinds of policy priorities that will be set, and the distribution of resources that will take place – in brief, property relations constitute communities. Or, in the words of Edwin Hettinger: “Property institutions fundamentally shape a society” (Hettinger 1989: 31).

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39 Some of the more important works in recent decades are C.B. Macpherson’s “Theory of Possessive Individualism: From Hobbes to Locke” (1962), which provoked many responses, including a renewed engagement with seventeenth century philosophers’ views on property; and Robert Nozick’s “Anarchy, State and Utopia” (1974), which assumes the primacy of individual property rights and which led to critical explorations of the justification of private property, including general analyses of justificatory arguments for and against private property (e.g. Becker 1977).

Andrew Reeve has argued that thinking about property blurs the boundaries between the idea of an economic system, a legal system and a political system, by providing some of the most fundamental connections between them all (1986: 7). Property connects the economic, legal, and political in its coding of relations between people with regard to things. Humans dwell in a very material world, no matter how suffused it may be with symbolisms, know-how, value and meaning. As human beings, we participate in and share this world in which the animate and inanimate, the human and non-human intermingle and interpenetrate. But how we share and how we participate can take a multitude of forms. Property is a central part of shaping these *hows*.

Despite being “ubiquitous and complex, socially important and controversial”, property is also “notoriously elusive” (Harris 1996: 6). Writings in political philosophy dealing with property do not always refer to the same thing. As Waldron writes: “My suspicion is that talk of 'a right to property' means something different in each case” (1988: 15).

Sometimes, property is envisioned as a simple relation between a person and a thing, and explored in terms of the justifications that exist for someone to have absolute dominion over a thing of the external world. Sometimes it is envisioned as “a social cake capable of being sliced up in different ways” (Harris 1996: 6), and investigated in terms of the justifications for the unequal distribution of the cake. Lawyers conceive of property differently than moral or political philosophers who again work with different conceptions than economists. There is, it seems, not one single correct meaning of the term “property”.

One thing is for sure, however, property is more than either private or common. Neither “private property” nor “common

property” have had stable meanings throughout different eras and areas. Nor has one conception ever prevailed exclusively. Property “...is not immutable ... but ... like all material and intellectual phenomena, incessantly evolves and passes through a series of forms which differ, but are derived, from one another” (Lafargue 1975: 3).

Apart from the countless normative works that have been written over the centuries and which expound in detail the advantages and disadvantages of any particular manifestation of property, there exist also a series of studies which explore the different historic manifestations of property as an institution in legal and political thought and practice (e.g. Schlatter 1951; Lafargue 1975; Alexander 1997). But to acknowledge the historical variation in conceptions of property also:

“...throws up the problems of identifying the significant variation in institutions and ideas, and relating the two, on the one hand; and of providing a general account of the features of property of which these variants are examples on the other” (Reeve 1986: 45).

In that sense, a general characterisation of property depends on how to identify different conceptions of property, and how many of them to recognise.

A *general* account of property, for Reeve, should encompass all the *particular instantiations* of property as its variants. It should indicate what might vary amongst the different conceptions of property, and thereby also what exactly a justification of property needs to address. However,

“All attempts in the history of theorizing about property to provide a univocal explication of the concept of ownership, applicable within all societies and to all resources, have failed” (Harris 1996: 5; see also Honoré 1987).

It is a curious fact that the perhaps most central concept that is shared across the disciplinary boundaries of philosophy, law and political economy remains an unsolved puzzle. This is probably a testimony to its ubiquity: it is simply too wide a concept to pin down. As such, the fact that no univocal explication exists is not a call for a solution either. It is certainly not my ambition to here provide such an explication.

I do, however, want to present a framework from within which property analyses of a wide range can be applied in a variety of settings. The settings that I am particularly concerned with are those of social movements, the lived realities of struggles for redistribution of land, its resources, and the means of production and distribution. The application I imagine is the self-articulation of needs, desires, aspirations, affects and relational modalities with regards to things, in the form of property protocols. In other words, the process of self-articulation, that is, the collective determination of property protocols which structure social relations with regard to things is also a process through which a community autonomously constitutes itself. From an anti-capitalist perspective the most attractive power of property, it seems to me, is the power that some systems of property relations lend people to self-legislate and thus inscribe a community's values and priorities upon the land and into the surrounding things.

### **2.3 Property as social relations.**

To begin with, then, we need to overcome the idea that property is a simple person-thing relation that implies an absolute (or even conditional) entitlement:

“We often think of property as some version of entitlement to things: I have a right to this thing or that. In a more sophisticated version of property, of course, we see property as a way of defining our relationships with other people. On such versions, my right to this thing or that isn't about controlling the "thing" so much as it is about my relationship with you, and with everybody else in the world”  
(Rose 1993: 27-28)

#### **2.3.1 Hohfeld's matrix.**

The more nuanced perspective can in great part be attributed to “a pivotal article” (ibid: 42, note 10) by Wesley Newcomb Hohfeld in which he outlined ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913). However, because the work of Hohfeld stands as a milestone in the liberal and legal positivist traditions, not much - if any - “politically radical” work has been built on his conceptions; indeed there is a general reluctance amongst anti-capitalists to engage with liberal jurisprudence, including structural analyses of property. This can be taken to reflect the conflation shared across the political spectrum and in the public imagination that property *in general* is seen as equal to the very *particular* social relations that exclusive, private property rights give rise to. Or, *private property rights, particular to capitalism*, are understood as *property in general*. Writing on property often does not unpack a given instance of property properly, but for instance merely states

that “property is theft”. That is in itself a false reference, since Proudhon arguably was among the first to seriously analyse and unpack the idea of private property, which he did *not* simply write off as theft (Waldron 1988)<sup>40</sup>.

Hohfeld’s important contribution to jurisprudence was a way of systematising components of legal reasoning. His analysis applies to property as one of the sub-systems of law. Hohfeld “expounded the lowest common denominators of the law by reference to two squares of correlations and opposition” (Harris 1996: 120-121):

Right	Privilege	Power	Immunity
Duty	No-right	Liability	Disability

***Illustration 1: Hohfeld's matrix.***

In this matrix there is *correlation* (vertically) between *right* and *duty*, between *privilege* and *no-right*, between *power* and *liability* and between *immunity* and *disability*; while there is an *opposition* (diagonally) between *right* and *no-right*, between *duty* and *privilege*, between *power* and *disability*, and between *liability* and *immunity*. The top half of the squares refers to the entitlements that characterise jural relations, the bottom half to its

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40 It is beyond the scope of this essay to discuss Proudhon's analytical work further, but Waldron (1988: 323-330) provides a good starting point for an understanding of Proudhon's analysis, which, to put it in very simple terms, for example takes note of the fact that: *If a justification of private property is based on the idea that it is good and essential for a human being to have and to hold private property rights, then all human beings should have and hold such private property rights, unless a society wittingly wants to create inequalities.*

correlated position.<sup>41</sup> On Hohfeld's account of jural relations, each such relation consists of four basic components: (i) the person or group of persons holding an entitlement (X); (ii) the person or group of persons occupying the position correlative to the entitlement (Y); (iii) the form of the relation (i.e. whether it is, say, a right-duty relation or a power-liability relation); (iv) and the content thereof (the specification of the right-duty relation).

A Hohfeldian explication of proprietary entitlements would hence specify the content of such entitlements. That is, it would specify what Y must do or cannot do, and what X may do or can do. With regard to proprietary entitlements, any suitable specification would necessarily refer to the object or resource with regard to which X and Y have to behave in a certain way<sup>42</sup>. In that sense, the relation of primary importance is the relation *between people* (X and Y, you and me), even though this relation will *concern things*. We can begin to understand property relations as social relations between people – all people – with regard to any given thing.

The matrix permits us to understand the simple dominion conception – the vision of one individual having absolute, legitimate control over a thing – as implicating everyone else.

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41 Hohfeld was convinced that “if all more complex legal conceptions were reduced to combinations of these various bi-party relations, legal reasoning would be clarified, fallacious conceptualization would be avoided, and genuine normative choices made apparent” (Harris 1996: 121).

42 Misreadings of Hohfeld have led to the disaggregation thesis (most prominently developed by Grey 1980), in which property as a concept is rendered (legally) useless. Property “disintegrates” and leaves only rights-duty relations between persons, the “owner” becomes invisible as emphasis is placed on different people having different rights with regard to the same resource (cf. the “bundle of rights” conception), thereby obscuring further the projection of the king into the sovereign individual.

Our starting point thus becomes the web of relations between people, and the interrelated nature of their actions which always involve objects, things, resources as either settings or props. Hohfeld's work added that multi-lateral dimension to liberal jurisprudence and thus raised awareness of the complexity of the social relations that are involved in any given instance of property relations<sup>43</sup>.

### **2.3.2 Social relations as starting point.**

In a related context, yet with a different analytical approach, Sol Picciotto takes note of the importance of the starting point in analyses of property: “Property should be thought of *in the first instance* as social” (2003).

In formulating what can be understood as a general understanding of property relations, Irving Hallowell, following the versatile Huntington Cairns (1935) and Hohfeld, emphasises the *triadic* character of the institution of property. In a classic anthropological theory essay from 1955 Hallowell writes: “A

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43 Hohfeld's matrix has served as an inspiration for the influential understanding of property in terms of a “bundle of rights” (Maine 1917; see also Becker 1977; Munzer 1990). Penner (1997) provides a critique of the “bundle of rights” conception), which simply refers to the aggregation of different rights and duties that make up an instance of property relations. That is, the bundle of rights idea highlights the different components that make up property such as the right to use, dispose of, inherit. Different rights of the bundle might at different times be allocated to different persons (or other legal entities). The rights of the bundle can be separated and reassembled depending on circumstances, as we shall see in some detail in Section 2.5. The bundle of rights understanding is derived directly from Hohfeld's matrix, as it refers to the correlations that can be composed from within Hohfeld's matrix or any modification thereof.

owns B against C', where C represents all other individuals" (Hallowell 1974: 239). The dominion conception of property, by contrast, is *dyadic*. A dyadic conception of property would propound that A owns B, without C even entering into the equation. The difference is one of starting point, where the dyadic conception fails to see that the notion of an entitlement logically implicates those whom it is an entitlement *against*.

The triadic understanding as a starting point in analyses of property relations permits a more thorough understanding of property relations in *general*. It also facilitates and enhances an analysis of any given *particular* set of property relations within a specific economic system or culture, such as capitalist democracy.

"If we wish to understand property as an institution in any society our primary concern must be an analysis of the pattern of rights, duties, privileges, powers, etc., which control the behavior of individuals or groups in relation to one another and to the custody, possession, use, enjoyment, disposal, etc., of various classes of objects. In such an undertaking we have to reckon with an exceedingly complex network of structural relations and a wide range of variables, the specific pattern or constellation of which constitutes the structure of property as a social institution in any particular case." (Hallowell 1974: 239)

Here we have the definition of property with which I would like to start. Property relations, on this view, are social relations. These social relations make up and are shaped by a "pattern of rights, duties, privileges, powers, etc., which control the behavior of individuals or groups in relation to one another and to the

custody, possession, use, enjoyment, disposal, etc., of various classes of objects”. The etceteras of the definition might worry the analytic philosopher, but they open up the general concept of property to a wide variety of particular configurations. This open definition should not prove to be controversial. It is reflected in Jeremy Waldron's work where he defines property as “the concept of a system of rules governing access to and control of material resources” (Waldron 1988: 31). It is taken for granted in the elaborate frameworks that Andrew Reeve (1986), and John Christman (1994) present, as well as in discussions of intellectual property rights, such as Hettinger’s “Justifying Intellectual Property Rights” (1989). All start from a perspective of property as social relations between people with regard to things – patterned by legal or customary protocols that guide behaviour.

As already mentioned, Harris’s authoritative treatment of property, however, argues that property protocols have distinctive features without which they might still be protocols guiding people’s behaviour with regard to things, but they would not be *property* protocols. It will be instructive to familiarise ourselves with Harris’s terminology and account at this point.

### **2.3.3 Property and non-property.**

Property, according to Harris, has the dual function of governing the use of things and of allocating “social wealth”, which for Harris refers to the total of those things and resources which are scarce, that is, over which there might be substantial conflict regarding their use. That is, property functions as both a mechanism for distributing *use-privileges* (and their concomitant wealth effects, about which more later), as well as *control-powers* (decision-making authority). If rights of property only

conferred on the holder the right to use a resource as she liked but never the right to allow another to use it, then the dual nature of the function of typical property institutions would be split (Harris 1996: 28). For Harris, in property, use privileges come with control over uses made by others.

All property institutions (actual articulations of complex sets of property protocols into property systems or regimes), for Harris, are characterised by the twin notions of *trespassory rules* on the one hand, and the *ownership spectrum* on the other (Harris 1996: 31-32). The *ownership spectrum* is made up of a set of *ownership interests*, which are best understood as the kinds of specifications needed to make sense of the Hohfeldian jurial relation. An ownership interest will specify a particular use-privilege or control-power. Different ownership interests may obtain for different people for the same resource. All ownership interests (i) specify a juridical relation between an owner and a resource, (ii) are open-ended, in that they do not specify exactly the kind of uses that a resource may be put to, they merely express open-ended privileges and powers, and (iii) they authorise the pursuit of one's self-interest on part of the individual or group owner. It is the *open-endedness* and *authorised self-seekingness* of ownership interests which are crucial to Harris's account.

*Trespassory rules* are social norms that oblige every member of a society – apart from the individual or group of individuals that are taken to have the kind of open-ended, self-seeking relationship to a thing that ownership is – not to make use of the thing in question without the latter's consent. The ownership spectrum refers to those open-ended relationships that the trespassory rules presuppose and protect.

“Where trespassory protection runs out, the owner cannot dictate uses. Within the compass of that protection, his use-privileges and control-powers are inferred, not from the content of the trespassory rules, but from the prevailing conception of the ownership interest itself” (Harris 1996: 32).

Without the prevailing (and, so Harris, *prima facie*) conception of *ownership interests as open-ended and as authorising self-seekingness*, no talk of property would make sense. The limitations and constraints that are imposed on owners (such as expropriation rules, planning and environmental regulations) presuppose this idea of dominion. Normative discussions of property which seek to replace private property regimes with common property regimes also all presuppose this notion of dominion as the ultimate referent in regard to which they make their case for its dissolution in practice.

“Ownership interests, however labeled in law, are among the organizing ideas through which social wealth is filtered. Social wealth confronts citizens as lumps over which open-ended privileges and powers obtain, not as packages of specified rights” (Harris 1996: 138).

It is the open-endedness of privileges and powers that is crucial to the concept of ownership, argues Harris. As the owner of an apple, I do not only have the right to eat my apple raw, and to eat it cooked, and to sell it and to give it away, that is, I am not the holder of a package of specified rights<sup>44</sup>. Rather, I have a

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44 As we shall see later, in a lot of liberal jurisprudence, ownership is often explained by reference to the idea of a “bundle of rights” which obtain to the owner (or is spread over several people).

privilege to use it in whichever way I want: I can eat it by myself, cut it up and share it, let it rot in the fruit basket, bury it in the garden, pickle it in formaldehyde, or or or. This is what open-endedness refers to. Open-endedness is limited to uses that do not contradict any other kind of law. For example, I cannot justify intentionally causing your asphyxiation by lodging my apple very deep in your throat, simply by reference to the fact that it is *my* apple (i.e. over which I have open-ended use-privileges). Criminal law still applies. But since it would apply whether or not the apple was mine, indeed whether it was an apple or a fist that asphyxiated you, Harris calls such prohibitions *property-independent*. While it is possible to imagine societies that are structured *without* such open-ended powers of persons over things, Harris holds that no actually existing societies are structured that way.

For Harris, the institution of property presupposes the notion of open-ended powers and privileges which a person can have over things, and which authorise the pursuit of ends that are entirely justified simply by virtue of being *the person's own ends*. These ends might be worthwhile, healthy, cooperative, or even altruistic, but they might well not be. The characteristic of the idea of property is that it legitimises (within the confines of the rest of the law) *whatever* choices an owner makes. The owner is cast in the image of the monarch who is the source of legitimacy rather than its object. Within the little king's realm, the king is right *whatever*. Of course, as already discussed, Harris is not committed to the view that the pursuit of self-interest, is the only or primary motivation for human action. He does show, however, that the conception of property as open-ended power is fundamental to its legal operation, and that the vision of the individual sovereign is at the heart of the property system of capitalist democracy.

The notion of open-ended use-privileges *to* and control-powers *over* things which authorise self-seekingness might be a prevailing notion, systemically instituted. It might also be a notion that is presupposed in all existing discussions of property relations, but this does obviously not mean that it is only by manifesting this notion that social relations with regard to things can be structured. Harris of course does not deny this. In fact, he expounds in detail the social structures of imaginary societies that show that social life can be organised entirely without reference to this fundamental notion of ownership (which I will continue calling the dominion conception). However, he calls such societies “property-less”, exactly because they *do not* conceive of relations between people with regard to things in terms of (primarily) dominion (Harris 1996: 15-23).

But this break between property and non-property is exactly the kind of break which I want to overcome. Why is that necessary? Would I not be stretching the concept of property too far and too thin? What usefulness would remain in the term? Property, most contemporary commentators would agree, is social relations between people with regard to things, which are given their particular content through particular normative protocols. By providing a framework within which all such relations can be (roughly) understood, we are also providing a framework that facilitates a comparison. Private property, then, can clearly be seen as one particular configuration of property relations in an ocean of possibilities. In fact, it will be seen as a set of several different such configurations, rather than a monolithic idea itself. This will help to free our imagination with regard to the possible. Moreover, by being able to account for commoning through such a widened understanding of property, we enable a more detailed comparison of commoning on the one hand, and the various forms of private property on the other. If we think of commoning as the normatively guided practice of particular kinds of social

relations with regard to things, we can develop a property framework which accounts for different possibilities of commons.

## **2.4 A framework for property as social relations.**

Let me hence begin to present a framework based on the definitions of property as social relations which we encountered above. It should be understood primarily as a heuristic device (rather than an exposed ontology) for the purpose of bringing into relief certain features of relations between people with regard to things which I would like to discuss.

### **2.4.1 The variables of social relations with regard to things.**

What this framework reveals is that property, as patterns of conventions structuring social relations with regard to things, always refers to (i) a social group amongst whom the relations hold and are performed (the *relating subject*), (ii) some resource, object or set of objects with regard to which the relations hold and are performed (the *related-to object*), and (iii) the way in which the relations are shaped, that is constrained and/or enabled, through normative protocols (the *relational modality*).

These variables will find different extensions in different contexts. For example, the *relating subject* might be the population of a nation state, it might be a tribal community, a corporation, a social movement, or the whole of humanity. Property associates pluralities of people, and so an analysis of property requires us to inquire into some such plurality. In important ways, the relating subject is co-emergent with the

relational modality. That is, communities are continuously reproduced through people's interaction with each other and the things that surround them on the terms given by their conception(s) of property. The normative protocols that shape these interactions, conversely, emerge and are transformed in the continuous reproduction of community. It might be important to clarify here that the "relating subject", as I construe it, is the A+C of the often used schema "A owns B against C". It is not merely A. This defines a starting point for an analysis of property that is social, rather than one focused on the "owner" (the individual or group holder of use-privileges and control-powers).

The *related-to object*, as already stated, might be a resource, an object or a set of objects, or a heterogeneous pool comprising various resources and objects. These might be big or small, tangible or intangible, significant or trivial, but they will always have some meaning and value to people. The stuff of the material world is suffused with meaning and value: as human beings, we do not only name things, we also order them in categories and in relation to one another, conferring meaning on them through that ordering/relating process. But, of course, we do not name and order things out of the blue, or from some sort of "view from nowhere" (Nagel 1989). Things play roles in the human lifeworlds they furnish, and gain their meanings accordingly. Meanings mostly develop over long periods of time, and in association with occurrences, cosmologies, actions, and all the other things that make up human social realities. It is because people dwell and participate in the material world, always already relating to all its constituents, that meaning emerges. It emerges from lived, human-non-human interaction, rather than being super-imposed by the human onto the non-human from some kind of external position (Ingold 2000). The particular meaning and value that something has for people thus depends on, and in fact arises from, the particular ways in which people

interact with it (over time). While objects are most often concrete, measurable entities, resources need not be. A forest might seem like a relatively bounded thing in most of Europe, but in the Amazon basin “the forest” is an all-pervasive, amorphous meta-resource providing all that is needed for food, home-building, fuel, ornamentation and medicine. It is in constant transformation, growth and decay, and even if we could measure its totality in some way, it might have significantly changed soon thereafter. Similarly, Free Software can be seen as a pool of software code, made up of individual code fragments, but also of projects that combine, transform, rework, comment on and discard these fragments. The pool is growing and changing constantly, and might one day dry up. The related-to object of our framework maps onto most other characterisations of property systems, as the B of the “A owns B against C” relation.

The *relational modality* is what characterises the associations between the entities that make up the relating subject (between the individuals and sub-groups of individuals of an overarching community, i.e. A+C) with regard to the related-to object. To say that property is relations between people with regard to things does of course not tell us anything very specific about these relations. Property in general says very little about property in particular (which is possibly an additional reason for why it is so easy to conflate the two: specifying property in one way or the other at least commits us to a particular understanding of the relations that actually pertain or ought to pertain between people with regard to things – rather than just positing that such relations exist). “A owns B against C” does not tell us anything about what “owns against” actually means, apart from that it somehow associates A and C with regard to B. It is the specificities of that association that an analysis of property must address.

Above we spoke of the primacy of interaction between humans, and between humans and non-humans. Co-existence is the starting point for all of us. If we proceed from this point of view of the interaction between humans and things, it should become obvious that the *relational modality* of our property framework is primarily an active one. We *do* things with people and the stuff that surrounds us. But what we *do* is usually dependent on what we *can do*, and what we can do is partly subject to norms and conventions, customs and laws, freedoms and prohibitions. It is these normative protocols that guide social interactions with regard to things that *relational modality* refers to. This brings in the “controlling behaviour” aspect of the definition we adopted above. Property relations, we said, are a “pattern of rights, duties, privileges, powers, etc., which control the behavior of individuals or groups in relation to one another and to the custody, possession, use, enjoyment, disposal, etc., of various classes of objects”. It is the *particularity* of these action-guiding protocols that an inquiry into the relational modality of a particular form of property would set out to describe. It would be an inquiry into what “owns against” of the “A owns B against C” expression actually involves in practice. Harris’s open-ended ownership interests are specifications of relational modality on our account.

The kind of social analysis of property for which I am arguing hence begins with an inquiry into the particularities of the *relating subject*, the *related-to object*, and the *relational modality* of the property relations under examination. For purposes of this essay, this means that if we want to understand the property relations that characterise the Free Software movement, for example, then we begin by asking the questions posed above.

### 2.4.2 Articulated and unarticulated normative protocols.

The Free Software movement is a translocal community of, primarily, software developers and software users, who are associated by their common creation, maintenance, reproduction, distribution and use of (free) software, in a shared vision of software development. The pattern of rights and duties that guide their activities is clearly articulated in the movement's defining legal document, the GPL software license. We will examine the GPL in Section 3.5. In the case of Free Software, the pattern is articulated in legal detail, while in other contexts it may not be articulated at all. This is an important point for understanding the social analysis of property that I envision: the rights and duties may be embedded in shared customary practices or other forms of unwritten rules, without being legally articulated or otherwise made explicit. Hackers' customs were implicitly embedded in hackers' practices in this way before they were articulated in the GPL. "Rights and duties" hence have to be understood in a loose sense as referring to the kinds of freedoms and responsibilities people in social settings take one another to have. Hallowell clarifies:

"From a comparative point of view ... property, conceived as a social institution, does not necessarily imply legal relations in the narrow sense as part of its structure. But it may be discovered upon analysis that the social *function* performed by law in securing property interests in our culture may, in another society, be performed by a non-legal institution. Such variables are of great importance to our understanding of the structure and functioning of property as a *human* institution." (Hallowell 1974: 238)

Social structuration that might be upheld by the letter of the law in one society, might be upheld by a different social institution in another. Such different social institutions might be customary: habits, rituals, ceremonies, manners or, to put it simply, unwritten law. Indeed, customs are often precursors for legal articulation<sup>45</sup>. On my account Richard Stallman successfully articulated hacker customs into property relations in order to defend the software commons, even though he does not recognise his achievement on those terms.

Approaching the practices of Free Software from our framework will allow us to identify the particular features that distinguish “Free Software as property” (Chapter 3) from other configurations of property relations. Doing so will reveal aspects of both Free Software and private property that otherwise pass unnoticed. The former is an example of how the latter can be radically transformed through subversive use of the decision-making authority that private property entails. This will only become fully clear in Section 3.5.

To propose a common framework within which all the different varieties of relations between people with regard to things can be located allows us to contrast and evaluate them with more ease. It is not to flatten out important distinctions in the variety of human social experience and organisation, but it is to highlight that in

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45 There is no scope to deal properly with the concept of custom in relation to positive law here. I had previously drafted a chapter on customary law, particularly drawing upon the work of Platt (1894), Smith (1903) and Allen (1927) as well as Rose (1993): “It is at least certain that in many societies of which we have evidence, before any clearly articulated system of law-making and law-dispensing has developed, the conduct of men in society is governed by customary rules...they are 'legal'...inasmuch as they are binding and obligatory rules of conduct (not merely of faith or conviction), and that the breach of them is the breach of a positive duty” (Allen 1927: 64)

terms of social relations with regard to things, certain variables (subject, object, modality) generally apply, and their particular extensions in different contexts speak of the variety of ways in which human co-habitation, of a hamlet, a mountain, a metropolis, cyberspace, planet Earth, including all their respective non-human constituents, can be realised.

By starting from such a general view on property, we “snap” the conventional and constricted understanding of property as private property, and open it up to the multitude of modalities of agency that characterise social relations with regard to things. Moreover, this framework allows us to articulate property relations from community practices. Such articulation, or making explicit, fosters reflexivity in communities, and is particularly helpful for those who struggle against privatisation. It can be a means by which to constitute and strengthen spaces which operate on logics different from, and maybe even subversive of the logics of capitalism. It is, in my view, somewhat ironic that this way of articulating practised social relations with regard to things into explicit property relations has been so well performed by Richard Stallmann and the Free Software Foundation, who refuse to see property in this way, let alone consider Free Software on such terms at all. But to look at matters in this way is, I believe, to better recognise their achievements and the wider potentialities involved.

Our framing of property as particular configurations of social relations, which at its most general level associates a relating subject with regard to a related-to object in a relational modality, pushes us to inquire into the details of these variables in order to understand and evaluate any one property system. The behaviour of individuals or groups in relation to one another and with regard to various classes of objects is guided by particular laws, norms, customs, or values, which vary from one socio-cultural

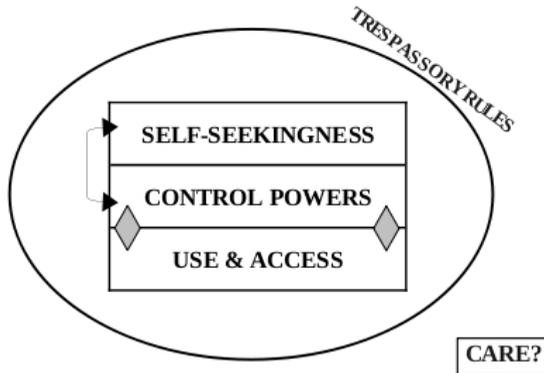
context to another, and often within any one such context. Property systems might be multiple and overlapping, maybe even conflicting within any particular setting. A social analysis of property would have to be attentive to such multiplicity.

But leaving such complexity aside for the moment, in order to illustrate the particular way in which the relational modality of private property is predominantly configured, we shall examine now the (legal) specifications that determine the actual rights and duties of a private property owner with regard to others in capitalist democracies.

### **2.5 Specification of property: the configurations of relational modality.**

I have already said that Harris's open-ended, self-seekingness-authorising ownership interests should, on our model, be understood as specifying the *relational modality of basic private property*.

A diagram (on the following page) will aid the understanding of the discussion that is to follow.



**Illustration 2: Basic configuration of private property.**

### 2.5.1 The basics of private property.

*Use of or access to* a resource is a fundamental element of social relations with regard to things. We said that most of the time, our interactions with things are about *doing* things. I might eat the apple, or cut it up and share it, or bury it, or let it rot in the fruit basket, but a precondition of whatever I do with it, is my *access* to it. *Use-privileges are about accessing and using resources* – in specific as well as open-ended ways.

The function of property, according to Harris (and Waldron and others), is to distribute decision-making authority over the use of things (*control power*) along with access to these things (*use-privileges*). While control-power might lie with one person (e.g. the landlady), and use-privileges with another (e.g. the tenant), in the paradigmatic case of private property, these are *collocated* in

the sense that it is the landlady who can make the decision to grant the use-privileges that are part of her ownership interests to the tenant. The two grey arrows of Illustration 2 are meant to illustrate this collocation of what is sometimes also called “beneficial use” (use-privileges) and “title” (control-power). Control power, on Harris’s account (which I accept as expounding the paradigmatic case of private property), is *self-referential in terms of its legitimation*. The landlady’s decisions with regard to, say, whom she is going to let her house to, are legitimate simply because she is the landlady. She can justify all her decisions simply by stating that they were hers. The institution of private property authorises her to exploit all her control powers and use privileges according to her rational self-interest – or whim. The thin black arrow to the left indicates the referral. Self-seekingness is not only authorised, it authorises her decisions. It is in this way that the individual is enthroned as sovereign in her own realm.

*Trespassory rules*, the social norms and legal protection that keep people from accessing or using what is under someone else’s control power without their consent, circumscribe the realm within which the individual is sovereign. This realm can be understood as a real territory, especially in the context of land ownership: trespassory rules legally fortify the fence. But more importantly, this realm is a commixture of a thing and its open-ended uses: trespassory rules do not only keep you from sitting on my chair without my consent, they also keep you from interfering with my painting it fluorescent green. Within this “realm”, the owner is free to dictate uses (unless she has contracted some of them away as the landlady has to the tenant). Trespassory protection legally secures this power. We shall see in Section 3.5 that it is copyright that circumscribes the realm within which Free Software can flourish.

Interestingly, as already broached, on the economic account it is simply assumed that once a sovereign is in place, *care* is taken of the realm, because the individual is an agent that optimises the use of resources and generates the most wealth. But as Proudhon so usefully reminds us, the Aristotelian premise does not necessarily hold:

“The Roman law defined property as the right to use and abuse one's own within the limits of the law -- *jus utendi et abutendi re sua, quatenus juris ratio patitur*. A justification of the word abuse has been attempted, on the ground that it signifies, not senseless and immoral abuse, but only absolute domain. Vain distinction! ... The proprietor may, if he chooses, allow his crops to rot under foot; sow his field with salt; milk his cows on the sand; change his vineyard into a desert, and use his vegetable-garden as a park: do these things constitute abuse, or not? In the matter of property, use and abuse are necessarily indistinguishable.”<sup>46</sup>  
(1840: 42)

An effective distribution of care – so that the things of the world may not only be used, but used in intergenerational perpetuity, for example – is not achieved simply through paradigmatic private property arrangements. Unless decision-making authority is legitimated by reference to something else than mere self-seekingness, care cannot adequately be accounted for on this model. In fact, we may say that the distribution of care has been entirely overridden by the distribution of self-seeking decision-

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46 *Abuti* in Latin means both 'to misuse' and 'to use up, to consume', which might temper Proudhon's exclamations somewhat. His point is still relevant to our discussion, however.

making authority in the institution of private property. By mapping the elements out in our heuristic diagram, we learn that it is not necessarily the exclusivity of the decision-making authority (the landlady can make the decision exclusively, and she can make the decision to exclude you) that is the normatively most problematic issue with dominion. Another, possibly deeper-seated issue concerns the value by reference to which such decisions are made.

It is a particular vision of the interrelations of autonomy, agency, identity, authority that underlies the conception that the legitimacy of a decision derives from who made it rather than by reference to what it is justified. It is the instantiation of private property itself that creates the automatic link between justification and self-seekingness: we have projected the monarch into the individual. The individual (like the monarch before her) becomes the source of all legitimacy: within the confines of my realm, what I want and choose is right. The institution of private property confers the power to make might into right. In Harris's terms, it allows for desire to become authorised choice (Harris 1996: 102). But to place the source of legitimacy into the individual will is the expression of a particular value. It is the valuing of individual choice that needs to make reference only to itself. It is the valuing of a subjectivisation of values (cf. Sayer 1999) over and above coming together in a mutual shaping of values.

### **2.5.2 Capitalist private property.**

*Capitalist private property* has to be characterised in slight distinction from "basic private property". It has been argued decisively (Christman 1996; Holderness 2003; Berle and Means

1932) that it is especially *two* conditions that are central to the particular configuration of private property in capitalist democracy. For the influential jurist-cum-economist Richard Posner, the function of property rights is to “create incentives to use resources efficiently” (1977: 10), and exclusive property rights are a necessary but not sufficient condition for the efficient use of resources. Wealth is thought to be maximised when resources are used most efficiently. Wealth maximisation, however, “requires a mechanism by which the [owner] can be induced to transfer rights in the property to someone who can work it more productively; a transferable property right is such a mechanism” (Posner 1977: 29). Private property rights-based relations within capitalist democracy are hence specified by the *collocation* of (i) *exclusionary rights*, that is, control powers or decision rights and (ii) *exchange rights*, that is, rights to alienability on the market and wealth effects. This collocation is at the core of the privatising forces of the capitalist economy: in the so-called free market, agents (i) enjoy exclusive decision making power over goods and resources (or capital) and (ii) the rights to any income that the fruits of their resources may bear and generate through exchange in the market place.

“This collocation of decision rights and wealth effects provides both the incentive and the feasibility for value-enhancing transfers. Berle and Means ... appropriately call collocation the “atom of property” and view it as “the very foundation on which the economic order of the past three centuries has rested” (Holderness 2003: 77).

This (second)<sup>47</sup> collocation will have to be added to our diagram (see Illustration 3 on the following page).

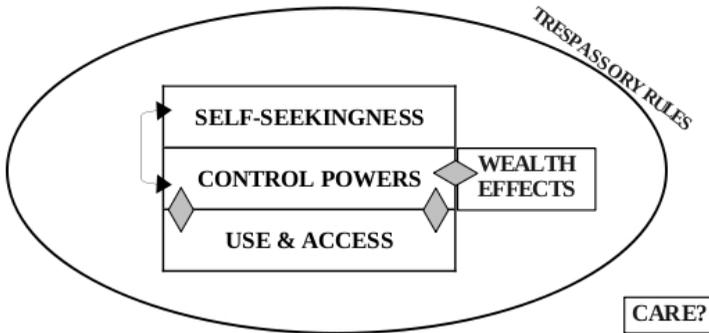
We might conceive of the right and privilege to wealth effects as part and parcel of use privileges. But it adds a particular quality to private property, making it characteristic *of the particular form of private property that structures capitalism*.

It is this particular configuration of relational modality that converts things into commodities, and makes the capitalist market feasible.<sup>48</sup>

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47 The first collocation we observed of decision-making authority or control power and use privileges or access has, to my knowledge, never been identified as being of much significance. Given that, as we shall see below, splitting either of these collocations changes social dynamic significantly, I have decided to highlight the collocated nature of both of them.

48 Interestingly, corporations are usually characterised by a separation of the use-control and wealth-allocation functions of property (or the “separation of control and ownership” in Berle and Means terms (1947: 93)). Shareholders, for example, have the right to a share of the wealth effects, yet cannot usually expect a right to make use of corporate assets. However, because a corporation counts as a juridical person, of which shareholders and chief executive officers are just parts, we can still sensibly speak of a collocation here.



***Illustration 3: Capitalist configuration of private property.***

### 2.5.3 Splitting the atom of capitalist property.

If the collocation of control powers and wealth privileges is the “atom of property”, what happens, we may wonder, if we split it?

A simple illustration with regard to the real estate market may be illustrative. If we decoupled control powers and wealth privileges with regard to land and housing, i.e. if we removed the exchange rights from the property arrangement that governs real estate, then the speculative aspect of the markets in land and housing would, if not completely disappear, at least be severely undermined<sup>49</sup>. Although the land and housing market would be profoundly changed with far reaching implications of wealth distribution, you remain a private home owner with the right to

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49 For this to work in practice, other organisational forms for the circulation of housing would of course be necessary in order to ensure the mobility of people. However, this merely serves as a heuristic example here.

exclude others, but *not* the right to sell it. You and I could be house owners and enjoy a substantial part of the privileges that come with being house owners, but we could not sell our houses to one another or to others. With regard to land, people could exclusively own pieces of land for growing crops, but they could not engage in speculative trade of land. Moreover, we could imagine that, if we only reconfigured the property arrangements with regard to the use of land, but not of the fruits of the land, the right to sell those crops could still obtain. Removing the right to exchange, one of the powers of the owner under a capitalist private property regime, would hence make the real estate market – as we know it – disappear. The kind of speculation that makes some people very rich through controlling land and through letting, but which keeps others confined to renting in poverty and without direct access to land, would not exist. At the very least, it would be transformed to such a degree that it would be unrecognisable. In other words, the implications of private property with regard to land and housing would be entirely different if only one of its conditions was changed or removed.<sup>50</sup>

Another way of reconfiguring the private property relations that define capitalist democracy would be to alter the conditions of (for example) the right to exchange, rather than removing it completely. If exchange rights were not decoupled from exclusion rights, but rather *redefined*, such as through the prescription of wider community involvement in the transfer, (legal) agency of owners in the market of land and housing would necessarily unfold completely differently, literally on

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50 An argument for the ownership of one's organs could also unfold along these lines, because it would not be prone to criticisms based on the claim that it encourages a trade in organs. A poor person would through exclusive ownership, but without exchange rights, not be encouraged by the law of property to trade in her organs.

different terms or conditions. Speculation would be possible, but it could be specified that those implicated by speculative transfer would have to be consulted in the process of transfer. Transfers – and thus speculation – would be significantly slowed down, and could then be assessed through community participation on a case by case basis. Exchange would thus become much more transparent. The same principle could be applied to currency speculation and such activities as computer algorithm and network based currency speculation consisting of many transfers per day would effectively become impossible. There is an initiative called the Tobin Tax, which proposes a simple tax on currency trading that is designed with a view to limit speculation in currencies. In structure the Tobin Tax is similar to the alteration of exchange rights, but does not constitute a removal of the fundamental right that is currently facilitating financial speculation in currencies across borders. The Tobin Tax does not imply that “speculation” will definitively disappear. It “merely” implies that those who have the desire to speculate in and exploit the potentials for wealth in taking exclusive control of currency with a view to speculative trade, will be subjected to taxation that either: (a) might lower the incentives for doing so, or (b) will generate an income for the state that can be redistributed, for example through the provision of universal health care or perhaps a basic income for all human beings or instead used for the purchase of repressive technologies. This example is for illustrative purposes only. The ambiguity associated with what the state can and will do with such revenues – including the problem of the state as such from an anti-capitalist perspective – should be obvious. Moreover, the Tobin Tax as an additional and limiting element of exchange rights is an indirect and rather weak version of the addition of “community involvement in transfers” that I was suggesting above. It does not carry as much weight as direct community participation might do in the changing of socio-economic organisation, but it is structurally very similar

and, nevertheless, arguably a reconfiguration of property worth considering<sup>51</sup>. However, such discussion crucially should involve open debate about the use of those revenues. Such state income could in theory be used for the upkeep of squats, social centres and permaculture villages, rather than for the consolidation of the state.

#### **2.5.4 Personal property.**

This point about property (re-)configuration can be expanded by focusing on the related-to object. Many of the classical justifications of some form of private property (based primarily on decision or exclusion rights) were arguably never intended to apply to all classes of objects. Arguments for an inalienable right to private property at their most laudable refer to a relatively small amount of things, those that constitute a person's identity (Hegel), those that a person has directly mixed their labour with (Locke), and those that are necessary for an at least minimally dignified life, free from hunger and fear. Such a right would not include the right to unlimited accumulation, and would not obtain with regard to the means of production and natural resources. There is a wide variety of arguments, reasons and narratives inherent in the writings of the philosophers who originally justified private property as an important theoretical aspect of the transition into capitalism that are relevant for delimiting personal property. Many different aspects could be singled out, indeed an entire thesis could be written about just that. I am here not

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51 During the current financial crisis the Tobin Tax has unsurprisingly gained currency, as it were, in mainstream debate. See for instance "The time is ripe for a Tobin tax" by Larry Elliot (2009). However, see De Angelis (1999/2000) for a critical examination of the shortcomings of the Tobin Tax in the real world of speculation.

arguing for what kind of objects ought to be the object of such personal, private property relations, but merely raising the point that there might exist some that ought to be.

The arguments of Hegel, Locke and others suggest that a certain kind of exclusive decision-making power over and responsibility for some things is of great value to individuals. People get bound up with things in constitutive ways that are not always fetishistic in an unhealthy sense. If we remember that we said a relation can be constituted by interaction, that is it can be performed as well as symbolically posited, we should be able to see that there are relations between an individual and an object that are intimate because of the significance (to the individual) of the action that involves both of them. The cuddling of a teddy bear comes to mind, or the daily use of a toothbrush or saucepan, or the occasional, cathartic weeping over an old photograph. Hence a certain kind of exclusive personal control (possibly never absolute) over a few things in the world – enough to sustain a realm of autonomy and freedom – is needed in any community. Regarding land, its resources, and the means of production and distribution, however, I maintain that access to and use of them is so crucial for basic subsistence, while the way in which it is accessed and used have such significant social and environmental implications that affect, ultimately, the whole of humanity (and all other living beings), that the configuration of these property relations ought to be approached differently than the configuration of personal property. These, however, are normative side points for now.

The atom of the private property relations that define capitalist democracy has been identified as the collocation of exclusionary and exchange rights and it follows from this that one of the most profound reconfigurations of capitalist property relations consists in splitting that atom, or radically altering the composition of that

atom. One way in which that can be done is by adding limitations to the scope of those exchange rights. I will show in Chapter 3 how Free Software is a reconfiguration of property relations where the two elements whose collocation makes up copyright – exclusion and exchange – are both redefined in such a way, and their social implications thereby changed so fundamentally, that they are hardly recognisable (which might explain why it is that some authors fail to understand Free Software as an instance of property relations at all).

Having seen that the kind of community that property relations give rise to can be altered in potentially radical ways merely by small changes to the normative codes that guide collective behaviour with regard to things, we can begin to imagine property configurations of many different kinds with regard to different things and for different purposes.

## **2.6 Property and commons.**

Because of the way in which we have construed our relating subject (as the overarching community of our analysis), we can see that the relational modality within capitalist democracy is, as a starting point, primarily one of asymmetry and exclusion, and hence also fragmentation. However, the asymmetry is, in some not insignificant way, shared. Rose (1993) suggests that private property can be understood as the “common property” of a community which has agreed upon, embraced and considered the implementation of private property theirs (or, we might want to add, upon which private property was imposed). De Angelis relatedly argues that: “No social relation among people can do without some types of commons that act as a centre of their interaction. Not even in capitalist production” (De Angelis

2005b: 68). In capitalist democracy, the normative protocols that are private property rights are part of such a centre. A+C are united, as well as separated, through the common values that underlie the institution of private property. Whether or not, however, private property continuously causes fragmentation is not the primary question for a general understanding of property. The more important point that I want to make here is that not only do communities make property relations, but property relations make communities. And, as repeatedly noted, it is the *particular specifications* of property that actually give structure to a community.

Above I have introduced the reader to the basic configuration of private property, and its capitalist variant. In this section, I will examine the structure of property configurations that are usually contrasted with private property and variably referred to as common, public, communal, communitarian, or collective property, or some such. While we have seen that there can be even within one particular school of thought a lot of disagreement over the particular kind of thing that private property is, its central idea is usually that decision-making authority over particular resources is allocated to *individuals*. That is, individuals are given rights to make decisions about what is being done with a resource and who can do so – and they are given these rights as against everybody else. Private property being a right, the owners' decisions with regard to the object of their ownership will be backed up by public force. Common property is sometimes used to refer to *joint ownership* – where a determinate number, but more than one person hold private property rights in something together. This form of property is probably best thought of as a particular configuration of private property and is obviously central to capitalism, in the form of firms, corporations and (indeed) charities.

### 2.6.1 The importance of access.

Benkler contrasts “property” (really, *private* property) with *commons*, which he divides into four different types according to two parameters. The first parameter concerns the collectivity which has access to the commons: is it a defined group, or an indeterminate “everyone”? Open commons are open to all, whereas limited-access commons are open only to a defined group of people. In that sense the latter are, according to Benkler, better thought of as “limited common property regimes rather than commons, because they behave as property vis-a-vis the entire world except members of the group who together hold them in common” (2006: 61). The second parameter concerns the regulation of access. All limited common property regimes that have been studied, so Benkler, are governed by some set of rules regarding their use, but of course we could at least imagine *some* that were not regulated in that way. Open-access commons are those that can be accessed unconditionally by all. Other commons might be governed by rules, but even so, these constraints, if present at all, “are symmetric among all users, and cannot be unilaterally controlled by any single individual” (2006: 61-62).

	Regulated	Unregulated
Open to all	Regulated commons	Open-access commons
Open to a defined group	Limited common property regimes	?

#### ***Illustration 4: Benkler’s commons.***

On this conception, *access* is central. Classifications turn on the question of *who* has access (all or only some) and *what kind* of

access they have (“anything goes”, free for all, or conditional access, specified by rules). This is of course in many ways in line with the conventional view that property is about access to and use of things. The distribution of control power, that is, decision-making authority, however, is slightly submerged on this perspective as the questions of regulation and openness take its place.

I have to add here a few observations. Firstly, one wonders why regulation is supposed to be a defining parameter: if entirely open-access commons exist primarily as a justificatory “tragic” fiction for private property (see Section 2.1), and all known “limited property regime commons” are regulated; that is, if all *realistic* commons are governed by some kind of rule, why is regulation a parameter at all? Secondly, we might be able to imagine “open” commons that are governed by rules that *do not* apply symmetrically among all users, which can however neither be controlled *unilaterally*. What about a lake to whom everyone has symmetric access in terms of swimming, but only women can remove water for their gardens from? Assuming that this rule has not been unilaterally imposed, but evolved over time or through a collective decision-making process, would we be looking at a limited property regime in terms of “water-removal” and at a commons in terms of “swimming”?

Moreover, one is easily led to muse whether, on Benkler’s characterisation, there is anything else than air (his example) that could ever be a truly open commons. Of course access to certain things can be *potentially* open to all, such as Central Park in Manhattan, if only everyone could get a visa, and across the sea. A “virtual” internet commons, similarly, might be *potentially* open to all, but actually to very many it is not. The question this raises is why *potential* openness is supposed to be a usefully defining parameter.

However, “openness” (always potential), if inquired into a little more, might tell us something that is somewhat hidden by the terminology. The question of whether a commons is (potentially) open or not makes a difference in a situation of conflict: trespassory rules would circumscribe a “limited common property commons”, whereas they would not circumscribe an open commons. In a court of law, “openness-to-all” would make a difference if someone had been denied access to a common resource. That is, potential openness seems to matter in terms of *allegations of trespass* and *conflict resolution*. This is the conventional view: openness means nobody can trespass, after all, the commons is open to all. However, if all realistic open commons are regulated in some way, then we might wonder whether trespassory rules would not in some significant way still circumscribe even the open commons. After all, even if the group which has access to the commons is indeterminate (potentially open to anyone) rather than clearly defined (only open to a group of people that could potentially be listed), access would only be allowed under certain conditions. That is, access would be (potentially) open to anyone *who abides by the conditions of access* (for example, access to a lake is open for swimming, but not for using the water in irrigation). While we might not be able to draw up a positive list of persons who have access as against everybody else (“Sarah, John and Paul, and all their offspring”, i.e. the defined group), we can clearly state the characteristics of someone who can have access as against someone who cannot (“she who abides by the rules”). Trespassory rules would hence still circumscribe the commons, yet trespass would not be based on *identity* (in the birth certificate kind of sense), but on *action* (how do people behave).

“Openness”, we might say, is meant to capture this difference: are people excluded from access for reasons of identity or for

reasons of action?<sup>52</sup> We can note here that identity and action are key organising principles of social relations with regard to things that are rarely made explicit. They will resurface in our discussion below. Again, however, the question of control power looms large: *who* is making the decisions with regard to who has access and under which conditions? I will now turn to Jeremy Waldron's account of common property, in which it becomes clear that the value by reference to which these decisions are legitimised plays an important role in the institution of property.

### **2.6.2 The importance of “whose interest”.**

Waldron (1988) contrasts private property with common property on the one hand, and collective property on the other. On his account, *common property* is understood as referring to resources, access to which is *open to all and any* member of that society or community. Rules with regard to such access might exist, but they exist only in order to enable equal access and enjoyment, or care and maintenance of the resource. A public park would fall under this rubric. It might be forbidden to cut down trees or dig large holes or build pyramids in the park, but these rules merely exist to ensure that its main purpose as a place of recreation is upheld *for all*.

What is called common property by Waldron is elsewhere sometimes called public (or state) property, as it often refers to resources that are administered by the government of a nation state for the benefit “the public”. The public is of course an elusive unit, referring usually to an indeterminate group of

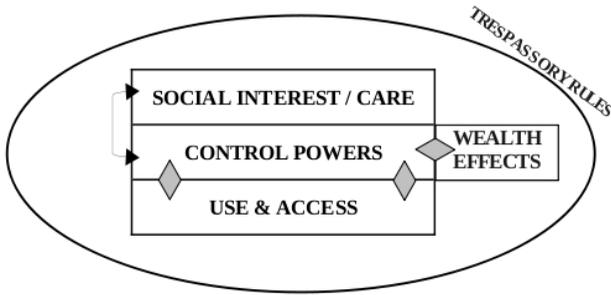
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52 I will leave the question of the ontology of identity and action, and the potential collapse of their distinction for someone else's work.

people, even if connected to a specific nation state. Public property usually implies that use-privileges are available equally for this indeterminate group of people, who, however, do not have any control powers. The public authority administering the park would usually have such control powers, which is why it could sell the grounds to a developer (unless additional legislation prohibits it). Public property is predominantly characterised by a separation of “beneficial use” (use-privileges) from “title” (control-power), and the title holder is supposed to control and dispose of the property *in the “public interest”*.

On Waldron’s account, *collective property* refers to resources, decisions over access to which are made collectively, based on a determination of *the “social interest”* – for example through “leisurely debate among the elders of a tribe [or] the forming and implementing of a Soviet-style ‘Five-Year Plan’” (2004). This implies that members of a society would not necessarily all have equal access to the collective resource. It might be that it was decided to be in the best interest of “all” that, say, only the elderly, or an intellectual elite have access to a fresh water reserve.

Waldron’s classification of property systems turns firstly on the question of *who has the authority* to make decisions over access to resources (individuals and quasi-individuals such as incorporated groups, or some wider collective such as a nation or a tribal community). Secondly, it turns on the question of “*in whose interest*” these decisions are made. Very crudely, private property allows for decisions to be made purely in pursuit of self-interest, common property ensures that everyone’s (individual) interest is equally addressed, whereas collective property provides access to resources according to the overarching social interest, or common good.



***Illustration 5: Basic configuration of public property***

It seems to me, however, that Waldron’s distinction collapses too easily. The objective of keeping access to a resource open to all embodies ultimately just as much a determination of “the social interest” as a decision with regard to a collective resource would – which is why the administering authority is understood as accountable to the public with regard to, say, the park. We have also already discussed the way in which a system that is predominantly based on private property arrangements embodies a particular idea of the common interest (a particular common value), namely one of the primacy of individual autonomy – often reduced to market agency. Despite these reservations regarding the distinction between “social interest” and “interest of all”, we can glean from Waldron’s account that (i) distribution of decision-making authority, on the one hand, and (ii) the norms and values according to which decisions are made, on the other, remain key organising principles of social relations with regard to things.

On Waldron's account, common (and collective) property are characterised by their control power having to refer to something else than merely itself in order to be legitimate (see Illustration 5). The monarch's self-referentiality in terms of legitimacy has been abolished, while the element of care is often retained in public property arrangements as part of its justificatory basis. Trespassory rules, of course, continue to stake out and protect the scope of decision-making authority (made legitimate by its consideration of the social interest).

### **2.6.3 Common property and the legitimacy of self-seekingness.**

For Harris, property institutions, as we have already seen, are characterised by ownership interests – open-ended powers and privileges with regard to a thing, which authorise self-seekingness, hence bridging the gap between desire and authorised choice – and trespassory rules which protect these interests. Ownership interests which do not authorise self-seekingness, but rather imply that particular uses can only be justified by reference to something else than self-interest (e.g. the public good) are called *quasi-ownership interests*. Non-property, hence, refers to resources with regard to which *no* ownership interests or quasi-ownership interests, and concomitantly *no* trespassory rules obtain<sup>53</sup>. An open-access commons is the paradigmatic example of non-property on this account<sup>54</sup>. Harris refers to such non-property as “common property” (always in

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53 Harris also excludes from property institutions resources access to which is protected by trespassory rules, but without any reference to ownership interests. Since these “protected non-property holdings” are (according to Harris) “rare” (1996: 111), and we might want to add “hard to imagine at all”, I will not worry too much about them here.

quotation marks) to mirror the terminology of other writers. Apart from “common property” (which, for Harris, really is no property at all) there are other forms of property that are nonetheless distinguished from the ownership interests plus trespassory rules model characterising individual private property. These are (i) joint (or group or corporate) property, (ii) public (or state) property, and (iii) communitarian property.

As already mentioned, joint property is best thought of as a version of private property. It is characterised by the *absence of trespassory* rules regarding the resource *between* the owners, even though there might be “internal regulations allocating use-privileges and control-powers between members of a group, as will often be the case with associations like clubs or trade unions” (Harris 1996: 101). Corporations are usually characterised by a separation of the use-control and wealth-allocation functions of property (or the “separation of control and ownership” in Berle and Means terms (1947: 93)). Shareholders, for example, have the right to a share of the wealth effects, yet cannot usually expect a right to make use of corporate assets. Whatever the internal organisation actually looks like however, Harris writes that “those who exercise control are free ... to justify their actions on the grounds that they are in the self-seeking interests of their members or shareholders. In the case of these [joint] variants, as in that of individual private property, ownership interests serve as irreducible organizing ideas between desire and authorized choice” (Harris 1996: 102).

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54 He admits that certain uses of the resource might be banned to all, but this would have to be by property-independent prohibitions, such as through taboos. Any rule that may govern the particular resource in question would have to be free from proprietary presuppositions, that is it cannot assume any ownership interest whatsoever: “[i]f property is ‘common’, no man may say you nay because the thing is his” (Harris 1996: 109).

Public (or state) property, according to Harris and mirroring Waldron's account, is characterised by *quasi-ownership interests*. Those agencies vested with certain use-privileges and control-powers are not at liberty to exploit these for their own benefit, that is, *they lack authorised self-seekingness*. Instead, the exploitation of their powers can only be justified by reference to the particular public purpose for which the agency has been vested with these powers in the first place. For example, by reference to the public interest in terms of the park (as is reflected in Illustration 5). Public property is hence, for Harris, a quasi-property, an aberrant form of dominion.

Harris contrasts communitarian property with public property and joint forms of private property: "a spontaneously evolved category of property holding which has been of the greatest historical significance, but which, for better or for worse, has been largely eclipsed in modern society" (Harris 1996: 103). "Communitarian property" in his sense, refers to a wide range of land-holding arrangements, the particular specifications of which depend on social, economic and spiritual variables, and are only conceptually united by their negative contrast with private property. He explains:

“'[C]ommunitarian property' refers to a situation in which a community of persons has the following relationship to a resource, usually land. They have the benefit of trespassory rules excluding outsiders from the resource – in that sense it is their private property. However whatever powers of internal division or transmission they possess are referable, not to the wider institution which contains the trespassory rules that confer protection against

outsiders, but to internal regulations arising from their mutual sense of community” (Harris 1996: 103).

While communitarian property is accorded trespassory protection, “it carries no connotation of open-ended self-regarding exploitation” (Harris 1996: 104). In that sense, it resembles public property. However, particular uses that are made of the resource do not have to be justified by reference to any particular purpose that is external to the community. The community does not have to defer to any exogenous regulations with regard to the internal distribution of use-privileges and control-powers. In that sense, it resembles private property. A crucial difference between joint private property and communitarian property, on Harris’s account, is that the former is an institution *of* and *in* existing legal systems, while the latter is not – even though legal systems might *recognise* communitarian property (for example in the form of indigenous title to land) as some kind of special, though probably defeasible interest<sup>55</sup>.

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55 Harris refers to a decision of the High Court of Australia in *Mabo v. State of Queensland* (No. 2) 1992, 175 CLR 1, which ruled that “the ‘radical title’ to land acquired by the Crown on settlement was burdened with the ‘native title’ of any aboriginal ... group ... for so long as its descendants remained in occupation and until native title was effectively extinguished by legislation or exercise of executive power, or surrendered to the Crown. So long as it persisted, the community’s native title was subject to appropriate legal protection against all the world. All questions as to the rights of individual members of the community over their land were to be determined, as questions of fact, by reference to the particular evolving traditions of the group. It was not requisite to show that, internally, the members viewed their relationship to the land as an ‘ownership’ interest, in any way comparable to the range of ownership interests known to modern legal systems” (Harris 1996: 103).

Harris's classifications are very useful in understanding the way in which most contemporary legal systems *actually* function with regard to questions of property. However, as noted previously, while the open-ended powers authorising self-seekingness which obtain over "lumps" of social wealth (Harris 1996: 138) *indeed* characterise the landscape of capitalist nation states, there is of course no reason for them to *have to* do so. And this is so *whether or not* private property is logically prior to any conception of "common property", as Harris incessantly argues.

For our purposes, his conception of communitarian property warrants special attention. It is characterised by a clear sense of communal autonomy from the greater totality of which it is nonetheless a part. Let me repeat his words again here:

"[W]hatever powers of internal division or transmission they possess are referable, not to the wider institution which contains the trespassory rules that confer protection against outsiders, but to internal regulations arising from their mutual sense of community" (Harris 1996: 103).

Moreover, it is characterised by diversity in its manifestations, and an independence (another autonomy) of the *only* institution of property that Harris recognises as proper property:

"The social, ethical, and spiritual bonds which unite a spontaneously-evolved community to the resource it collectively claims for its own are infinitely variable. In the absence of private property institutions, that variable relationship has its normative force independently of any conception of property whatever" (Harris 1996: 117).

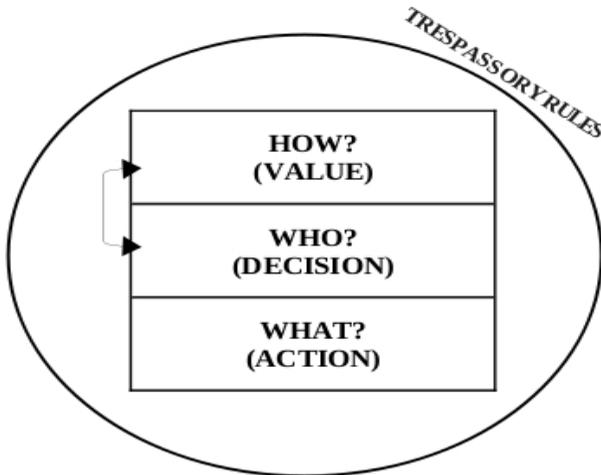
I proposed a framework that seeks to understand property as structuring the social relations with regard to things that give rise to a community, and that illuminates the constitution of a *relating-subject* through its particular interactions with regard to a *related-to object*. Given this framework, we can understand communitarian property as *the autonomous constitution of a commons based on the articulation of common values in the form of property protocols*.

#### **2.6.4 Commoning as autonomous property configuration.**

Let me conclude (for now) that the conventional accounts we encountered so far can be summarised as all explaining and classifying different forms of property according to particular configurations of (i) the distribution of decision-making authority (regarding what use can be made of something and by whom, including wealth effects, and the trespassory rules that stabilise this distribution); and (ii) that by reference to which these decisions are made legitimate (whim or self-seekingness, “public” or “social” interest, spontaneously evolved community values).

We might summarise this further as (i) *who decides about what?* and (ii) *how?* And we might map these concerns onto our original diagram. Self-seekingness or social interest are encompassed by the question of *how* decisions are justified. And justifications always happen, even if tacitly, in common. If most people respect the boundaries that private property draws, and if those that do not are being publicly penalised, then the idea of self-referential decision-making authority is, at least to a certain degree, a *common value*. Control power is encompassed by the question of *who can make decisions* about what can be done with

something. Are individuals or groups of individuals assigned sovereignty over different things? *Who* has to be involved in the decision-making process for it to be legitimate? Do I need to ask someone before I hurl the plate I eat from against the wall? Do I need to ask someone before I cut down trees to build a parking lot? Access and use are encompassed by the question of *what can be done* with the resource in question. We have discussed above that, as human beings, we do not only do things, we do things *with things*. The decision-making power that characterises property is hence about enabling and constraining *action*. And as action also always involves an agent, this power is also obviously about people.



*Illustration 6: Elementary questions of property.*

Autonomy, in the sense of Harris's communitarian property holders, I maintain, is the background upon which answers to these primary questions are configured, and which provides the background values by reference to which these configurations gain their meaning (and legitimacy). And this is not only so for the kind of communities that hold communitarian property in Harris's terms, but for any kind of social totality (what we have been calling the *relating-subject* or A+C). Autonomy is not primarily *freedom-from* something or other, but the *freedom-to* collectively self-constitute. Those who can collectively self-constitute form autonomous communities. Commoning is such collective self-constitution, commoning is creating autonomy. It is in the process of self-constitution that a certain kind of force of law is unleashed which binds the collective together. What binds us together is our common values, emerging, as they do, from common action, co-habitation, communication, sociality. And it is from the collectivity that answers to how, who and what emerge, are contested, entrenched and overthrown.

Does this mean, then, that capitalist democracies are autonomous commons? In some ways, it is instructive to see all social totalities as commoning. I have noted a few times already that there are important ways in which capitalist societies do indeed also constitute commons, with shared values and common (if fragmenting) practices and relationships.

However, there is a distinction that I would like to make lest I stretch the concept of commons too far for it to be useful for my anti-capitalist purposes. The distinction is based on Linebaugh's thesis of the difference between individual rights and rights of commoning. And also reflects Harris's insight that "social, ethical, and spiritual bonds ... unite a spontaneously-evolved community to the resource it collectively claims for its own" (1996: 117).

In the introduction we introduced a distinction between individual rights, invested in individuals, and rights of commoning that was reflected in the principle differences between, on the one hand, The American Declaration of Independence, and the Magna Carta and the Charter of Forest (the Great Charters) on the other.

The former revolves around the individual's right to private property, while the latter take as a starting point “a world of use values” (Linebaugh 2008: 42-43) and are “independent ... of the state and the temporality of the law and state” (ibid: 45). Rights of commoning, for Linebaugh, reflect “a natural attitude” - it is not the self-referential, individual will that decides on action in isolation from the environment and the community in which it is embedded.

The configuration of control powers (who makes the decisions) and use privileges (what actions are enabled or constrained) emerges through a collective labour process, and is not sanctioned nor enforced by the state, but lived and negotiated in common (Linebaugh 2008: 45).

Conversely, The American Declaration of Independence articulates the right to private property, projecting the monarch into the individual, thereby instantiating and valuing self-referential legitimacy (of course not always a bad thing), and justifying the state insofar as it upholds these individual rights.

The commoner's body is autonomous from the state, her privileges and powers, rights and duties are laid upon the land and emerge and are reproduced through social interaction.

This nature of the rights of commoning distinguishes them radically from liberal logics of private property, which proceed

from assumptions about a sovereign individual whose autonomy can be interpreted, in an ironical reversal, as a fiction that serves to legitimate the state. The common value associated with capitalist private property lies in a moment of *creation of separation*, and the common value is thus expressed by all remaining sovereigns in their individual realms. The message of this value is that no further common values are necessary: the sum of market agency will deliver the common good. That it is sufficient for achieving commonalty, then, is the core value encoded in capitalist property.

Commoning, on the other hand, is the collective performing of actions involving the use of things. It is collective not insofar as it is *always* performed *together*, but insofar as it is guided by norms and values that are *common*. It is not about everybody working on the field, or on a software project *at the same time* (even though it sometimes will be). Rather it is about building relationships to one another through *the attention to* a common field or a software project, that is, through the attention to a common resource which enables and sustains both collective and individual projects. It is in the *shared attention* that is paid to a resource that the commoners' relationships are formed. And the forming of relationships is also the forming of values – the learning of a *common language*. In this sense, commoning is recursive: it both *makes* and *is made by* shared values.

Care, we might say, lies at the heart of the decisions that need to be made with regard to a commons. In commoning, it is less about *who has the power to make decisions*, and more about *which decisions are actually made*. Decisions are legitimised by the shared values they embody (if they do) rather than *by whom*

they were made<sup>56</sup>. The primacy of *identity* (in the birth certificate kind of sense) is eclipsed by the primacy of *action* in the question of who makes authorised decisions and who has authorised access. The elements of property (use-privileges, control power, that which legitimises control power, trespassory rules) are still the same, but their different configurations give rise to qualitatively different social relations with regard to things.

## **2.7 Concluding Remarks.**

As a technical code for the commodity form, private property has proven very powerful. As such, it has colonised our understanding of social relations with regard to things. Indeed, we have become objects ourselves, as captured in Marx's concept of alienated labour or the management concept of "human resources". However, as argued in the Introduction, freeing ourselves from the commodity form does not mean freeing ourselves from "the thing". As a matter of fact, it seems entirely unlikely that we would at all be able to free ourselves from the commodity form, deeply ingrained in our psyche as it is, without a foregrounding of the role of things in social relations. Such foregrounding of the thing in order to escape the commodity form would be expressive of self-articulated needs and desires and be sensitive to its social and environmental setting.

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56 This is not to say that power and identity are absent in the commons. In the context of the Linux kernel, which is a central Free Software project, it has been noted that the organisational mode is meritocracy (Moody 2001). This means that it often matters after all *by whom* decisions are made. However, this *power to decide* is closely associated with how well a person embodies the *central values* of the commons in her *actions*.

Understanding property primarily as social relations opens up to a possible critique of property that goes far beyond the usual arguments regarding the justifiable reach of private property, or the exact conditions that make up property rights. By taking a social relations view, the way in which property protocols shape entire communities moves into the foreground. The focus on entire communities brings questions of the *ends* of social organisation, which the hegemony of the economic view suppressed, back into discussion. Correspondingly, the possibility of constituting commons through an articulation of property relations into property protocols becomes more visible. Such articulation can be based on actually practised relations or on normative judgements about which kinds of practices would help constitute the kind of commons people would like to create.

I set out to provide a minimalist framework for a *social analysis of property* that could facilitate *processes of self-articulation of relational modalities* through which commons can *autonomously constitute* themselves. The framework can moreover be used for re-articulations of the private property rights through which exclusive control of the land, its resources, and the means of production and distribution is sanctioned. My purpose has been to deconstruct and destabilise property, reveal its anatomy and operationalise it to open ends. Property provides answers to the question of who makes (or can make) decisions over the actions of people with regard to things, and by reference to what these decisions are legitimised. But can the commons, even if it finds its own answers to these questions, constitute itself under capitalist democracy?

Commons always generate their own property protocols. Commoning is acting together in a world full of things, and full of life which is dependent on things. Values which guide this action will always be present, and will inform the practice of the

commons. To articulate these values into property protocols is a form of reflexive self-constitution. The important question is now how to articulate them within the setting of capitalist democracy.

Free Software, I argue, is an example of how a (very capitalist) private property protocol (namely, copyright) was cleverly reconfigured to instantiate and protect the commoning practices of hackers. As we will see in more detail in the next chapter, the Free Software commons relies on the decision-making power it has been granted through copyright, using it to provide freedoms for all in perpetuity.

It is not my intention to suggest that adopting the Free Software model is possible in exactly the same way *outside* the realm of copyright. Research on the legal particularities of different property rights would be necessary, and might vary between jurisdictions<sup>57</sup>. However, articulating the property protocols of Free Software will *inscribe upon the theoretical province of property the relational modalities of Free Software*, thereby *enriching* this province.

Moreover, by articulating their property protocols, many other commons could also contribute to an even more fine-grained understanding of the possibilities of property. Every time a commons inscribes itself upon property the conceptual framework is enlarged, as new tools and perspectives for property analyses become available. The picture is enriched through new ideas for *relational modalities*, ways of constituting

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57 The work of the P2P Foundation – led by Michel Bauwens – is doing pioneering work with regard to the translation of Free Software and related cyberspace principles into other domains. See <http://p2pfoundation.net/>.

the *relating subject*, classifying the *related-to object* and whatever else can be imagined.

As long as the *end* of the commons – the continued mutual articulation of the many yeses - is also the *means* of the commons, autonomy based on action and relationships has eclipsed the commodity form as a guiding principle of building social relations. The commons conceived in this way is a realisation of the politics of the meaning of life, and suggestive of social organisation beyond the nation state. The commons is a lived resistance: if there is any exit at all from capital, it lies in the subversion of property frameworks through the inscription of the relational modalities of the multitude of commons upon it.

Let us finally investigate the Free Software commons in detail to investigate its technical foundation, history of resistance, community building practices, and, of course, property relations.