

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 parcels³¹. 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 new³². 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

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 privatised³³. 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).

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.³⁴ 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:

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