

# 1. Property law

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## 1. THE DOMINANT IDEA OF PROPERTY

In this chapter, we discuss the modern paradigm of property law, or, in other words, the dominant idea of property shaped by (and shaping) the economic, social, and cultural elements of current forms of human organization. Legal narratives reflecting the dominant idea of property discount the tendency of lawyers to be left behind by technological developments. Lawyers constantly and belatedly try to subsume these developments into a stable *fundamental legal framework* that they consider almost immutable but is actually historically and culturally determined.

The existence of such a framework reflects the *fundamental ideology* of lawyers who describe law as a positive legal order against which a fact of real life can be objectively measured by knowing *ex ante* “what the law is.” Such measurement, they deem, allows social activity to be considered either *legal* (coherent with the abstract order) or *illegal* (at odds with it) through a professional act of comparison of the facts. This vision demonstrates the fundamental ideology (in the sense of false consciousness) called *legal positivism*. The reality, of course, is very different: no competent lawyer would ever tell her client whether he is going to win any case, even the simplest one.

The law “emerges” *officially* only at the very moment of the adjudication of a social conflict. Its “emergence” one way rather than the other is just probabilistic. From this perspective, the legal process seems closer to that described by quantum theory (in modern physics) than by traditional positivistic assumptions. The law, as such, is not therefore like a pre-existing object; rather, it is a probabilistic function depending on the context of its ascertainment. As in quantum theory—where the tools of observation are so powerful that they can determine the behavior of matter and energy at the subatomic level—in the law, the interpreter determines the outcome.

How could one predict that an occupation of property motivated by the need for shelter could be protected by law even against the legal owner,

as has occurred many times with squatters around the world?<sup>1</sup> Indeed, property law is particularly exposed to such a dynamic because a counter-principle of possession (based on factual control and use rather than formal title) is always at play in a remarkably unpredictable way. This is particularly the case when technological developments are involved.<sup>2</sup> Does the law of trespass apply to drones landing on my tree? It certainly does not apply to squirrels or raccoons.

In this chapter, we demonstrate that a difference exists between property as *a legal institution in action* and its paradigmatic description that results from the dominant ideological assumptions of positivism (e.g. a clear-cut severability of facts from values, of the domain of the “is” from that of the “ought to be”). Firstly, in property law, limits to the powers of the owner are diffuse and generally accepted by everyone as a necessary condition of relational life. For this reason, exceptions to the owner’s right to exclude unwanted interferences with her property exist in every legal system. Courts balance exclusion and access in many situations, determining through this process the contours of property law.<sup>3</sup> In the paradigmatic description of ownership, which property lawyers (and social scientists) assume to be a monolithic concept based on the idea of “mine,” the right to exclude is the essential feature of owning property, and every limit is at most exceptional and temporary.<sup>4</sup> In this view, property is individual sovereignty: the owner at home is like the queen in her castle. Once a limit is no longer applicable (for example, a servitude of access that allows a neighbor to cross a park), ownership naturally returns to its previous unrestrained might. Clearly, there is no logical reason why matters should be this way. When a servitude of transit is over, there are as many reasons to argue that the power of exclusion should return to the owner as there are that the right of access to the park should be extended as a generalized right to roam and access nature. Indeed, litigation on such matters can come out both ways depending on the conditions of the case and on the political and cultural attitudes of the judge and of the community. Nevertheless, the dominant

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<sup>1</sup> A Quarta and T Ferrando, ‘Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation’ (2015) 15(3) *Global Jurist* 261 <<https://www.degruyter.com/view/j/gj.2015.15.issue-3/gj-2015-0001/gj-2015-0001.xml>> accessed 16 December 2017.

<sup>2</sup> J Gordley and U Mattei, ‘Protecting Possessions’ [1996] *AJCL* 293.

<sup>3</sup> Joseph W Singer, *Entitlement: The Paradoxes of Property* (Yale University Press 2000).

<sup>4</sup> Thomas W Merrill, ‘Property and the Right to Exclude’ [1998] 77(4) *Neb. L. Rev.* 730.

legal generalization of the idea of property as exclusion produces a significant political impact since it determines the default rules of the system, in the broad sense of rules that would be applied in principle unless there are (legally argued) reasons to depart from them. The default rules of the system determine the behavior of law-abiding people and most often self-enforce. They are, so to say, the general regime of knowledge of the law. For instance, in Sweden or Italy (where there is no law of trespass in the Anglo-American sense) it is most natural that people would grab an apple from a tree whose branches can be easily reached from a public pathway. In the City of Berkeley, California, apples and lemons stay on the trees to rot, and if someone from the street reaches for them, it is not unusual that some third party would enforce the rule against trespass by grumbling about the owner's right to keep the fruit to rot.<sup>5</sup>

The dominant approach to property as the law of exclusion (and power concentration in the hands of the owner) is historically based and it is possible to highlight some turning points for the consolidation of these now generally accepted ideas, which correspond to the disappearance of the commons from the legal discussion.

## 2. THE ROMAN TRADITION

In the Western legal and political tradition, private property evokes a very specific paradigm, constructed in continental Europe between the eighteenth and nineteenth centuries.<sup>6</sup> It is a complex concept in which the legal attributes—particularly the right to enjoy and dispose of an asset fully and exclusively—are tied to the idea of freedom and personal fulfillment.<sup>7</sup>

The civil law and common law traditions share the centrality of the right to exclude in the paradigm of property, even if the construction of the legal category has been based on different approaches determined, among other things, by the absence in the Anglo-American system of a traumatic break with the feudal order, such as that of the French

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<sup>5</sup> On grumbling as diffused law enforcement see W Michael Reisman, *Law in Brief Encounters* (Yale University Press 1999).

<sup>6</sup> Richard Schlatter, *Private Property: The History of an Idea* (Russell & Russell 1973); P Gansey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge University Press 2007).

<sup>7</sup> Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Greenwood 2000).

Revolution.<sup>8</sup> According to this framework, in the civil law tradition, property law regulates the relationship between the individual and the things that belong to her: subject and object are rigidly separated, with the former governing the latter independently of its nature or particular characteristics. In the common law tradition, scholars typically consider property law as regulating the relationship between individuals, connected by relationships of power (rights) and of subjugation (duties) according to a relational approach.<sup>9</sup> In both systems of the Western legal tradition, property law is a set of crystallized rules aimed at ensuring stability for the allocation of wealth. In both systems, the default structure of private property is (1) the concentration of decision-making power about a certain thing in the hands of the owner and (2) the exclusion of any unwanted intrusion on the thing by a third party.

The idea of property changed during the long history of Rome from a small village around the Tiber in the sixth century BCE to a mighty global empire that was already well into its decline when Justinian enacted the most important compilation of Western law in 533 CE. The idea of *dominium* is considered the essential legal basis for the modern idea of private property because of its three main characteristics: absolutism (no duties to anybody), autonomy (full power to rule within the property), and perpetuity. Nevertheless, *dominium* was diffuse in the archaic era of Roman society in which families were political entities and the *pater familiae* was a political authority, a sort of king to whom things, land, and persons belonged (including his wife, sons, and slaves). The development of the Roman Empire and the transformation of its political order modified the idea of property as well. The complexity of such an extended period of time prevents, in other words, any interpretative generalization for demonstrating that the absolutism of private property derives from the Roman experience.

In particular, life in the cities imposed special rules on lands and buildings, so the absence of limits (the very meaning of absolute) was not a typical feature of property in Roman law. At the same time, property was not the only form of ownership: precarious possessions—ancient forms of temporary uses—were established on large public lands (*ager publicus*) for agriculture and pastures.<sup>10</sup>

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<sup>8</sup> John Philip Dawson, *The Oracles of the Law* (Greenwood Press 1978).

<sup>9</sup> Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1917] 23(1) Yale L.J. 16.

<sup>10</sup> W W Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (The University Press 1952; 2nd edn, revised by F H Lawson).

In spite of these transformations the term *dominium*, of Roman origin with its three attributes (absolute—autonomous—perpetual) exercises a strong performative power, such that in the famous words of Sir William Blackstone:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic *dominion* which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.<sup>11</sup>

### 3. THE FEUDAL TRADITION AND THE EARLY ROOTS OF INDIVIDUALIZATION

The variety of the forms of ownership expanded during the Middle Ages, both in individual and in collective forms. Uncultivated lands, forests, and swamps made the European landscape quite inhospitable for communities, whose survival depended on agriculture. For this reason, the organization of agricultural work was a survival priority for human beings. In order to organize production, different agreements granted different powers to use and cultivate land, according to a principle of bottom-up rationality aimed at granting survival to peasants and wealth to the *haves*.<sup>12</sup> The feudal era was the moment in which property law acquired elements of deep originality that the common law tradition still maintains in its professional terminology and structure: key concepts like tenure and estate emerged to describe the relationships among the king, barons, and tenants, foregrounding the system of personal obligations that binds subjects with different interests and powers over the same land. This background, in which land is not just seen as a physical entity but as a source of utilities assigned to different individuals, households, and communities, explains the facility that common law systems have even today to accept the sharing of powers among different owners (the famous bundle of sticks metaphor)<sup>13</sup> and the possibility to protect as

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<sup>11</sup> William Blackstone, *Commentaries*, Vol 1, Bk 2, Ch 1 (emphasis added). Available at <http://onang.com/library/reference/blackstone-commentaries-law-england/>.

<sup>12</sup> Ernst Levy, *West Roman Vulgar Law: The Law of Property* (American Philosophical Society 1951).

<sup>13</sup> Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', cit.; Tony M Honoré, 'Ownership', in A G Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 107–147.

property different interests and legal positions over the same resource.<sup>14</sup> Anglo-American trust law is the most famous example, proverbially difficult to understand by lawyers trained in the continental ideology of property as the dominium of one subject (the owner) over a material object (the thing). Both the trustee and the beneficiary of a fiduciary *relationship* can be considered owners of the same resource under common law (legal owner and equitable owner, respectively). The civilian is puzzled by what she considers a contradiction.

During an era of inequality and exploitation such as the feudal one, commons were fundamental for the life of peasants in England, a particularly disadvantaged segment of the population. In fact, the regime of open fields (lands without fences) and the crop rotation system gave poor families the possibility of collecting the resting ears after the harvest; lords used to give some lands to the villagers—the commons—for pastures and gathering firewood.<sup>15</sup> These practices were created from the bottom-up and through a system of social norms of private nature. On the public side, the Charter of the Forest, introduced in 1215 together with the Magna Carta, regulated the collective use of forests: “every free man” could have access to forest against any claim of barons or priests. This text has an extraordinary importance in the medieval history of the commons, even if legal scholars have forgotten it: the Charter of the Forest gave to the commons and to the rights of the commoners constitutional dignity and legal protection, considering them on the same grounds as property and owners.<sup>16</sup> The commons based on the power of *collective access* were given the same constitutional dignity as ownership based on the power of *individual exclusion*. This equal constitutional dignity given to access and exclusion was *de facto* erased during the reign of the Tudors, which inaugurated the era of political modernization and enclosures of open fields, putting an end to the commons experience that worked as a kind of pre-modern “welfare system.” It is no accident that the first English Poor Laws were adopted in the sixteenth century: they were directed, to some extent, toward compensating those persons

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<sup>14</sup> F H Lawson and B Rudden, *The Law of Property* (Oxford University Press 2002; 3rd edn).

<sup>15</sup> W N Parker and E L Jones (eds), *European Peasants and their Markets: Essays in Agrarian Economic History* (Princeton University Press 1975).

<sup>16</sup> Peter Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All* (University of California Press 2008).

who, after the enclosure of the fields and the division and allocation of the commons, were deprived of their means of subsistence.<sup>17</sup>

At the beginning of the thirteenth century, when the Charter of the Forest was granting constitutional dignity to access, new studies were impacting property law on the Continent. In the middle of that century, Franciscan theorists dominated the theological dispute of their time and contributed innovative ideas to the legal debate. In their studies, they were not concerned with the real-life detailed organization of property or, in particular, with the way to manage fields in the countryside. Their aim was to present the theoretical background of property, considering the main opinions that influenced the philosophical and religious debate. In this sense, the Franciscan school surpassed the theoretical model proposed by St. Thomas Aquinas (1225–1274), in which man was subject to God's will. In Franciscan thought, for the first time, man was independent from natural phenomena and could exercise self-determination.

Unlike St. Thomas, Franciscan scholars considered the owner as a man liberated from the yoke of the community structures: he is finally an autonomous individual, not simply a "tile of a great mosaic." Man is capable of governing himself, his person, and his body, and the external reality. In this light, property law ceased to be configured exclusively as a tool for regulating the concrete relationship between man and things. Accordingly, the characteristics of the right of property started to be constructed as independent from those of the material goods, because it is the will of man, not the unanimated material, that can shape the institution of ownership. With the Franciscans, property began to be described as an essential component of the subject.<sup>18</sup>

In the sixteenth century, the authors of Scholastic philosophy, such as Francisco de Vitoria (1483–1546), Domingo de Soto (1494–1560), and Luis de Molina (1535–1600), largely followed the Franciscan way of thinking, although still maintaining a holistic approach that made the separation of the subject and the object problematic. During this time, the centrality of individual will and freedom was enhanced by the development of humanism and the beginning of early modernity determined by the discovery of the New World. Man began to be described as the master of himself, a free subject; he was the owner of his person and he could determine his actions thanks to the free will granted by God. Thus,

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<sup>17</sup> J S Cohen and M L Weitzman, 'Enclosures and Depopulation: A Marxian Analysis', in William N Parker and Eric L Jones (eds), *European Peasants and their Markets*, cit.

<sup>18</sup> David Burri, *Olivi and Franciscan Poverty: The Origins of the Usus Pauper Controversy* (University of Pennsylvania Press 1989).

property of things began to be considered as the corollary of self-ownership. This conception, still in the making and somewhat problematic due to the strong resistance of Scholastic thought, was nevertheless convenient for explaining and legitimizing the occupation of American lands by the Spanish kingdom.<sup>19</sup> Once perfected a century later by John Locke, it closed any discussion about the legitimacy of Western plunder and genocide of the “people without history.”<sup>20</sup> The main legal argument of the natural law tradition was premised on “empty land.” American lands could not belong to indigenous people because they did not know and use a right of private property similar to *dominium* derived from Roman law. Thus, Spanish *conquistadores* could legitimately establish a sovereign and absolute power, by occupation and consequent original acquisition of title on a *res nullius* (a thing belonging to no one), just as we do when we take home a shell that we find on the beach. A notary was traveling with Cristopher Columbus to legally guarantee the plunder. Natural law supported the papal bulls that granted the occupation of American lands and appeased the conscience of Queen Isabel, a fervent Catholic. None of these worries or formalisms was needed a century later to exterminate the Native Americans in the current United States, where the take happened without hypocrisy with the gloves off.<sup>21</sup>

#### 4. NORTHERN NATURAL LAW AND THE ACCOMPLISHMENT OF THE MODERN VIEW

In the seventeenth century, the theory of natural rights contributed to consecrating State sovereignty (*imperium*) and private property (*dominium*) as the foundational institutional structures of modernity (and of capitalist extraction).<sup>22</sup> Philosophers tried to explain the origins of

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<sup>19</sup> Aldo Andrea Cassi, *Ultramar: l'invenzione europea del Nuovo mondo* (Laterza 2007).

<sup>20</sup> Eric R Wolff, *Europe and the People without History* (University of California Press 1990).

<sup>21</sup> U Mattei and L Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008).

<sup>22</sup> Michael Lobban, ‘A History of the Philosophy of Law in the Common Law World, 1600–1900’, in E Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, Vol. 8 (Springer 2007).

property and statehood as sharing a starting point: men lived free in an ideal and original state of nature where they were entitled to equal rights.<sup>23</sup>

Hugo Grotius (1583–1645) is generally considered the father of modern northern rationalistic natural law, although his theory was still quite influenced by the Scholastic doctrine and by Aristotle. According to Grotius, men are endowed with a strong social instinct that leads them to live in community. Private property did not exist until resources were deployed for productive purposes. At that point, in order to maintain peace, men agreed to the division of those goods that were in common before assigning them as private property. Public authorities created by men could change the rules and the ways of acquiring property, but they could not eliminate this right. In Grotius's mind, property was an institute of *ius gentium* (law that in Roman times was applied to all people and not just citizens) and, for this reason, it was not yet perfectly described as a natural right. The full-fledged rationalist theory arrived with Thomas Hobbes (1588–1679) and his vision of absolute sovereignty.<sup>24</sup>

Hobbes's book *De Cive* was published in 1642 and the more famous *Leviathan* was published nine years later. The English political situation in Hobbes's years was characterized by the Stuart monarchy's being undermined by religious conflict, which would lead to its fall and to Oliver Cromwell's protectorate followed by the restoration of the monarchy in 1660. These political facts explain why Hobbes, like Machiavelli in equally turbulent times, supported the stability of power that, according to him, was only ensured by absolute monarchy.

Hobbes displayed in the famous motto "*Homo homini lupus*" an anthropology that was all but paranoid. His man is selfish and ruthless, exclusively driven by the pursuit of his own utility and by ambition and vanity; he is not inclined to live in community. Because of these characteristics, the state of nature, rather than being inhabited by Rousseau's *bon sauvage*, quickly became a state of war. Men renounced their rights to live peacefully and safely and transferred them, through a contract, to a sovereign political authority (an individual or an assembly), which also had the task of establishing and dividing and distributing property. According to Hobbes, property was created through an agreement between men but, unlike Grotius, he believed that an absolute king could revoke it at any time.

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<sup>23</sup> Stephen Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Oxford University Press 1991).

<sup>24</sup> Crawford Brough Macpherson, *The Political Theory of Possessive Individualism* (Clarendon Press 1969).

Hobbes has been called the ingenious creator of a “machine of obedience” and the founder of “possessive individualism,” an anthropological theory according to which all social relationships are driven by individual utility and the competitive desire to accumulate wealth and power.<sup>25</sup> Hobbes has certainly provided a fully developed idea of absolute sovereignty, which, along with John Locke’s (1632–1704) theory of property, composes the philosophical mosaic of the key institutions of modernity.<sup>26</sup>

It took Locke to create a fully naturalistic vision of private property (protected even against Leviathan) and inextricably link it with work and productivity, providing perhaps the most powerful justification of key ideologies still with us, including the rhetoric of “meritocracy” and the social acceptability of radical inequality. According to Locke, man, who owns as a gift of nature his body and his energies, modifies nature by transforming and producing things through his own work: thus, the institution of private property represents a reward for and the product of this effort. Lockean theory exercised tremendous influence on the subsequent debate on the origins of property, by becoming a necessary compelling antagonist for those who in the nineteenth century developed an opposite view, a different genealogical tradition, from Rousseau to Proudhon to Marx.<sup>27</sup>

The theory of natural law influenced the Bill of Rights introduced by many of the constitutions adopted by the 13 states after the American Revolution and the independence of American colonies from British rule. During the Continental Congress of 1774, delegates supported the idea according to which the right to life, liberty, and private property derived from the immutable natural laws. However, private property did not appear in the revolutionary triad that opens the United States Declaration of Independence (1776): in this text, only life, liberty, and the pursuit of happiness are defined as inalienable rights. The political father of this text, Thomas Jefferson, was well conversant with the theory of natural rights, but at the same time he was aware that land in the United States was not equally distributed. In other words, he preferred not to include

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<sup>25</sup> Norberto Bobbio, *Giusnaturalismo e positivismo giuridico* (Laterza 2011).

<sup>26</sup> Matthew H Kramer, *John Locke and the Origins of Private Property* (Cambridge University Press 1997).

<sup>27</sup> M Mancall and U Mattei, ‘First Steps for a Social Theory of the Commons’ [forthcoming]; P Dardot and C Laval, *Commun: essai sur la révolution au 21 siècle* (La Decouverte 2014).

property in the Declaration in order to keep a free hand in reducing disparities and inequalities. In the United States Constitution (1784), however, private property, mostly championed by James Madison, received protection in the Fifth Amendment (and in the Fourteenth, introduced in 1868 after the Civil War). The rule states that no one can be deprived of life, liberty, or property without the guarantee of a “due process of law.”

## 5. THE FRENCH REVOLUTION AND THE GERMAN ELABORATION OF PROPERTY AS SUBJECTIVE RIGHT

In the incremental interpretative process that produced the current paradigm of property, one can isolate some crucial moments in the theoretical discussion. In the civil law tradition, scholars consider the modern paradigm of property as the product of the Napoleonic Code of 1804 and of the German doctrinal elaboration that took place throughout the nineteenth century before Germany itself codified private law in 1896 (this elaboration takes different names: Pandectist school, dogmatic school, legal romanticism, and more). This quite simplified account signals, nevertheless, two fundamental steps.

In the ideology of the bourgeois revolution later enshrined in the Napoleonic Code, individual ownership became the only form of private property,<sup>28</sup> while other types of property (especially collective or limited forms) all but disappeared.<sup>29</sup> Of course, the denial of any burden or constraint on land was mostly an ideological move against the *Ancien Régime* and of the feudal structures. While the letter of the Code still reflects some hangover of the past against which the bourgeoisie revolted, the new order was quickly established by the early commentators: the so-called *école del l'exégèse*. In Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of 1789,<sup>30</sup> individual

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<sup>28</sup> James Gordley, ‘Myths of French Civil Code’ [1994] 42(3) AJCL 459; Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico* (Giuffrè 1988).

<sup>29</sup> A A Rozental, ‘Enclosure Movement in France’ [1956] 16 Am. J. Ec. & Sociol. 55.

<sup>30</sup> Article 2 of the Declaration provides that “[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression” and, in accordance with Art. 17, “Since property is an inviolable and sacred right, no

ownership is characterized by sacredness and inviolability, thus insulating the boundaries of a physical object from any external interference while recognizing the owner's full decision-making power. In this vision, ownership is a corollary of individual freedom and acts as a shield against the power of the state. The right of ownership is thus recognized in terms of natural law, inaugurating a trend that would permeate constitutionalism beginning from the late eighteenth century. This dimension famously emerges in the Fifth Amendment of the United States Constitution, approved on September 25, 1789, where the right to property alongside life and liberty is one of the foundational doctrines of limited Government by the people.<sup>31</sup>

In the background of these principles and of the rules that early interpreters of the Napoleonic Code extracted from them, there is an anthropocentric view, in which ownership of things is the external manifestation of self-ownership, the property that every individual has in his own body: "Something of mine that becomes inseparable from me and that inevitably makes itself an absolute."<sup>32</sup> Because of this identification of ownership with individual freedom, the institution of private property is radically simplified: it escapes from the complexity of things and the phenomenal reality to take refuge in the subject's identifying property with his will.<sup>33</sup>

The Napoleonic Code was the synthesis and sanction of this self-serving ideological construction of the bourgeoisie:<sup>34</sup> the definition of property, contained in Article 544,<sup>35</sup> crystallized the reaction to the feudal system, creating an abstract highly individualistic institution in which the owner was alone and perfectly free. Moreover, he was in exclusive relationship with the sovereign state, which was empowered to set limits to his property rights but *not* to take them away outside of strict exceptions (*e.g.* public utility previous indemnity for expropriation).

one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified."

<sup>31</sup> Charles Murray, *By the People: Rebuilding Liberty Without Permission* (Crown Forum 2016).

<sup>32</sup> Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico*, cit., 367.

<sup>33</sup> *Ibid.*, 409–410.

<sup>34</sup> Ugo Mattei has defined it as "the economic constitution of the bourgeoisie" in *Contro riforme* (Einaudi 2013).

<sup>35</sup> "Property is the right to enjoy and to dispose of things in the most absolute manner provided that one does not make a use of them that is prohibited by laws (*lois*) or regulations (*reglements*)".

Closer observation shows that the wording of the law has maintained many connections with the culture of the *Ancien Régime*, where there was no relationship between individual fundamental freedom and ownership.<sup>36</sup> In fact, Article 544 shows the trace of an attempt to provide a list of the owner's specific powers (*ius utendi* and *ius disponendi*), according to the same approach that had, in the medieval concept of property, legitimized the division of the dominion by allocating different specific powers on the same land to different owners. At the same time, Book II of the Code is entitled "Of Property, and the different Modifications of Property," meaning that rights *in rem* (such as usufruct or servitudes) or *in personam* (such as contracts) could legally limit and transform the powers of the owner. Other traces of the past are evidenced by the Code's Articles 542 (property of local communities) and 714 (on things without an owner),<sup>37</sup> which remain the law today and may provide a basis for advancing ecologically-friendly interpretations seeking to grant subjectivity to human or non-human ecological communities (such as a river or a basin).<sup>38</sup>

Because of these contacts between the text of the Code and the legal culture of the *Ancien Régime*, the task of establishing a paradigm of property fully coherent with the abstraction of individual free will could not be fully accomplished by French scholars. It took German professors sitting in their university offices and unimpaired by any letter of the law for another century to accomplish a systematic presentation of the new paradigm of fully individualistic and absolute ownership. Their contribution marks another crucial step in the construction of the modern idea of extractive ownership. Free unimpaired ownership as a default rule granting power to accumulate became a complete and strict legal model in the nineteenth century, assuming the substance of an organizational structure for everyday life.<sup>39</sup> The most influential work globally was that of Bernhard Windscheid (1817–1892),<sup>40</sup> which expanded the theoretical connection between freedom, autonomy, and ownership, famously defining *subjective right*: an institute capable of legitimizing full freedom of extraction and consumption even beyond the powers of the owner. In this way, *private property as subjective right* became the symbol representing

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<sup>36</sup> James Gordley 'Myths of French Civil Code', cit.

<sup>37</sup> Marie-Alice Chardeaux, *Les choses communes* (LGDJ 2006).

<sup>38</sup> See *infra* Chapter 2.

<sup>39</sup> Paolo Grossi, *La proprietà e le proprietà nell'officina dello storico*, cit. 407.

<sup>40</sup> Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (3 vols, 1891; Italian translation by Bensa and Fadda, Utet 1930).

the anthropology of an individualized subject capable of self-determination fully in tune with the experience of the American frontier. His autonomy includes the fully unlimited exploitation of any resource that he happens to control. Private property is thus a little portion of the world where the autonomous individual is separated from everyone else and can exercise sovereign power. The law excludes both the state and everybody else in the world from this zone of autonomy, except under the most exceptional circumstances.

## 6. THE INDUSTRIAL ERA, THE NEW REVOLUTIONARY FORCES, AND THE SOCIAL FUNCTION OF PROPERTY

Throughout the nineteenth century, powerful counter-narratives of property became popular, especially among the disenfranchised working classes that (together with the natural environment) were footing most of the bill for the tremendous might of the capitalist exploitation and extractive mentality. In particular, according to Karl Marx (1818–1883), private ownership of the means of production caused worker exploitation and alienation through the sale of labor power for a salary. This is the alienated condition in which the unpropertied proletariat lives. Theoretically, alienation demonstrates the disconnection between property and work; it denies the premise of Locke's theory and exposes the bourgeois ideology's shielding of naturalistic private property from political critique. Capitalist accumulation through bourgeois property is at the origin of not only economic but also social exclusion, as evidenced by the rise of brigandage and loitering after the enclosures of the commons.<sup>41</sup> According to Marx, one of the goals to be achieved with the proletarian revolution and the dictatorship of the proletariat should be the abolition of private ownership over the means of production and their collective management. Individual personal property, however, had to be preserved, because it was fundamental to the development and realization of the person. Marxist critique, the rise of the Socialist movement, and the more or less successful revolutionary attempts from 1848 to the Paris Commune of 1871—where a Constitution of the commons was experimented

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<sup>41</sup> Karl Marx, *Capital: A Critique of Political Economy*, vol. 1 (Penguin 1976; translated by Ben Fowkes. First published in German in 1867). He defined this phenomenon as the primitive accumulation.

with briefly by the communards for the first time—produced a dramatic disruption of the formal elegance of bourgeois property law.

Beginning in the last part of the nineteenth century, in an era of rapid industrialization, a professional legal debate addressed the limits of ownership in the “public interest,” a vague notion elaborated to save capitalism from its own excesses. This notion gave the public authority to protect the whole community: a “police power” (or similar notions such as maintaining public order) to limit the unrestricted selfishness of the private owner whose absolute subjective right to carry on entrepreneurial activity or extract rent could make social life impossible. In this period, the French jurist Léon Duguit (1859–1928) described the so-called “social function” of property as the obligation of the owner to use his goods for the satisfaction of his needs and for the satisfaction of the collective need of the society.<sup>42</sup> At the beginning of the twentieth century, the Weimar Constitution (1919) introduced this clause in its definition of property rights (Art. 153: “... property obliges. Its use should also serve the general interest”). The social function of property was later incorporated in the Italian Constitution of 1948, among others, as a result of a long debate started in the early 1930s (Art. 42, par. 2: public regulation has the task to ensure the social function of private property).

It is widely believed that the *social function of private property* has represented the most significant change in the constitutional protection of property rights in many countries since the Second World War.<sup>43</sup> The central idea of this clause, incorporated in a variety of twentieth-century constitutions (notably in Europe, South America, and post-colonial Africa and the Middle East), is that property can be limited by public regulation in order to realize a social interest and avoid the idiosyncratic or excessively selfish conduct of the owner. Whether this concept played, or can play today, any significant role in limiting exploitation of people and the environment by the owners is an open and much discussed question

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<sup>42</sup> Karl Renner, *The Economic and Social Functions of Legal Institutions* (Routledge & Kegan Paul 1949 reprinted 1976).

<sup>43</sup> For a comparative perspective see S Foster and D Bonilla, ‘The Social Function of Property: a Comparative Perspective’ [2011] 80 *Fordham L. Rev.* 1003; Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press 2006); Anna di Robilant, ‘Property: A Bundle of Sticks or a Tree’ [2013] 66(3) *Vanderbilt L. Rev.* 869.

among property law scholars, including in the United States.<sup>44</sup> From a general point of view, the social function should re-establish those mechanisms of solidarity among individuals that can be put at risk by the idiosyncrasy of ownership, ensuring that the owner exercises his powers not only to meet his own interests but also those of the community.<sup>45</sup>

During the Cold War, the social function clause enjoyed its fair share of success in allowing capitalist governments to limit private property rights, carrying out nationalization programs of major industries of public concern (such as banks, electricity, transportation), or expropriating ownership at a lower compensation rate to accomplish social reforms such as public housing or other public works. Its success was mixed and, among scholars today, there is no lack of critical voices emphasizing its inadequacy, if not its uselessness.<sup>46</sup> Certainly the social function of property, born within Catholic social thought and moderate social-democratic visions, is no full-fledged alternative to capitalist ownership and its exploitative nature.<sup>47</sup> Nevertheless, if duly elaborated by ecologically literate lawyers to limit exploitation, it could represent a useful tool in an overall design to change the default rules of the system. A right of ownership internally limited by the social function should incorporate the interest of the whole ecological community in the choices of any one of its members, outlawing *ex ante* a set of owners' extractive behaviors (that should simply stop) and incentivizing generative ones.<sup>48</sup>

## 7. THE NEOLIBERAL REACTION AND EU REGULATION

The extractive mentality of modernity developed a vision of the individual owner of property as a "part" theoretically constructed as a subject

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<sup>44</sup> See Gregory Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence*, cit.; Anna di Robilant, 'Property: A Bundle of Sticks or a Tree', cit.

<sup>45</sup> These two points also emerge from Léon Duguit's theory. For the latter, property is "la fonction sociale du détenteur de la richesse," because the owner has a specific role in the community to which he belongs and by using his capital he should help increase the general wealth.

<sup>46</sup> Antonio Gambaro, 'Relazione introduttiva,' in Aa. Vv., *Fra individuo e collettività. La proprietà nel secolo XXI* (Giuffrè 2013).

<sup>47</sup> Stefano Rodotà, *Il terribile diritto. Studi sulla proprietà e i beni comuni* (Il Mulino 2013; 3rd edn).

<sup>48</sup> Ugo Mattei, 'Una primavera di movimento per la funzione sociale della proprietà' [2013] RCDP, 542.

holding an absolute subjective right that made him free to act selfishly, with no concern for the interests of the “whole.” The default rules of modern property law were established within this scheme. When, in the early phase of industrialization and consequent urbanization, this ideology excessively victimized the proletariat (non-owners), revolutionary labor movements, eventually successful in the Soviet Union and in other countries such as China, somewhat tamed capitalism and forced the development of a welfare administrative state. This process reached its peak in the 1970s, the apogee of the capitalist limitation of property rights in the interest of the *have-nots* (labor and possibly even the environment). Toward the end of that decade, the global geo-political scenario changed dramatically and in the last decade of the twentieth century the major technological transformation of the Internet further stressed the (dis)equilibrium between capital and labor.<sup>49</sup> Private law was the fundamental legal infrastructure most impacted by this further transformation, a “second enclosure movement” when observed from the perspective of property law in the new global frontier that capitalism opened to itself.<sup>50</sup>

The late 1970s were a turning point in global economic and social history.<sup>51</sup> In 1978, the accession to power of Deng Xiaoping in China, with his bold reforms aimed at the accumulation of capital, and his opening up to Western leaders, politically isolated the Soviet Union just months before the beginning of the latter country’s decade long disastrous war in Afghanistan. In May 1979, Margaret Thatcher became Prime Minister of Great Britain and the following year Ronald Reagan was elected President of the United States. They both pledged to revive the economies of their countries through a reactionary economic policy later known as neoliberalism. Neoliberalism seized the opportunity offered by the global change of power-balance between capitalism and socialism to undo the welfare state compromise; it celebrated entrepreneurial freedom, free markets, and free trade, all of which must be fully guaranteed in order to ensure individual well-being. In this scheme, government must be limited to protecting private property, once more interpreted outside of any social function as an unrestrained subjective right (the guardian of every other right) of extraction and accumulation. This kind of private

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<sup>49</sup> Paul Mason, *Post-Capitalism: A Guide to Our Future* (Penguin 2016).

<sup>50</sup> James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’ [2003] 66(1) *L. & Contemp. Probs.* 33.

<sup>51</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford University Press 2005).

property (of physical persons and of corporations: see *infra*) is the fundamental condition for market development. The idea of a minimal state (a vision philosophically articulated by Harvard philosopher Robert Nozick)<sup>52</sup> and policy keywords such as deregulation, downsizing, outsourcing, liberalization, and privatization quickly became the keys of the so-called Washington Consensus. After the fall of the Soviet Union, leveraged by international financial institutions such as the World Bank and the International Monetary Fund, neoliberalism—which included massive transfers of resources to the military—reached “end of history” status at the global level.<sup>53</sup> Friedrich von Hayek (1899–1992) and Milton Friedman (1912–2006) were two of the most influential neoliberal theorists. In particular, they tried to enhance the relationship between freedom and private property, conceived as the prerequisites of the free market.

This aggregate of political and economic doctrines was developed in the years immediately following the Second World War by an informal forum of right wing economists called the Mont Pelerin Society. Neoliberalism started as a reaction to the Keynesian economic policy that attained, in the aftermath of the Great Depression of the 1930s, mainstream status in mediating the aforementioned capital-labor compromise. During the Keynesian period, the intervention of government in the market was very extensive and involved new sectors, from mining to chemistry to the credit system, leading to the emergence of numerous public enterprises. The capitalist block pursued the goal of economic growth consistent with an attempted compromise between market and democracy, something that turned out to be impossible outside of the global bipolar equilibrium. Accordingly, the latter part of the twentieth century was characterized by a different trend: the public sector—state and local authorities—was progressively weakened in favor of private (mostly global) corporations that generated profits from privatization, concentrating huge capital in private property and acquiring very significant political power.<sup>54</sup>

The consequent capture of the political system made neoliberalism a bipartisan project with Clinton, Blair, and practically every elected politician thereafter in the United States and Great Britain. Neoliberalism became a true regime of knowledge, dominating the mainstream media

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<sup>52</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basil Blackwell 1980).

<sup>53</sup> Francis Fukuyama, *The End of History and the Last Man* (Free Press 2006).

<sup>54</sup> David Harvey, ‘The “New” Imperialism: Accumulation By Dispossession’ [2004] 40 *Socialist Register* 63.

and social sciences. Its logic and dynamics reached sectors traditionally outside of the free trade logic (think of the market for pollution rights under the Kyoto Protocol), showing how the “object” of property rights can be artificially created if only lawyers are on board.<sup>55</sup> The economic analysis of law was there to serve.<sup>56</sup> It developed the sophisticated legal tools and the legal ideology of efficiency necessary for this submission of any interest to market logic and way of reasoning. In property law, this means that “things” can just be considered for their exchange value.<sup>57</sup> Everything can have a price as long as technology allows exclusion. Water, air, food, culture, human genome, seeds, and space orbits have all been submitted to this logic. The enclosures of land that Karl Polanyi described in *The Great Transformation* are today technologically possible for most things. It is not intellectually difficult for lawyers to ride this economic trend. It is enough to return to the vision of property as a subjective right vision that preceded the generous attempt to work out the social function of property law. It is much more difficult, however, to create and impose legal ideas that resist this new devastating wave of extraction and exploitation.

In this scenario, the social function clause is very weak (the law itself is very weak in its capacity to protect the losers of social processes) and cannot represent a strong form of protection for the non-owner or for the exploited global commons. In fact, even where present in a constitutional text it is not sufficient to ensure equal access to property in a context where increased exclusion and inequality are legitimized by courts of law presided over by neoliberal judges. It is worth noting that in the most recent legislative definitions of property rights at the European level, that clause is not even contemplated in Article 1 of Protocol No. 1 attached to the European Convention on Human Rights (ECHR)<sup>58</sup> and Article 17 of

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<sup>55</sup> Thomas C Grey, ‘The Disintegration of Property’, in R Pennock and J W Chapman (eds), *Nomos*, vol. XXII: *Property* (New York University Press 1980) 69.

<sup>56</sup> Ugo Mattei, ‘The Rise and Fall of Law and Economics: An Essay for Judge Guido Calabresi’ [2005] 64 *Md. L. Rev.* 220.

<sup>57</sup> Charles A Reich, ‘The New Property’ [1964] 73(5) *Yale L.J.* 733.

<sup>58</sup> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

the Charter of Fundamental Rights of the European Union.<sup>59</sup> European case law deploys this textual exclusion to strike down member states' legislation still inspired by the social function of property in favor of increasingly nineteenth-century visions of ownership as a fundamental right of extractive development.

## 8. THE NEW FRONTIERS OF PROPERTY LAW

Property law is once again at the core of modern law. It pervades law's structure; it cuts across law's categories. In a capitalist system, its guarantee, protection, and limitation are the very function of law. Today, a century after the Russian Revolution and the beginning of the Soviet experiment, it appears to be almost impossible for lawyers even to think about a legal system without property law, paradoxically confirming, eighty years after his tragic execution, the truth in Evgeny Pashukanis's (1891–1937) vision.<sup>60</sup> According to this most respected socialist jurist of the twentieth century, modern professional law is inextricably connected with the bourgeois mercantile society since it emerges as the unavoidable backbone of economic exchange and exploitation. In a socialist society, Pashukanis argued, the law will necessarily decline and ultimately disappear with the demise of state sovereignty and the making of an international socialist order. Andrey Vyshinsky (1883–1954), his historical antagonist, argued that socialist law, while getting rid of the market and implementing a planned economy, and itself strictly linked to an unavoidable sovereign state, was to be seen as progress rather than decay when compared to bourgeois law. Pashukanis fell into disgrace when Stalin deemed it necessary to give up the internationalist ambition of the socialist revolution in an attempt to consolidate it within Soviet sovereign borders. This debate was not merely academic, as evidenced by its tragic outcome. Today, the urgency of an ecological revolution in the law in order to overcome the predicaments that motivate this book makes it crucial once again. Can the core of capitalist law—the law of property, to

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<sup>59</sup> “1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.”

<sup>60</sup> Evgeny Bronislavovich Pashukanis, *The General Theory of Law and Marxism* (Transaction Publishers 2002).

a large extent a product of the sovereign state—be interpreted by professional jurists in a fashion compatible with the needs of the survival of civilization on Earth? Is a system of eco-private law compatible with private property?

The literature on the commons that has recently re-opened this kind of foundational discussion has revealed two main approaches to this issue.<sup>61</sup> On the one hand, especially in the United States, it has developed theories that construct the commons as a different form of collective ownership, better suited to managing certain kinds of resources (the so-called common pool resources) than private property or government (public) rule-making. In this view, the law of the commons stems from the bottom up and avoids the famous “tragedy” but only occupies a relatively narrow space.<sup>62</sup> On the other hand, there is a vision that deems the commons as a political, economic, and institutional structure incompatible with capitalism, beyond the dichotomy between the private and the public and thus necessarily disruptive of the current legal order in what is deemed a constituent process.<sup>63</sup> The position we take in this book is that the current state of affairs requires a vision that is radically transformative but compatible, at least tactically, with the current structure of the legal system. In other words, we suggest a counter-hegemonic interpretation of existing property law, a way of thinking about it that intrinsically and systematically connects it to the needs of reproduction of the commons rather than to production of capital. If absolute and exclusive ownership developed in early modernity as a powerful incentive to accumulate capital by extracting and transforming common pool resources and other forms of social cooperation, in this chapter we sketch a theory of property aimed at a return of capital (exchange value) into common (use value). The intuition is that should professional interpreters (lawyers, judges, and notaries) come on board with a more ecologically literate (and critical) vision of reality, they would participate as a class in the development of a body of property law that could become generative rather than extractive. Short of getting rid of private property, this counter-hegemonic interpretation would turn it against the excesses of

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<sup>61</sup> M Mancall and U Mattei, ‘First Steps for a Social Theory of the Commons’, cit.

<sup>62</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990); Carol M Rose, ‘The Comedy of the Commons: Customs, Commerce and Inherently Public Property’ [1986] 53 *The University of Chicago Law Review* 711.

<sup>63</sup> M Hardt and A Negri, *Commonwealth* (Harvard University Press 2009); P Dardot and C Laval, *Commun*, cit.

capitalist accumulation that are lethal to human survival. For example, generative property law would clearly distinguish ownership as protection of use value and privacy interests from ownership as a legal backbone of infinite accumulation through economic production and exchange value. It would pierce the veil of ideology from the capitalist strategy of deploying the general desire for individual privacy and security of basic possession to organize the political consensus necessary to protect corporate accumulation of value and protection of international investments and extraction of resources as “property.” Protection of property does not necessarily mean protection of a social order that tolerates inequality generated by the excesses of accumulation. We can have a well-ordered system of property even without protecting Bezos, Buffett, Zuckerberg, and Gates’s unfair share of resources accumulated through extraction of social and ecological value. Thus, a counter-hegemonic interpretation is crucial in using property law as a limit to capitalist extraction and accumulation. Paradoxically, when sovereignty is hijacked by vested private interests, only property rights can resist further privatization: a foundation or a trust created in the interest of future generations is a much more powerful institutional protection of a park than its being public property. Moreover, when intellectual property is highly concentrated in corporate hands, as it is today, only full protection of use value of the owner of a smart device through old-fashioned property law can serve as a legally enforceable check on corporate abuses: here again, we face a counter-hegemonic use made necessary by the overwhelming pace and might of technological transformations under corporate control. Finally, ecologically literate interpretations are crucial as a defense of cultural property, territory, and natural beauty against unsustainable development. These protections are scarcely attainable through public regulation because of its capture.

It is therefore natural to begin a discussion of ecological private law with the law of property, a notion so rich with nuance that it is able to be simultaneously the best friend and the worst enemy of any attempt to cure the current dramatic ecological predicaments.

As we have discussed, over the years that separate us from the scientific revolution, the birth of modernity, and the Industrial Revolution, a notion of property as a zone of legally protected individual autonomy over an object has emerged. Such autonomy celebrated as an owner’s freedom has been described over time in more or less emphatic terms (very famous in the English-speaking world is Sir William Blackstone’s “sole and despotic” power, as mentioned earlier). It has been more or less restricted in favor of other subjects, from the well-known

“bundle of sticks” metaphor<sup>64</sup> to the more radical idea of the Weimar Constitution with its emphasis on the owner’s obligations as a correlative of his power. In spite of this very rich debate among lawyers through the Western legal tradition, the archetypical notion of private property as power to exclude unwanted interferences by others without the owner’s consent is so solidly dominant in lawyers’ imagination<sup>65</sup> that only very recently has anyone been able to note the radical transformations occurring in the current phase of capitalist development, where such a zone of autonomy is progressively declining and disrupting the traditionally quiet world of legal theory and practice. Indeed, in the era of technological transformations such as big data and the so-called “Internet of things,” private property in the traditional sense is all but dead. The ownership of our tablet or cell phone is simply useless if we do not agree to the conditions of use that are set by the company that produces the device. The traditional “decentralized” system of property rights is therefore replaced by the increasingly centralized decision-making power of large concentrated capitalist entities that remotely “decide” on the property device they have just sold. Indeed, a social organization, where the decentralized decision-making power of private property is substituted by the centralized power of large firms, can be considered already in the making at the increasingly important technological frontier of the Internet.<sup>66</sup> To be sure, ownership of a smart device, from a cell phone to a last generation TV set, refrigerator, or a smart car, has very little in common with old-fashioned, traditional property. The owner of such a thing connected through the Internet has indeed no power to exclude, nor agency on many uses. In fact, by switching on our new device and clicking several *I agree*’s (which are not choices if we wish to use it) we grant to the selling company that owns the intellectual property the power remotely to intervene on our gadget. Car companies can now switch off our cars while we drive them if we default on paying the loan; smart TV companies can decide what we can or cannot watch and can survey our use, selling this intelligence to advertising companies who know exactly what we are watching at what time; Apple can sue us if we try to hack our own device to make it compatible with other devices they do not like us to use (it is even a crime); and we cannot remove the battery from a

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<sup>64</sup> Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’, cit.

<sup>65</sup> G Calabresi and D Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ [1982] 85(6) Harvard L. Rev. 1089.

<sup>66</sup> Joshua A T Fairfield, *Owned: Property, Privacy, and the New Digital Serfdom* (Cambridge University Press 2017).

new generation cell phone without breaking it, which precludes us from eluding the radar screen of surveillance apparatuses. Amazon does not allow us to resell an e-book we have bought to read on Kindle, as we can do with a physical book. All the above practices are shielded from courts by arbitration agreements so tailored against the owner's interest that practically nobody uses them to resolve disputes. This means that at the new frontier of capitalism there is no zone of legally protected individual autonomy of very essential personal property we own, and this is also going to be true for real property because of the new techniques of smart building. Where is the fundamental power to exclude in front of the big corporations that sell us the gadget but maintain control of their licensees? Where is the power to modify our object according to our desires? Where is the power to sell a thing once we are done with it? All of this is not an essential attribute of property anymore but depends on what we "agree" to transfer to the seller or to its licensee whenever we operate our gadget the first time.

These fundamental transformations require us fundamentally to rethink property. Indeed, capitalism can well survive without traditional modern private property, as it is already doing in its online frontier. Once the overwhelming ongoing transformations are understood, we can effectively think about alternatives to private property that are in the interest of people (and the living ecosystems) rather than of capital (and the online ecosystem). There might be a case to protect traditional private property against such corporate transformations of the legal structure, in order to develop counter-hegemonic generative interpretations against capitalist lawlessness and the rule of the stronger.

## 9. THE INDIVIDUAL AND THE COLLECTIVE

Property is a vague and opaque notion. It can be private or public. It is private when formally owned by a private individual or a private organization (a collective entity reduced to "unity" by a legal fiction such as a corporation). It is public when owned by the government or any political or administrative branch of the State. This neat separation between private and public is an exquisite product of modernity. A distinction has been incrementally formalized between public *imperium* (sovereignty such as that of the State over its territory) and private *dominium* (the sole and despotic dominion of a man over a thing in the famous Blackstonian definition). The purposes of *public imperium* and *private dominium* are deemed different. *Imperium* is political power aimed at the public benefit. *Dominium* is private power aimed at the

benefit of its holder. Reality, of course, defeats this neat separation. Through feudal times, before the triumph of national territorial states, private property justified public functions such as holding a court of law (manorial courts) with jurisdiction within the boundaries of property. Every significant owner of what we would consider private property in land today was also a political actor. Only modernity, in particular the French and American Revolutions and the birth of public and constitutional law as discrete fields of knowledge, made the neat distinction appear meaningful.<sup>67</sup> In fact, it is no less true today than it was in the *Ancien Régime* that large private property owners end up performing public functions as sources of private benefit. Think about keeping track and maintaining knowledge of the population on a given territory for political control: today, Facebook does exactly that.

The French Revolution reached a clear-cut separation between private and public property, through a subjective rather than an objective criterion. Property is private if the owner is private. It is public if the owner is public. Public ownership and public sovereignty are difficult to separate. The State is sovereign of its territory (eminent domain power), portions of which are private property and other portions of which are public property (such as the national forests in the US). Structurally speaking, it is difficult to separate public property and public sovereignty.

This subjective separation of private and public ownership is itself an abstraction. The object of property is highly relevant when it comes to understanding the structure of the institution. Lawyers, for example, distinguish immovable and movable property because the kinds of problems they generate when it comes to transfer or protection are very different.<sup>68</sup> Other distinctions as to the “object” of property are also introduced, such as material or immaterial property, *choses in action* or *choses in possession*, and so on. Private property is constantly limited by law or by factual conditions, in spite of the powerful rhetoric of the “sovereignty of will” introduced by German nineteenth-century jurists to describe ownership as the quintessential absolute right. As the Italian legal scholar Antonio Gambaro famously pointed out, even if I am the owner of a bicycle and my sovereign will desires it intensely, the physical external conditions preclude me from riding it up a few flights of stairs.<sup>69</sup>

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<sup>67</sup> J H Baker and F C Stroud Milsonm, *Sources of English Legal History: Private Law to 1750* (Butterworths 1986).

<sup>68</sup> Ugo Mattei, *Basic Principles of Property Law*, cit.

<sup>69</sup> Antonio Gambaro, ‘La proprietà. Beni, proprietà, comunione’ in Giovanni Iudica and Paolo Zatti (eds), *Trattato di diritto privato* (Giuffrè 1990).

The separation of the subject from the object is the fiction through which lawyers have translated into the institutional setting of modernity the fundamental positivistic vision generated by René Descartes's (1596–1650) philosophy. According to this vision, the subject and the object are two separate entities of a different nature. The object is material, physical, immanent. It is the domain of the facts. The subject is free, unlimited, transcendent, and lives in the domain of the *ought to be*, the province of values. Consequently, it is not a limit in the subject's power (right of ownership) over the bicycle if it cannot be driven up the stairs: it is a limit in the object of property, in the nature of the bicycle, not of its owner.

None of this sophistry was shared in ancient, medieval, or non-Western law, nor did it take very long for lawyers to observe that the nature of the material object defines the utility that the owner can obtain from it. The First World War made it plain that the sovereignty of the will was pure fantasy because owners of companies were forced to produce boots rather than high heels, and the logistic military decisions to shelter troops in any given private property certainly could not be stopped by the opposing will of any sovereign private owner. Consequently, different theories of private property became dominant in Western jurisprudence, the most famous of those being the Hohfeldian "bundle of sticks" in the common law tradition and the already discussed "social function" of private property in the civil law tradition.<sup>70</sup> Nevertheless, a vision of property as a legal concept to be kept separate from the material and political conditions of life has been jealously protected by lawyers to the point that today practically nobody teaching property law considers its unfair distribution and staggering private concentration an issue that has to do with its legal nature.

Other social forces were unleashed by industrialization and technological transformations. In particular, labor was reaching political subjectivity and launching a challenge to the idea that means of production could be privately owned and managed in the private interest. This challenge became politically successful in a variety of countries in the first half of the twentieth century. Socialist States, once established, formalized a distinction between *personal property* recognized as protection of use value (not to be confused with personal property as opposed to real property in the capitalist common law tradition) and *socialist property of the means of production* that was excluded from private decision-making and reserved to the State or (to a more limited extent) to

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<sup>70</sup> Anna di Robilant, 'Property: A Bundle of Sticks or a Tree?', cit.

workers' organizations.<sup>71</sup> The socialist revolution, and its Soviet involution into unlimited Stalinist State autocracy, did not break with the positivist conception of the separation of subject and object, and the idea of a zero-sum game between the private and the public, conceived as necessarily mutually exclusive, was all but confirmed. This means a greater role for the public (State planning) and a lesser role for the private (market and exchange value) in socialism; while more private property means less public authority (limited government) in capitalism.

The Progressive Era and the welfare state determined, in some rich countries, a compromise between labor and capital. In these liberal capitalist settings, the political right became the champion of private property and the political left of government management of the economy. However, the positivist understanding of reality as objective facts as distinct from subjective values never really left the center stage of the discussion about institutions. Instead, it joined with mechanistic thought to create the "social sciences" as domains of de-politicized academic inquiry about political interactions.

Economic and social transformations of paramount importance nevertheless occurred, but lawyers, especially after the fall of the Berlin Wall, displayed an attitude of denial and remained professionally engaged in avoiding any paradigmatic shift. We refer here to what has been called the organizational revolution, something noted already by Oliver Wendell Holmes (1841–1935), one of the early American legal realists of the Progressive Era: "every major social task has been entrusted to large organizations, from producing economic goods and services to health-care, from social security and welfare to education, from the search for new knowledge to the protection of the natural environment".<sup>72</sup> We discuss in another chapter the enormity of such a transformation. Suffice it to say that today the global economy is inhabited by enormous collective organizations that own unimaginable amounts of property and deploy unparalleled technological might. Such corporations are organized in a vertical structure of power that allows its top management—unchecked in authority—to decide matters concerning the life, death, and dignity of millions of people. These collective structures are designed like dictatorships and function as such, conquering broader and broader domains of public spaces through dictatorial decision-making.

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<sup>71</sup> William Elliott Butler, *Soviet Law* (Butterworths 1988; 2nd edn).

<sup>72</sup> Oliver Wendell Holmes, *The Common Law* (edited by Mark De Wolfe Howe; The Belknap Press of Harvard University Press 1963; 1st edn 1881).

The resilience of the separation between private and public domains and the abstraction of bourgeois legal theory from the material conditions in which it operates (in other words, de-politicization) make lawyers consider such collective gigantic organizations as any ordinary private physical person in terms of owning property or enjoying any other right. In spite of the enormity of the role of private corporations in current global conditions, lawyers refuse any serious methodological shift and “the individual human being remains the paradigmatic legal actor, in whose image the law is shaped and then applied to corporations and other collective entities.”<sup>73</sup>

As we have already mentioned, any attempt to develop a paradigm shift in private law must confront this deep professional ideology of lawyers and must consider fully the context that has generated it. Taking the individual physical owner off the center stage of global private law is the required strategy. Imagining a legal system without individual private ownership as its fundamental postulate is a task of no ordinary complexity because of the depth of its historical solidification. This vision is what we outline in this book, trying to put the commons rather than private property center stage.

## 10. WHY PRIVATE PROPERTY?

In today’s legal education, which reflects worldwide the neoliberal hegemonic regime of knowledge, property (private is taken for granted) is usually presented starting from two fundamental questions. The first one is: “What is private property?”; the second is: “Why private property?” To answer these questions, almost invariably the so-called “tragedy of the commons” is introduced.<sup>74</sup> The parable describes some sort of natural decline of any object that is not owned. In this framework, private property is described as the beneficial legal institution that avoids the overexploitation of scarce resources by assigning them to individuals. The owner decides how to use the resource and maintains the monopoly of this decision-making power; consequently, on the one hand he can exclude others from his resource and, on the other hand, public authorities can impose limits that are only exceptions to a default rule of private sovereignty that includes use value and exchange value. The owner is the

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<sup>73</sup> Meir Dan-Cohen, *Rights, Persons and Organizations: A Legal Theory for Bureaucratic Society* (University of California Press 1986).

<sup>74</sup> Garrett Hardin, ‘The Tragedy of the Commons’ [1968] 162(3859) *Science* 1243.

uncontested king in his piece of land until he freely decides to depart from it by sale or gift.

This narrative, even if presented as natural, is not a politically neutral introduction to property law. The absence of neutrality is not news in the legal world, but in the field of property it produces a simplification that transforms ownership into the perfect tool to legitimize fully the unlimited accumulation of resources and wealth and the resulting dramatic social inequality. This legal assumption has political and social consequences, considering that private property is the basic structure of the market. We can appreciate these consequences by considering the political battle of the 99% movement, which protests against the accumulation of wealth in the hands of the top 1% of the population. The slogan (“We are the 99%”) inaugurated by Occupy Wall Street and deployed by many other social movements worldwide captures the critique of the unfair distribution of wealth that is the most visible plague of the current phase of capitalism. It is property law that allows such appalling unfairness inflicted by the haves upon the have-nots to an extent that is unprecedented in history. For this reason, the traditional paradigm of property needs a critical discussion, which today is theoretically robust because of the commons discourse that inaugurated a new debate around the legitimacy of private property and the powers of the owner.<sup>75</sup>

As we have seen, private property is the result of a complex evolutionary process during which it has been loaded with extra-legal meanings (political, ethical, moral, etc.) that shaped the legal concept of ownership. More than a simple tool for allocating resources and creating an economic organization, it has been made into an icon of individualism capable of mobilizing scores of small owners to protect the wealth of a few mega-rich individuals out of fear of losing their petit bourgeois privilege. Unfortunately, this diffused individualistic attitude is responsible for many of our ecological predicaments, since it determines scarce political resolve to limit self-centered daily decision-making in favor of some care and public engagement. Because of its pivotal role and performative production of political motivations, the legal definition of private property determines many other chains of meaning that are themselves full of political implications and in need of radical restructuring.

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<sup>75</sup> David Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (New Society 2014).

## 11. PROPERTY, CITIZENSHIP, AND DEMOCRACY

The definitions of citizen and, conversely, of foreigner are related to the legal category of property. Participation in public life has been conditioned for centuries by census: in other words, property produced an enabling effect in the political discourse and—conversely—no-property determined (and still *de facto* can determine) exclusion from political life. However, the study of the history of suffrage and therefore of electoral systems' evolution would offer only a partial reading of this phenomenon, since the relationship between individual and community, in terms of membership, is at stake.<sup>76</sup> From the fourteenth century, many Italian municipalities granted the status of citizenship, and the associated benefits, by considering contributing capacity. In that period, because taxation was mostly on immovable property, forms of citizenship were connected to the capability of paying this kind of tax; for the same reason, non-owners were not considered citizens. Between the fourteenth and eighteenth centuries, the foreigner was not simply the person coming from another geographical place, but also a person without a lineage (*ab origine* or because he had been excluded from his family) and, therefore, without the possibility of inheriting (and of becoming an owner).<sup>77</sup>

Between the seventeenth and nineteenth centuries, in the debate about the criteria for assigning the right to vote, the differences among owners and non-owners were significantly highlighted. Owners were considered free, independent, and rational persons; non-owners were considered “potentially irrational, naturally subversive” and, for this reason, not reliable. They could not participate in the democratic management of public life.<sup>78</sup>

This is the model of the citizen-owner, the same we find in the debate about suffrage that took place in France after the bourgeois revolution. This brief reconstruction is enough to show that property can influence political concepts and criteria of inclusion in a political community. It is enough to think about the disenfranchising of modern growing homeless populations to understand this point. At the same time, the citizen-owner

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<sup>76</sup> Simona Cerutti, *Étrangers: étude d'une condition d'incertitude dans une société d'Ancien régime* (Bayard 2012).

<sup>77</sup> Simona Cerutti, 'A qui appartiennent les biens qui n'appartiennent à personne? Citoyenneté et droit d'aubaine à l'époque moderne' [2007] 62 *Annales. Histoire, Sciences Sociales* 355.

<sup>78</sup> Pietro Costa, *Proprietà e cittadinanza nell'Europa moderna: una mappa tematica* [2003] 30 *Parole Chiave* 41; Pierre Rosanvallon, *Le sacre du citoyen: histoire du suffrage universel en France* (Ed. Gallimard 1992).

builds a double-faced relationship with the political authority: ownership on the one hand gives him an intangible individual sphere that can be opposed to the sovereign; on the other hand, it certifies the kind of loyalty and reliability that allows him to participate in political life.

## 12. PROPERTY AND THE URBAN SPACE

In the last few years, the discussion about urban development has resurged, possibly because for the first time in human history urban dwellers are more numerous than rural dwellers. Ecologically, the city is a portion of the Earth's surface that is not capable of feeding its population and is therefore dependent on chains of food import and distribution that make it extremely vulnerable. Today, the controllers of the food supply chain are a handful of multinational corporations, which explains why phenomena of massive urbanization carry with them major risks.<sup>79</sup> The discussion on the city, moreover, considers phenomena such as the decrease of urban public spaces, their privatization and gentrification, and the transformation of city planning determined by the concentration of rent.<sup>80</sup> In all these areas of concern, the development of the city involves the structure and effects of private property, since planning limits the power of the owners who tend to resist (or to capture regulators) in order to protect their prerogative to extract value produced by common activity and urbanization pressure. Private property in the urban space is thus able to create new zones of exclusion that are valuable for the owner but damaging to the common good, depriving communities of accessible and open urban areas. This is the effect of the privatization of public space when private areas with limited access substitute accessible places. Gated communities are the most visible face of this phenomenon: the construction of a segregated area separated from the rest of the city, with its own system of control and private security.

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<sup>79</sup> Luigi Russi, *Hungry Capital: The Financialization of Food* (Zero Books 2013).

<sup>80</sup> C Iaione and S Foster, 'The City as a Commons' [2016] 34(2) *Yale Law & Policy Review* 281.

### 13. SUBSTITUTING INCLUSION FOR EXCLUSION IN PROPERTY LAW: A SCANDINAVIAN PRIMER

Exclusion plays a starring role in the modern paradigm of property, which traditionally relies only on the idea of *having*. It is the fundamental power of the owner and, in terms of interpretation, it has often been considered as the general principle, the default rule, at the core of private property. According to this approach, exclusion is the necessary and sufficient condition to have property, and without it the legal category is compromised and can disappear. The right to exclude has an instrumental purpose, which supports both the right to enjoy and the right to dispose of things.<sup>81</sup> Exclusion, in other words, is not the *end* of ownership, but only a *means* through which the owner can carry out, without interference, his private decision-making. In the dominant theory of property, exclusion represents the rule, while the opposite power, which is the right to be included or the power of access recognized for non-owners, is only an exception to the rule. In fact, the cases in which the owner is forced to accept the entry of strangers and an unauthorized use of his asset are precisely defined by law in almost every legal system and interpreters never expand them by analogy or other forms of expansive legal reasoning. Examples of rights to access someone else's property are myriad through different legal systems: entry is admitted when a stranger has to get his fugitive thing back; when a neighbor has to repair a fence or a common wall; when she has the right to protect her view by cutting branches of trees; when he is exercising a right to hunt and private property is not properly fenced (as in Italy); to ski or to collect mushrooms; to roam and enjoy nature (as in England); or even to dwell and camp as in Sweden and other Scandinavian countries. These are manifestations of the right *not* to be excluded, forms of access that have resisted the individualistic rhetoric but which, despite offering important clues for counter-hegemonic interpretations, have never been turned into a full-fledged counter-principle.<sup>82</sup> As a consequence, they are still unable to preside over that generative (ecological and redistributive) function that property law could play if access were also considered part of it.

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<sup>81</sup> Thomas Merrill, 'Property and the Right to Exclude', cit.

<sup>82</sup> Alessandra Quarta, *Non-proprietà. Teoria e prassi dell'accesso ai beni* (Esi 2016).

The most important example of this ecological counter-principle is represented by the practical application of access to nature in England<sup>83</sup> and Northern Europe.<sup>84</sup> The legal introduction of the right to roam in England is the result of a very long political process, which started with the community's need to enjoy the English countryside. The *Countryside and Rights of Way Act* was adopted in 2000 and regulates access to private rural areas. The political campaigns for the recognition of this right began in the second half of the nineteenth century. In that period, the Commons Preservation Society organized the movement for claiming the right to roam; in 1932, a group of hikers illegally entered the private area of Kinder Scout, a plateau considered to be one of the most beautiful English landscapes. The occupation claimed access to natural areas and obtained an important political result: in fact, after the Second World War, the government established national parks (and the Kinder Scout area was among them) and in 1949 it approved the *National Parks and Access to the Countryside Act*. This Act contained a map of passages, paths, and horse-drawn roads that could be freely crossed. The protests, however, did not stop because of the large number of natural areas or passages belonging to private owners who resisted the law promoted by the Labour Government. As a consequence of this resistance by landed interests, only a few areas were truly open to the public. In the 1990s, the movement of hikers known as The Land is Ours promoted the occupation of rural private areas in order to put pressure on the Labour Party. The movement claimed a complete recognition of the right to roam and its effectivity in private lands. The theme was included among the programmatic objectives of the Labour Party platform. Thus, the Blair Government, established in 1997, started a preliminary study on how to ensure the right to roam that was eventually regulated in 2000 by the *Countryside and the Rights of Way Act*. During the discussion of the law, the owners of rural areas asked to be compensated: they claimed that the introduction of the right to roam on their lands would reduce their properties' value and increase insurance costs and expenses for repairing possible damages caused by roamers. The Parliament, however, defended the public interest that supported the right to roam and denied any form of compensation, asking the competent local authorities to assist the owners involved during the first phase of the law's application.

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<sup>83</sup> Jerry L Anderson, 'Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks' [2007] 19 *Georgetown International Environmental Law Review* 375.

<sup>84</sup> Filippo Valguarnera, *Accesso alla natura tra ideologia e diritto* (Giappichelli 2013).

The right to roam is regulated as an exception, which shows how exclusion still remains the default rule. In fact, roamers can access exclusively on foot, with the use of cars or bicycles being forbidden. Moreover, the right to roam must have a recreational purpose, accessible lands are defined in special maps drafted by municipalities, and the owner can deny access for up to 28 days of the year.

The right to roam is protected in a broader fashion in Scandinavian countries such as Sweden. In this country, the *Allemansrätt* (the right of all men) is an ancient customary right that gives visitors access to private lands for walking, hiking, camping, picnicking, and foraging fruits. Access to cultivated lands and to those areas that are close to a private building is forbidden and considered abusive. These are the only two quite reasonable exceptions, and all other properties (regardless of whether they are open or fenced fields) are subject to the *Allemansrätt*, as long as no damage is caused by visitors. In 1994, the *Allemansrätt* was declared a fundamental right in the Swedish Constitution, but its content has not been clarified. However, this constitutional modification provides a defined legal framework to the practice.

In any case, the right to roam, when not reduced to an exceptional limitation to exclusion but rather a counter-principle of constitutional value, represents an interesting example of the legal protection of an *open ecological community of non-owners* that an *ecologically literate community of legal interpreters* could extend by analogy.

## 14. ACCESS AND EXCLUSION

The legal provisions governing access discussed above, rather than being interpreted as narrow exceptions, can be considered as first steps in the making of a counter-principle that potentially changes in a more sustainable way the default rules of the system. Other rules such as adverse possession (*usucapio*)<sup>85</sup> and the state of necessity (by the criminal law applied to the hypothesis of violation of ownership)<sup>86</sup> supplement our toolkit by governing an antagonistic relationship between two parties claiming the same resource. The owner claims it as a matter of right

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<sup>85</sup> Tessa Davis, 'Keeping the Welcome Mat Rolled-Up: Social Justice Theorists' Failure to Embrace Adverse Possession as a Redistributive Tool' [2010] 20 *Journal of Transnational Law & Policy* 73; Eduardo M Peñalver and Sonia K Katyal, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership* (Yale University Press 2010).

<sup>86</sup> E Peñalver and S Katyal, *Property Outlaws*, cit.

while his antagonist claims it as a matter of use or need. Often the law of possession decides in favor of the latter claim.<sup>87</sup> Similarly, compression in favor of access occurs to restrict exclusion that does not involve a serious economic damage for the owner. This is the case of the conflict between private property and freedom of speech in private shopping malls,<sup>88</sup> often solved in favor of the latter.

Exclusion and access can therefore coexist and the search for balance would be greatly facilitated by the professional elaboration of an inclusive, relational, and generative notion of property that imports into its deeper structure the needs of the ecological community to which each owner belongs, together with a number of non-owning stakeholders. It is crucial to recognize and identify such a community in which the interests of non-owners are qualified and not diluted in generic notions, such as the public interest. Western lawyers have remained remarkably far from any attempt to theorize generative structures of property by fine-tuning the power to exclude and by creating property rights favoring the sharing of resources. Fortunately, as is often the case, the life of the law created from the bottom up by customary uses has surpassed the imagination of scholars and access has become practice. Two examples can illustrate this point.

Non-owners have practiced the right not to be excluded from (*i.e.* to access) property where they claim a common stake through disobedience: intentional violations motivated by political goals of inclusion challenging the owner's power to exclude.<sup>89</sup> For example, the "Occupy movements" and their protests against the concentration of wealth in a few hands (*e.g.* Occupy Wall Street, Indignados Movement) have deployed the occupation of private and public property as politically motivated resistance. This strategy, deployed during the civil rights movements in the United States by sit-ins and occupations of segregated spaces (such as bus stops and restaurants), experimented with new forms of long-lasting direct collective care of spaces that might well be embryonic new institutions of the commons. Similarly, the spread of squatting in abandoned buildings and vacant apartments and their regeneration by

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<sup>87</sup> J Gordley and U Mattei, 'Protecting Possessions', *cit.*

<sup>88</sup> A Quarta, 'Property vs. Freedom of Speech: Cronache americane di un cortocircuito metropolitano' [2015] PD 157; Stanley H Friedelbaum, 'Private Property, Public Property: Shopping Centers and Expressive Freedom in the States' [1998–1999] *Alb. L. Rev.* 1229.

<sup>89</sup> A Quarta and T Ferrando, 'Italian Property Outlaws', *cit.*; E Peñalver and S Katyal, *Property Outlaws*, *cit.*

collectives of occupiers must be interpreted as the satisfaction of legitimate needs and constitutionally guaranteed rights through (formally) illegal direct collective enforcement.<sup>90</sup> There are many historical examples of such struggles, such as in Italy after the First World War when landless peasants invaded estates left uncultivated in order to take control of such idle means of production, and the contemporary struggles of *Sem Terra* in Brazil.

One has to consider that to non-owning members of the same ecological community (e.g. a city quarter or a countryside) property is only a source of obligations and duties, and that in any such community “any increase of property multiplies at the same time, in a more than proportional way, the non-property of others.”<sup>91</sup> Collective access to property has often characterized the political agenda of social movements.<sup>92</sup> The law has generally repressed but occasionally recognized such claims as “a conveyance driven by accesses” continuing nevertheless to ensure a framework of guarantees for the owner. This strategy has legitimized the “rule-exception” relationship between exclusion and access and has helped to keep the solution to the clash between owners and non-owners below the radar of property law.

Of course, these ex-post exceptional political mediations remain possible only as long as the public has the ability to implement redistributive interventions through measures that hit the strongest property-owning members of the stakeholders’ community. Today, the aforementioned change of power balance between government and big private interests makes it very difficult for the public sector (particularly the legislative and executive branches) to fulfill its traditional redistributive and mediating tasks. For this reason, the antagonism between owners and non-owners within the same ecological community needs to be addressed also by a decentralized system of choices made by courts (staffed with ecologically-literate judges) deciding between access and exclusion unbiased by the traditional default rules. In particular, the interest of the owner in excluding other members of the ecological community from his property must be aggressively second-guessed in the interest of long-term

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<sup>90</sup> L Fox O’Mahony and N A Cobb, ‘Taxonomies of Squatting: Unlawful Occupation in a New Legal Order’ [2008] 71(6) *Modern Law Review* 868.

<sup>91</sup> Niklas Luhmann, *Rechtssystem und Rechtsdogmatik* (Verlag W Kohlhammer 1974), Italian translation by A Febbrajo, *Sistema giuridico e dogmatica giuridica* (Il Mulino 1978 134).

<sup>92</sup> Ugo Mattei, ‘Protecting the Commons: Water, Culture and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance’ [2013] *The South Atlantic Quarterly* 366.

ecological equilibrium. A counter-hegemonic interpretation that intends to give new meanings to existing rules seems to require abandoning the paradigm of property as exclusion. Taking into account the ecological community, in which the life of the law unfolds, requires the introduction of elements of inclusion in the very structure of ownership, authorizing several forms of access, according to the characteristics of property. In this legal framework, access is not considered an exception, but a new general principle of property law. One must note that property postulates a necessary and unavoidable privative effect, such that the dimensions of having and not having are intimately connected. They cannot be separated in the development of a paradigm of generative property that seeks to tackle inequality and exploitation (both social and environmental).

The interpretive ethos of property law should therefore limit the paradigm of exclusion where it is socially and ecologically desirable, while at the same time elaborating a new access-based paradigm of property on inclusive bases (*i.e.* allowing the analogical and extensive interpretation of provisions related to access).

History has proven that exclusion might be an important aspect in the generation of a sustainable ecological community. Individuals need space to be left alone for developing their personalities. Having is sometimes necessary for being. Hence, Scandinavian *Allemansrätt* allows exclusion from the immediate surroundings of a home in order to protect privacy. Even the most hospitable people might object if someone invited to dinner suddenly enters the bedroom without authorization. For this same reason, Soviet law always allowed and protected *personal property*, in spite of capitalist propaganda telling people that in communist countries one had to share the bedroom, the kitchen, and even the toothbrush! Today, exclusion is threatened by *smart property* and the so-called *Internet of things* that connects our electronic devices to the Internet allowing the producer of our smart phone, TV set, electronically controlled heater, or car to control our life remotely or to sell our data, as they own property.<sup>93</sup> Property law should be able to *exclude* drones from flying close to our homes to spy on us, utility companies to install devices to measure remotely consumption if we are not certain of what they do with the data that they collect, or money lenders to install remote devices on cars we have purchased with the borrowed money that allow the lenders to switch the engine off if they believe we defaulted on a loan. Both exclusion and inclusion are necessary as principles in the

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<sup>93</sup> Joshua A T Fairfield, *Owned: Property, Privacy and the New Digital Serfdom*, cit.

toolkit of the property lawyer well equipped to face the challenges of a political system unbalanced in favor of private corporations. A correct balance between exclusion and inclusion is, however, not sufficient if disconnected from the legal construction of ecological communities, *i.e.* the kind of collective entities that the legal notion of the commons is supposed to construct beyond individualization.

## 15. COMMONS

There is no recognized legal definition of the commons.<sup>94</sup> There is, however, broad agreement among scholars that commons are neither private nor public. But the agreement stops there. According to some, the commons are resources (common pool resources) that are better managed collectively. According to others, they cannot be understood as an object, a portion of the material or immaterial space. In this latter perspective, commons are recognized as such by a *community* (what we called an ecological community) that engages in their management and care not only in its own interest but also in that of future generations.

Moreover, according to some, commons are not the foe of individual property as such (what Soviet lawyers recognized as personal property), but only of the excesses of its accumulation. Similarly, commons are not the foe of government as such, but only of the excesses of power concentration. Commons institutions limit the excesses of all power concentration through direct decision-making by the communities who take care of the commons, thus generating correct feedback loops for all other institutions. In this sense, commons are useful to critique and reform the exercise of public sovereignty. A more radical perspective sees the commons as a full-fledged alternative to capitalism, a kind of social and institutional experimentation that might in the long run change the current status quo.

For the limited purpose of legal interpretation, we do not have to take a position in this debate, but only to clarify that theoretically the commons are much more than just an intermediate form of property (or economy) between the private and the public. They are a *powerful interpretive tool* that might allow the eco-literate interpreter to overcome

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<sup>94</sup> For a deepened treatise of the theory of the commons, see M R Marella, 'The Commons as a Legal Concept' [2016] *Law and Critique* 1; F Capra and U Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Berrett-Koehler 2015); Ugo Mattei, *Beni Comuni. Un Manifesto* (Laterza 2011); A Quarta and T Ferrando, 'Italian Property Outlaws', *cit.*

some limits of the current individualized and positivistic framework of private law.

In fact, public ownership is traditionally described as a different institution from private ownership because the public interest rather than the private one should govern the management of (*imperium* over) public resources. Public authorities in this narrative are just managers acting in the interest of (sovereign) communities of citizens that appoint them through the political process. This narrative does not recognize that in the last 40 years, public authority has deliberated the privatization of public services as well as the sale of public goods most often against the interest of communities. There is currently a separation between Government (captured by vested interests) and the popular will. Because of this capture, the public authority owning property is not really different from the private one: in the neoliberal setting, public authority is simply incapable of taking care of the long-term public interest because of budget restrictions. It makes decisions in terms of its own short-term budgetary interest and, moreover, it is shielded from judicial scrutiny of its decisions to privatize.

Elaborating a legal notion of the commons, therefore, serves the function of involving citizens in the management of public goods and gives more protection to those natural resources and services that are at risk of privatization. In the perspective of private law, the commons are a set of rules produced from the bottom up by a community that takes care of certain material and immaterial goods. They are an act of autonomy. Commons do not exist outside of an ecological community of stakeholders but, at the same time, a community can create a commons by sharing activities and cooperation. In other words, a commons may be anything an open community recognizes as capable of satisfying some real or fundamental need outside of market exchange. In addition to physical public space, this may include institutional organizations such as cooperatives or commonwealths, trusts in the interest of future generations, village economies, civic usages, water-sharing devices, and many other arrangements, past and present. The value of the commons, qualitative rather than quantitative, is created by shared (ecological) *community access* and *diffused decision-making power*. These common institutions tend to counteract the selfish profit motive, inequality, and shortsightedness. Institutions of commons function through a direct legal empowerment of their members in common pursuit of a generative meaning or task, and they respond to real human needs for participation,

security, and sociability.<sup>95</sup> They are examples of generative rather than extractive property. The rules of commoning should inspire as models or principles of the ecological interpretation of property law.

A particular physical space may or may not be defined as a commons, depending on its use and whether it is capable of satisfying the fundamental needs of a community, both present and future.<sup>96</sup> For example, although a disused railroad station may be privatized and transformed into a shopping mall, it may also be recognized and protected as a commons, because it is capable of providing shelter to the homeless, a stage for street artists, or a venue for political activism. It does not matter whether the ultimate legal title to the premises is private or public, a corporation, or a municipality, but only whether the space fosters a generative collective activity or is run on a model of exclusion, extracting profit and rent.

Today, the serious depletion of our common natural and cultural resources makes it imperative to redress this imbalance of power among the private, the public, and (through) the commons.<sup>97</sup> Harmonizing human laws with the principles of ecology requires, at least, the development of a healthy and legally protected commons sector and associated institutions. We must start from the basics of ecological thinking, cultivating diversity, resilience, and social networks capable of changing the world from the bottom up.

## 16. SHIFTING THE DEFAULT RULES

The principles of access and inclusion in the ecological community when fully deployed in their interpretive meaning conjure up a relational rather than an individualized vision of property law that finds in the idea of the commons its more advanced institutional setting. Such principles were never completely obliterated by the modernist extractive project. Their re-emergence from social and political struggles for ecological justice must be integrated into the current legal order through interpretation by

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<sup>95</sup> S Bailey and U Mattei, 'Social Movements as Constituent Power: The Italian Struggle of the Commons' [2013] 20 *Indiana Journal of Global Legal Studies* 965.

<sup>96</sup> U Mattei and A Quarta, 'Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law' [2015] 1(2) *The Italian Law Journal* 303.

<sup>97</sup> David Bollier, *Think Like a Commoner*, cit.

jurists.<sup>98</sup> In particular, the principle of access not only means the chance to enter a place or to experience other forms of membership, but also the possibility to participate in managing various assets through new institutions or old refurbished mechanisms.<sup>99</sup>

Current Western property law sets its default rules in favor of private property as an arbitrary decision-making power of the owner. It is the non-owner that must prove the irrational behavior of the owner in a one-on-one conflict that naturally tends to favor the latter. Today, if an industrial farmer uses chemicals to farm his land—thereby making organic farming in the adjoining property impossible—it is the organic farmer that must sustain the burden of proving the unreasonableness of industrial farming. Thanks to the commons, this burden of proof can be subverted and it will then be the industrial farmer that needs to prove that organic farming is an unreasonable restriction to his power to pollute using chemicals. Commons can help legal scholars to develop new instruments of reasonableness and interpret property law in an inclusive direction. At the same time, they can introduce intrinsic ecological limits to the management of goods and services. According to the first objective, an inclusive paradigm of property needs two different approaches. On the one hand, we need an interpretative effort in order to assign a new meaning to existing property law. In this way, we can enhance collaborative elements, ecological sensibilities, and solidarity and discourage selfish use of the right. In this sense, we can define a framework of interpretative criteria that can drive interpreters in this important task.

As a general principle, the interest of the owner in an actual use of his goods is an important parameter by which to govern conflicts between access and exclusion; in this way, we can conciliate, for instance, temporary uses with property rights, giving access and the right of use to non-owners in those periods in which the owner is not using his goods. This principle avoids wasting the excess capacity of the goods and it is particularly useful when we consider empty buildings as well as uncultivated lands that can be used to create new economies and jobs.

Furthermore, temporary uses provide the possibility to challenge the neoliberal rent-driven urban “planning” leading to gentrification and exclusion. It opens experimentation on the way in which value can be

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<sup>98</sup> F Capra and U Mattei, *The Ecology of Law*, cit.

<sup>99</sup> *Ibid* 157 and 165.

generated by producing public spaces.<sup>100</sup> The regeneration of empty buildings benefits all the stakeholders: the public or private owner benefits from a reduction in maintenance costs; the neighborhood enjoys the positive externalities produced by regeneration, while the temporary users can find a place in which they can work or live. In this way, “temporary” is not a synonym for “exceptional,” because the new use is chosen with a bottom-up approach that involves the neighborhood where buildings and ecological community exist and may become durable. At the same time, the regeneration contributes to an ecological development of the city and assures to temporary users an active role in city planning.

The aim of this commons based counter-hegemonic interpretation is to shift the paradigm of property towards an inclusive and generative model by changing the default rules of the game. In the Western legal tradition, a variety of property rights structures can be interpreted to protect its generative use. Legal structures such as community land trusts, deployed in a number of cities in the United States and Europe to revamp blighted property, can be used to vest property rights in a community for extensive areas and only allow individuals exclusive use of some portions, which they may refurbish for themselves.<sup>101</sup> The community, a notion that includes future generations, is thus the beneficiary of a trust, and individuals might have rights of exclusive use with various limitations on alienability on parts of it. The community land trust is a relatively effective institution, limiting the impact of rent extraction for low-income people. Its care (governance in the neoliberal jargon) is vested in trustees who are selected in a variety of ways, usually by a community assembly.

Furthermore, the traditional ownership/possession dynamic can be structured in such a way that absentee property owners lose their property rights to actively cultivating or needy occupants. Legal systems (Italy, France, the UK) can do so by using very short terms of adverse possession or, as occurred in Italy, by allowing young farmers, organized in cooperatives, to petition local governments when they are interested in cultivating portions of land that they identify as vacant.<sup>102</sup> Even outside

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<sup>100</sup> Henry Lefebvre, *The Production of Space* (English translation by Donald Nicholson-Smith, Blackwell 1991).

<sup>101</sup> Anna di Robilant, ‘Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law’ [2014] 62 *AJCL* 301; Antonio Vercellone, ‘Urban commons e modelli di governo. Il Community Land Trust’, in Alessandra Quarta and Michele Spanò (eds), *Beni comuni 2.0. Contro-egemonia e nuove istituzioni* (Mimesis 2016) 171–185.

<sup>102</sup> This regulation is the n. 440 adopted by the Italian Parliament in 1978.

of legislative reforms, notions of *unjustified enrichment* can be interpreted to limit the incentives of absentee owners to sue possessors by taking into consideration the benefits produced by generative uses to the whole ecological community and thus making it very expensive to keep ownership vacant from occupants constructed as fellow commoners by legal interpretation. Indeed, keeping property empty invariably produces decay. Taking into consideration the damage thus produced to the whole *ecological community* allows for the interpretation of non-use as a nuisance against which a whole array of remedies (from injunction to damages to confiscation) could be deployed.

Developing tenure systems characterized by their generative capacity and thus favoring sustainable production over rent extraction is perhaps the most important frontier of property law. Translating capital and technology into commons requires an ecological legal order based upon genuine respect and a common purpose, which each community would be able to interpret and apply according to its own cultural traditions, business opportunities, and shared desires.

Such a central role of the ecological community is crucial in modifying the default rules of the game by interpretation. Imagine once again the conflict between a farmer who produces using chemical pesticides and genetically modified seeds and the neighbor engaged in organic agriculture. The first activity is perhaps the single most ecologically damaging way to exploit land, with an impact on a large ecological community of stakeholders, human and non-human. Monsanto and other large producers of chemicals, owners of seed patents, and land-grabbers aggressively lobby legislators globally to allow the use of such products that make nearby organic production of food impossible. The current default rules of extractive property law put the burden on the plaintiff to prove that GMO production is unreasonable because it makes organic production impossible. This is an almost impossible task today and the organic producer will have to keep a large buffer of his own land idle in order not to be contaminated (and in the US even accused of patent infringement if traces of GMOs nevertheless show up in his plants). Default rules of generative property law would take into consideration the impact on the whole ecological community and the fact that organic farming is perhaps the single most important culturally driven change to reduce greenhouse gas emissions. This can happen simply by shifting the burden of proof of the nuisance rules. It will be the chemical producer that has to prove, under standards of precaution or even just of *watertight protection* of the organically cultivated land (a traditional property exclusion that can be conditioned on the community-friendly use), that he does not impact on the ecological community for which the organic producer serves as

private attorney general. This simultaneous use of inclusion (generative use is determined by an ecological community) and of exclusion (generative use is entitled to the full protection of the law) is the essence of *generative ownership*. It limits from the inside, through a serious account of externalities not only in space but also over time (inter-generational externalities), the extent of proprietary freedom seen as a behavior of the “part” that cannot conflict with the “whole.”

An ecologically literate judge can now follow—without waiting for legislative reform—such an ecological jurisprudence everywhere.

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