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Private, Public and Common. Republican and Socialist Blueprints

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Abstract: The conception of property is usually moulded upon diverting historical and political-philosophical frameworks. The current interest on the commons illustrates these divergences when they come up between a 'pure' public and a 'pure' private form of ownership. This conceptual triad misleads by conflating private property with an absolute property right while equating public property with a centralised political regime. This article traces the republican conception of property in order to show how it draws a legal and philosophical continuum around different forms of ownership, based on a fiduciary principle underlying the relationship between the sovereign or principal (trustor) and its agent (trustee). Despite modern socialism apparently left aside the question of the commons, the republican-fiduciary rationale was reformulated according to the modern industrial capitalist society.

Keywords: commons, fiduciary principle, natural rights, property, republicanism, socialism

Discourses around property ownership respond to heterogeneous and even confronted historical and political-philosophical accounts. These discourses may differ not only in the content and the nature of the institution of property and its correlated rights, but also in the political dimension of this institution and these rights when installed in a particular political and institutional historical context. The current interest around the idea of commons resources and common property rights easily illustrates these divergences because the debate usually comes

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up with a third way of property, which somehow coexists between a supposedly pure public and a pure private form of ownership.

Over the last three decades, the debate on the commons has gained popularity among social movements and scholars. The Nobel Prize laureate Elinor Ostrom and her study on the 'common-pool resources' (Ostrom 1990) did significantly advance the pre-eminence of the topic. However, the increasing centrality of intellectual property rights and of the patents and copyrights, already advanced the discussion outside academia. Therefore, as long as some crucial legal, political and economic discussions have resulted from the commons over the last years, different ideological and personal positions have also been differentiated. Despite all the differences they may have, most of these perspectives similarly tend to conceptualise the commons as a different form of property detached from public and private ones, and to present them as a triad of set-apart or differentiated institutions or regimes of property. This article aims to problematise this conceptual understanding and to defend the hypothesis that public, private, and common property can be better understood as part of the same legal and philosophical continuum in light of the republican tradition.

To develop this hypothesis, the article is structured as follows. The second section points out that public, private, and common property regimes do not essentially stand as 'three ideal types of property'. The third section draws the historical, conceptual and normative framework through which republican thought understood the commons and common property until the late eighteenth century upon the idea of 'fiduciary property rights'. The fourth section explains how the defeat of the democratic wing of the French Revolution and the historical and economic developments of the early nineteenth century challenged this republican-fiduciary framework. The fifth section focuses more on how early socialist thinkers, including Karl Marx, welcomed and transmitted some aspects of this republican-fiduciary framework and how the new economic and political scenario forced rearticulation of such a framework in an innovative way. Conclusions suggest that both republicanism and socialism are important to understand common goods and common property because both traditions understood public, private, and commons property regimes as components of the same fiduciary logic that adopted different institutional settings according to each historical context.

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Property Rights and the Commons in Mainstream Contemporary Debate

When academic debates transcend to the political and economic real-world, they usually disclose multiple, interrelated perspectives. Within the actual debate on property rights, two main, generic perspectives may be identified, which in turn apply to the debate about the commons and their correlated property rights. This simple and non-exhaustive classification must not preclude us from considering other possible views or classifications, it is simply intended to facilitate our analysis.

One important perspective is usually associated with a critical view that attributes an emancipatory character to the commons and to the communities behind them. Based on collaborative practices and open, horizontal, participatory rules, the commons would enclose a democratising alternative to the centralising and tendentially 'dictatorial' socialist state, as well as to the oligopolistic forces of capitalist markets. The well-known slogan 'neither public, nor private, but common' is quite illustrative here. The commons and their associated property rights would challenge the public/private or state/market binarism. This way, 'the common/s appears as a possible "third" space besides and equal to the state and the market' (Caffentzis and Federici 2014: 100). Moreover, this would constitute a programme of political and economic transformation able to redraw the role of the states and the markets:

> the overall goal must be to reconceptualise the neoliberal State/Market as a 'triarchy' with the Commons – the State/Market/Commons – to realign authority and provisioning in new, more beneficial ways. The State would maintain its commitments to representative governance and management of public property just as private enterprise would continue to own capital to produce saleable goods and services in the Market sector. (Bollier and Weston 2012: 350, quoted in Caffentzis and Federici 2014)

The commons would not only contribute to 'realign authority and provisioning' of the state and the market, but rather they would reconceptualise the very idea of public and private property, and consequently, they challenge the very ideological systems supposedly correlative to them – socialism and capitalism. Michael Hardt and Antonio Negri are probably the most renowned thinkers in this line:

> Socialism and capitalism, however, even though they have at times been mingled together and at others occasioned bitter conflicts, are both regimes of property that exclude the common. The political project of instituting the common … cuts diagonally across these false alternatives – neither private nor public, neither capitalist nor socialist – and opens a new space for politics. (Hardt and Negri 2009: ix)

In sum, as Hardt defends, 'The commons, in contrast to both the private and the public, is defined by open access and democratic decision-making'.[1] Although this has become quite popular, a second perspective seems to prevail among legal scholars and political philosophers who tend to put forward a much more sceptical reading of the emancipatory potential of the commons. Here, the commons as well as their associated property rights, would rather represent a mere legal vestige of an anachronistic, often idealised world (Becker 1980; Narveson 1988) insofar as they do not correspond to the demands of efficiency and efficacy of capitalist modernity (Coase 1974; Merrill and Smith 2001).

From the possessive individualism (Macpherson 1962) up to the libertarian self-ownership (Nozick 1974), the core idea of this view is that modernity was unfolded through and characterised by the expansion of private property, being legally codified strictly as an individual, absolute, and exclusive right at the expenses of the common goods and of their corresponding property rights (Congost 2003; Neeson 1993). In other words, the commons would have succumbed to the 'inevitable' advance of capitalist modernity and to the 'natural' imposition of the 'classical liberal property' (Whelan 1980). This view usually invokes Sir William Blackstone's definition of private property as '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' (Blackstone 1897, II, I: 167). This Blackstonian dominion would become pivotal for the ulterior neoclassical economic and political thought that, once again, would define property as those 'objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded' (Hayek 1973: 107).

By overemphasising these two features – individualist nature and absolute, exclusive possession – actual mainstream philosophy and economic thought have tended to a-critically assume the idea that the property owner's right to exclude others is 'universally

held to be a fundamental element of the property right' (Callies and Breener 2000: 39).[2] Common goods and thus their correlative property rights would be problematic, since their use, management and exploitation involve different users whose rational interests and individual preferences would collide hence threatening the very existence of these goods (Demsetz 1967; Pejovich 1990). Consequently, the commons should be considered an inefficient ownership regime (North 1990) in front of the idea of a particular owner who 'despotically' excludes all others from his 'exclusive domain' within a more efficient, rational and sustainable framework of management of resources and of the whole economic system (Hardin 1968; Tietenberg 1992; Tisdell 1993).

Contesting this assumption, other authors have argued that real-world legal doctrines contain very few plausible instances of property rights as an exclusive and despotic dominion, and hence that the right-to-exclude approach should be rejected as too limiting (Mundó 2017; Rose 1998; Simon 1991). Nevertheless, although it is recognised that legal doctrines are richer and more complex, the notion of exclusive and despotic dominion became the bedrock of mainstream legal and political theory in the nineteenth and twentieth centuries and still endures as a core tenet of present-day academic wisdom on the matter.[3] Paradoxically, these two perspectives similarly embrace the idea that the private and common resources (not to mention the public ones), as well as their associated ownership regimes, are not only different legal entities with different historical and philosophical backgrounds, but that they are also setting apart, excluding each other in legal and conceptual terms.

A Historical and Philosophical Republican Reconstruction

The slogan 'neither public, nor private, but common' defended by Hardt and Negri is rather confusing because (1) it draws a triad of differentiated property regimes, which (2) are presented as mutually exclusive to each other. Paradoxically, the two perspectives described above coincide in these two points. However, characterising public, private, and commons as different and mutually exclusive regimes of ownership does not seem to correspond to the

historical nor legal-philosophical configuration of the institution of property nor to the rights associated to it. If this is true, might we instead speak of a legal and philosophical continuum encompassing these three types of property?

As follows, we aim to sustain that the somehow neglected republican tradition can be useful to respond to this question. As William H. Simon suggests, this framework is not historically anomalous nor conceptually implausible as the rigid perspectives of property rights may assume (1991: 1412). Therefore, our intuition is that the republican account is likely to offer a robust and parsimonious explanation when discussing property rights in general and the commons in particular. This republican framework may be of interest here for two reasons. First, it has more than 2,400 years of history behind the development of an institution – property – that has always been pivotal to this tradition of thought as well as to the very real world it has contributed to shaping. Second, because of the influence it exercised over the later nineteenth-century socialism. It is through this influence that the main republican axioms are still identifiable in the legal, political and constitutional configuration of nowadays market societies. Thus, it seems appropriate to explore these two reasons in a little more detail.

In his *Politics* (1959), Aristotle defined three types of property regimes: (1) common ownership with common use; (2) particular ownership but common use and benefit; (3) and common ownership with a particular or private use and benefit. It is worth noting that he did not consider private ownership and use. This was pretty-well considered, however, by the Roman civil law in the form of the *quiritarian* ownership or dominium (*dominium ex iure quiritium*). And it was by overemphasising the four abilities the *dominus* had on it (to freely enjoy – *ius fruendi,* to use – *ius utendi,* to benefit from – *ius disponendi,* and to alienate – *ius abutendi*), that most of contemporary philosophy and economic thought has tended to a-critically adopt the Blackstonian/Roman notion of absolute and exclusive possession and to associate it with 'classical liberal property'. Nevertheless, Roman civil law also sanctioned other kinds of ownership that falls far beyond this restrictive idea. These were the *res nullius* or things that have not been appropriated yet; *res publicae* for the state's roads, harbours, ports or bridges, which nobody can be excluded from; *res universitatis* for those municipalities or

local entities where private and public corporations could own and manage property in common; and *res communes* for things open to everybody, like the oceans and the air mantle because their nature made them impossible for anyone to own (Rose 2003).

During the Mediaeval era things became even more complex, though 'the whole corpus of Roman law' was proven to be 'an immensely influential codification of church law' (Tierney 2004: 5). In fact, only the proto-typical Roman ownership, the *allodium,* survived as an absolute tenure not subject to any feudal obligation. However, the most characteristic tenure was the lord's manor which Antoni Domènech (2013) synthesises as 'a right of using the imperial or royal's land', which in turn, 'was subrogated through different mechanisms to different third parties (vassals, sharecroppers, villeins, serfs, slaves)'. Throughout the whole thirteenth century, Domènech continues, popular classes were consolidating and expanding a sort of *ius in re aliena,* a bundle of rights of common use upon natural resources belonging to the public – the empire or the king. These were going to be known as the commons in England, *communaux* in France, *allmende* or *mark* in the Germanic territories, or *ejidos* in Spain.

In the high Middle Ages, the Church was one of the largest proprietors in most Western countries. The disproportionate asymmetrical wealth distribution this implied raised important critics from the most radical factions of the Franciscans and other orders. To some extent, most of the canonist thinkers did accept private property and the actual feudal structure of property ownership, but 'in their own language, the essential problem was that private property … seemed contrary to the law of nature' (Tierney 1959: 28).[4] Indeed, the language of natural rights was quite familiar among all of them, in particular the idea of the 'possession of all things in common' [*communis omnium possessio*] which according to the Gratians' *Decretum* was a 'matter of natural law' (Tuck 1979: 18).

Modern republicanism is sometimes deemed to be an heir of this late-mediaeval natural law tradition (Bertomeu 2018; Bosc 2016; Domènech 2019). Though reframed according to the new scenario, natural law language was proven to be at stake during the political events of the Atlantic revolutions, particularly in the United States and in France (Antieau 1960; Gauthier 1992; Laín 2020). The former is a quite interesting case mostly because the founders'

conception of property rights was radically different from the frequently accepted idea of the classical liberal property pointed out before. To Thomas Jefferson, for example, property was neither a natural nor an absolute right. On the contrary, the true natural rights of liberty, freedom and happiness must be secured through this positive right, which thus, contrary to the standard view, can neither be unrestricted nor absolute. It follows, then, that '[w]henever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on' (Jefferson 1904–5: VIII: 196). Set up upon clear Lockean grounds, Jefferson argued that 'the lands within the limits assumed by a nation belong to the nation as a body'. Therefore, legal and legitimate property in lands cannot be admitted until a government is established and civil laws enacted. 'Till then', he sustained, 'the property is in the body of the nation' (Jefferson 1814: 31). So then, according to his republican framework, land belongs to the sovereign, the 'body of the nation', as the trustor or the principal. How to lawfully determine land allotment, then? According to his fiduciary rationale, '[T]his may be done by themselves assembled collectively, or by their legislature to whom they may have delegated sovereign authority' (Jefferson 1904–5: II: 85–86). Legislatures are nothing but trustees or agents of the sovereign, and then the individual owner is nothing but a temporary usufructuary of the common land.

The French experience was also crucial on how the modern world conceptualised and legally framed the institution of property. Like the American case, the French republican-Jacobin programme also joined both the tradition of natural rights and its associated idea of the common possession and the modern conception of fiduciary allocation and management of property rights. Nevertheless, and contrary to the Americans' idea of freehold and its small individual private property, the idea of common property was found to be the backbone of French Jacobinism. By the second third of the eighteenth century, François Quesnay aimed to 'liberalise' the economy by removing the traditional feudal controls on wages, prices and the distribution of grain (Gauthier 2015). These policies were reinforced by promoting the agrarian large states ownership and, among other measures, by bolstering the *triage,* a legal procedure from the

late seventeenth century that, like the English enclosures, permitted the landlords to expropriate the common lands managed by small farmers (Jones 1983; Vivier 1998). This process of expropriation and commodification spurred popular alliances among the rural peasantry and urban labourers, which ended up in the *Guerres des farines* (Gauthier and Ikni 1988; Rudé [1959] 1967) and the *jacqueries*, which all together paved the way to 1789 and then to 1793.

These popular movements were permeated by the idea of securing the basic natural rights – among which was the traditional right to existence – to which the use of common lands was seen as essential. The bulk of these moral feelings, political and economic demands people were claiming was framed by the Maximilien Robespierre's 'popular political economy', the programme contrary to the physiocrats and the proto-liberal 'free market' dynamics (Gauthier 1992: 55–101). The idea of natural rights, which this programme was moulded on, was clearly exposed by Robespierre's idea of property rights. The 1789–1792 Brissotins/Girondins' policies allowed unlimited freedom of trade and secured the 'sacred right' of private property. To him, these policies created a new absolute and exclusive private property right contrary to the spirit of the Declaration of 1789. To the Montagnards, freedom of trade, commerce and this absolute private property right should not contradict political freedom nor material existence. The French political and ideological cleavage was then settled according to the different, partisan interpretations the property rights may adopt: on the one hand, those supporting the constitutionalisation of a supposedly 'natural right of private property' or, on the other hand, those prioritising to constitutionalise the 'natural right of existence'. Robespierre and his allies did not deny the rightful existence of private property, but rather its abuse: 'no man has the right to amass piles of wheat when his neighbour is dying of hunger', he claimed (Robespierre 1957: 112). So, as in the American case, private property was not considered in itself a natural right, nor was it an unlimited, absolute right. Rather, it was a positive legal convention, instrumental to and limited by the respect of the natural rights, being the first and above all, the right to existence:

> The first social law is thus that which guarantees to all members of society the means of existence; all others are subordinate to it. Property was

> only instituted and guaranteed to cement it; it is primarily to live that people have property. It is not true that property can ever be in opposition with men's subsistence. (Robespierre 1957: 112)

In order to assure this natural right, the essential resources like the land are considered common property, and henceforth they cannot be treated as mere commodities:

> Everything essential to conserve life is a common property of the whole of society … Any mercantile speculation I make at the expense of my fellow's life is not trade at all, it is brigandage and fratricide. (Robespierre 1957: 112)[5]

Contrary to physiocrats and proto liberals such as Dupont de Nemours or Nicolas de Condorcet, Robespierre's and the Montagnards's popular political economy defended a sort of government that guaranteed basic natural rights, prioritising that of existence without which political freedom – nor the very same Republic – could not be conceived. Echoing the Lockean proviso on individual appropriation as only rightful inasmuch it should not 'prejudice … any other man, since there was still enough, and as good left' (Locke 2003, V, §33), Robespierre's programme proscribed the absolute and exclusive private property that backed the unrestricted freedom of commerce and the right of accumulation and speculation if these were to threaten people's existence.

In sum, Jefferson's and Robespierre's republican conception of property rights was similarly moulded upon the requirements of natural law and in accordance with the fiduciary framework. In the former case the right of freedom and of the pursuit of happiness stand out, while in the latter it was the right of existence. Also provided by an anti-freedom-alienist theoretical framework of natural rights, both republican programmes similarly endorse the idea that all those resources – mostly lands and natural resources – necessary to secure the natural rights belong to all men in common. The public was then the ultimate legitimate owner, and therefore both private owners – the freeholders admired by Jefferson, as well as commoners – backing Robespierre's popular political economy, would be rather the former's agents or trustees. This way, the republican idea of private property

> is in fact nothing but private appropriation of the resource in question as a public *fideicomissus* in a Principal/Agent relationship: the

> private owner (as well as the enfranchised common owner) is merely a trustee of public or sovereign property. The sovereign (the Monarch or the People) is the Principal (the 'trustor') and the proprietor is the Agent (the 'trustee') in the fiduciary social relationship called property. (Domènech and Bertomeu 2016: 251)

The Montagnards' Defeat and the Emergence of Resonant Socialist Ideas

The dynamics of social transformation combined through the process of industrialisation led to a succession of crucial challenges for the whole spectrum of republican visions and underlying frameworks. A historical account of republican concepts requires, therefore, paying attention to the social contexts in which the mobilisation of political concepts successively got reshaped as they encountered obstacles to their realisation. Some adaptations contributed to give even greater impetus to the transformations underway, others lost credibility or viability, and others simply formed part of dynamics that made it possible to make this process compatible with some of the principles that previously sustained popular republican aspirations. Thus, although the question of the commons throughout the nineteenth century and its fit into the socialist strategy is a matter on which no sharp dividing lines should be drawn, the issue retains its essence through the fiduciary principle and the partial inheritance of the natural rights tradition.

The Napoleonic wars and the time immediately following the restoration of monarchic regimes was a period when popular revolutionary aspirations were not at a peak, the least that can be said is that the influence of the communard project continued to nurture a republican spirit of democratic drive. While the fall of the feudal lords enhanced the glory of the bourgeoisie, the defeat of the little people, those layers of the population who did not gain full political rights, could only be seen in this narrative as outbreaks of mass hysteria and the haunting of terror.[6] How could that testimony of a popular republican culture, historically rooted in a diversity of extinguishing social forms of communal life survive? Countless characters, collective experiences and episodes of struggle laying the foundations for the shaping of the working class in Western countries have been brought to light by Marxist historians such

as E. P. Thompson, Eric Hobsbawm and others, and it is blatantly common to see them echoing the revolutionary 'crowing of the Gallic cock' as Marx himself would claim.

However, as is often the case in the history of the subaltern, the protagonists were primarily concerned with resisting oppression, denouncing exclusion and finding a way to make a living. The same way many movements had hitherto resorted to the language of natural rights, they were looking for expressive means for their disputes and their self-understandings, not necessarily a systematised compendium of theses on world history or the foundation of a new social science. In this respect, the influence of Philippe Buonarroti's account (1828) on Robespierre's and Gracchus Babeuf's legacy can be seen to have had an impact on key proto-socialist figures such as the leading chartist James Bronterre O'Brien, who translated Buonarroti (1836) and other French revolutionary texts. In line with Thomas Hodgskin, O'Brien not only distinguished between natural and unnatural property rights,[7] but also took inspiration for political strategy (Dolléans 1909: 350–354; Maw 2005: 145–146; Martínez-Cava 2020).[8]

The transmission of these ideas often became idealisations without a possible fit, swinging its diminishing transformative force towards a moralising tone about relations between individuals and metaphysically speculative notions of property. This was a crucial point for Marx, and largely for this reason he has become as an inescapable figure as elusive or uncomfortable for many republican authors who shy away from looking at plebeian movements.[9] In his commitment to 'prepare the way for the critical and materialist socialism, which alone can render the real, historical development of social production intelligible'[10] (2010a: 326–327), for Marx it was primarily a quest for understanding reality, but this was inseparable from combining a re-composed social mobilisation with a new programme of transformation aimed at the 'expropriation of the expropriators'. In order to achieve that, he had to try to bring together the incipient socialist consciousness that was emerging from this reality in different workers' movements with a political project that until then had been defended with republican foreshadowing. In that context, he adopted and promoted a republican perspective and at the same time had to deal militantly with all sorts of invocations of a 'nebulous republican ideology' with recurring

warnings such as '[t]he tradition of all the dead generations weighs like a nightmare on the brain of the living' (2010b: 103).

The pressing changes in population structure with the industrial rise of movable property led to the definitive evaporation of James Harrington's envisioning of a social republic based on the protection of unmovable property, which also resonated with the 'fraternal' revolutionary aspirations claiming the 'right to existence' for the poor. Devoid of full citizenship rights, the psycho-moral effervescence of human universalist principles emanated from the private sphere of the new relations of production. As the revolutionary republican echoes became successively more class-oriented in the course of the nineteenth century, the political question of the commons was translated into the common appropriation of the means of production. All layers of the demos seemed to be tending to dissolve into one class. It was with this conviction that Marx tried to rally and fraternally associate the workers not only as a means of struggle but also as the germ of a new common sense of a proletarian democracy:

> When communist artisans associate with one another, theory, propaganda, etc., is their first end. But at the same time, as a result of this association, they acquire a new need – the need for society – and what appears as a means becomes an end. In this practical process the most splendid results are to be observed whenever French socialist workers are seen together … the brotherhood of man is no mere phrase with them, but a fact of life. (Marx 2010c: 313)

New Socialist Understandings on Property

It is hard to dispute that the labour movement in the West, under the slogan 'workers of the world unite', followed a socialist path that turned its back on the imaginary and orientation of increasingly localised communal struggles. To what extent, then, does the legacy we have been presenting allow us to dissociate a political conception of the commons that is opposed to the founding roots of socialism? Did Marx and the bulk of nineteenth-century socialists lead to an idea of public ownership that is irreconcilable – in terms of its historical-normative foundation and its strategic opportunity as far as possible – with this other very old, but still relevant, concern? Would it not be closer to misrepresentation to corner socialism with

the idea of an all-encompassing public control exercised by a centralised administrative corpus instead of the struggle for common ownership to guarantee an autonomous social existence?

In spite of many, the popular language of natural rights had entered a deep crisis and could not be effectively understood in a context where a kind of cultural battle could very easily contest and distort its meaning once declared. The dimension of the search for harmony in the Natural Law framework came to be seen predominantly as a sack of chimaeras without material basis. The Napoleonic civil code served as a decisive blow to the dismantling of this tradition as a skilful reasoning technique for legislation and jurisprudential practice. It essentially crystallised the Blackstonian notion of property and erased at a stroke the normative articulation of private property with respect to public law. The very republican definition of citizenship itself was fractured and represents the key historical moment from which the universal extension of freedom ceased to be addressed as a philosophical-political problem: whether rich or poor, entitled to participate effectively in politics or not, legal equality, in its most properly post-Thermidorian distortion, was erected as a guiding principle.

This collision entailed not only a legal block but also a blockage of the programmatic unfolding of the eighteenth century declarations of inalienable rights. In the emerging 'bourgeois' civil society, the old feudal disputes between peasants and feudal lords were diluted in a war of each against all (the Hobbesian *Bellum omnium contra omnes*), where each privately constituted individual shall contribute to the common good as long as that person does not exceed the absolute dominion of the other. This conceptual framework would not even allow for the possibility of theoretically proposing forms of collective self-regulation such as those analysed by Ostrom many years later.[11] There was also the imprint of institutions and practices that had been born in the heat of communal forms of social organisation in the past or even surviving in the present. The old Marx, deeply immersed in this preoccupation, found revealing clues in Americas, Asia and Africa (Anderson 2010) and even told his inseparable Friedrich Engels in amazement about the extensive evidence he was discovering even in his own region and about the enormous conceptual and political implications that these extensive social forms of life had:

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> [Maurer] demonstrates at length that private property in land only arose later, etc. The idiotic Westphalian squirearchical opinion (Möser, etc.) that the Germans settled each by himself, and only afterwards established villages, districts, etc., is completely refuted. (Marx 2010d: 547)
>
> But what would OLD Hegel say, were he to learn in the hereafter that the general [das Allgemeine] in German and Nordic means only the communal land, and that the particular, the special (*das Sundre, Besondere*) means only private property divided off from the communal land? Here are the logical categories coming damn well out of 'our intercourse' after all. (Marx 2010e: 558)

But some of the remains of the natural rights tradition were precisely able to offer intelligibility to social conflict: on extreme necessity, on the denunciation of the usurpation of power and property, on the rejection of the right of conquest, on the justification of regicide and the right of resistance, and so on. Even the *possessio communis* had been a developed argument for jurisprudential practice in the face of land use conflicts and so could be argued as a logical counterpoint for the sake of critique rather than positive laws:

> While not intending to discuss here all the arguments put forward by the advocates of private property in land – jurists, philosophers, and political economists – we shall only state firstly that they disguise the original fact of conquest under the cloak of 'natural right'. If conquest constitutes a natural right on the part of the few, the many have only to gather sufficient strength in order to acquire the natural right of reconquering what has been taken from them. (Marx 2010f: 131)

Much of this critique was applied to the theory with which he tried to understand the 'anatomy' of bourgeois civil society, a theory that in its own way was also rooted in natural law postulates. While the Smithian labour theory of value was clearly inspired by John Locke, various branches of early socialists in the nineteenth century, from the early 'Ricardian socialists', such as Thomas Hodgskin, William Thompson or John Francis Bray, to the legal socialists such as Anton Menger at the end of the century, used this Lockean matrix to argue about distributive and commutative justice. Marx's critique, not primarily concerned with finding distributive class compromises but with the abolition of its objective basis, can be read as a demonstration that over time the tensions involved in this Lockean economic-political matrix were exploding and blowing apart.

In Adam Smith's time it was still plausible to some extent to argue that personal labour could delimit what was appropriable, and in this respect, there was no need to question Locke's legitimation of labour-based appropriation. Taking the existence of small free producers as a starting point, it was not necessary to oppose the 'unproductive' feudal structures with a definition of property – and on this basis, of value – other than in a broad sense, as a form of communicability of complex sets of norms, rules and bundles of rights between people and around objects. Underlying this premise, however, there was an important Lockean tension that decades later would prove unavoidable: dependent labour (or, with Marx, 'alien labour'). Smith addressed this problem from a philosophical-moral perspective with a radical critique of industrialisation precisely to make the point that good governance could and should act.[12] The bottom line of the Smithian approach was not to determine how strictly the rights of access, use and transference of resources should be defined, but to argue that a pan-civilisational republican design was possible (Casassas 2013).

By the time the concentration of land ownership and the private use of dependent labour was at such a level that the project of small free producers was proving unattainable, the great machinery was beginning to impose the great superiority of its economies of scale. Confronting the extractive forces of traditional rentierism encouraged an exaltation of productivism, the merits of which were confined to capitalists, even knowing that this could lead to moments of stagnation and that there was no hope of prosperity for the workers. It was then, and not before, that the Lockean justification of 'improvement' got definitively divorced in political economy from the humanist principle of self-preservation. With this divorce, the deeper meaning of the anti-accumulative proviso 'enough, and as good left in common for others' got completely obliterated.

The meritocratic justification of the unequal appropriation of natural resources according to comparative advantage in order to profit from them had only a derivative character for Locke: guaranteeing the freedom and thus the capacity of each human being to produce one's own existence was a different normative level than that about the meritocratic distribution of the social product and the determination of the extent to which it is legitimate to intervene in nature. In addition to the preservation of each individual

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human being, mankind must also preserve its common heritage, and this idea had to fit with the premise that it was not legitimate to appropriate something from which no use value could be derived. Another Lockean tension arose here, that of the nature and function of money. For Locke money could be accumulated since it did not involve the abuse of imperishable resources. Placed in a theoretical scheme of exchange of equivalents, not only of produced surpluses but of any kind of commodity, both money and markets were seen as politically neutral devices. The dynamics engendered, however much they might be defended in reminiscently Lockean terminology, backfired against republican principles such as those of Harrington or Locke himself:

> In practice, the fiduciary (social or public) nature of private landed property disappears as, once 'pieces of land' can be sold and purchased with money, they can be hoarded indefinitely as assets without violating the spoiling clause. The 'trustee' – or Agent – who (indirectly through money) can accumulate without limits and arbitrarily alienate 'pieces of land', can then cut every fiduciary tie with his supposed Principal or trustor. The seemingly innocent idea of money as a standard commodity leads to another, very different, notion of private property as an exclusive and excluding social institution thanks to the severing of ties of fiduciary control. The absolutist monarch finally achieved a space of total discretionality by progressively breaking free from the fiduciary ties which traditionally bound him (as a 'trustee' in Locke's sense) to his free subjects. (Domènech and Bertomeu 2016: 255)

After the historical process of separation between labour power and the means of production, however, none of the elements of this Lockean matrix could be considered realised or realisable since, to begin with, it departed from massive dispossession in which the material conditions of existence were far from being guaranteed. Only by fictitiously assuming a different historical background the role of a capitalist could begin to be considered to resemble that of a fiduciary agent entrusted with guiding the production of wealth. And even if this fiction were assumed, it could be denounced that the capitalist behaved as parasitically with impunity as a feudal lord.[13] The concentration of productive resources had reached such a point that it was not possible to argue that the enrichment of a few could provide a guarantee for any kind of republican design. The endless expropriatory character that the very condition of existence

of this dynamic implied made it 'futile to appeal to the obligations of humanity'.[14]

Conclusions

The American freehold model of property, as well as the French communard ideal, would have only been realisable after the abolition of the feudal tenure regime and then the so-called classical liberal absolute and exclusive ownership. That would imply loosening the structural and institutional ties of personal dependence in feudal and capitalist property regimes. The early socialist perspective on the foundations of property was far from enclosing the communal re-appropriation in a clear-cut idea of state power, just as it was far from discarding all kinds of individual ownership within the different possible ways of instituting relations of production and social coexistence. If somehow the republican ideal of the small owner and that of the emancipation of the dispossessed proletariat was to serve the cause of humankind, it could only unfold by radically restoring the fiduciary principle of property in an industrialised world.

The rough categorisation into the three types of property (public, private, and common) could not have made sense to any republican actor during the Atlantic revolutionary era, nor to any socialist mind, before the rise of monopolistic capitalist dynamics along with the developments of administrative structures of the states' apparatus that started to appear in the late nineteenth century. There were forms of private property that were perfectly compatible with the broad socialist goal of abolishing the despotic dominion on working environments, and indeed, the many branches of socialism and workers' movements tried in different ways to restore fiduciary principles fitting into the conditions of possibility of their time. This included three intertwined dimensions that were addressed in their political agendas: the constitution of property of the means of existence, the constitution of political institutions and citizenship, and the farthest-reaching challenge of universal justifications towards the preservation of humanity and its environment.

Far from pretending to characterise the commons as a supposedly 'third type of property', this article aimed to reconsider those

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principles belonging first to the republican and then to the socialist tradition, which might be of use for a deeper understanding of the legal and philosophical nature of these kinds of resources and each tradition's respective property rights throughout the history. Contrary to the wider accepted emancipatory and standard perspectives, the republican and socialist common framework offers a much more historically robust and rich philosophical account of the commons. Rather than opposing them to 'public' and 'private' property regimes, the republican framework describes them as part of the same fiduciary rationale, leading to new institutional arrangements depending on each historical and economic context.

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Notes

1. See Hardt's piece, 'Saving the Commons from the Public', in the debate on 'Public Goods' hosted by the *Boston Review* on 5 September 2017, at https://bostonreview.net/forum/losing-and-gaining-public-goods/michael-hardt-saving-commons-public.
2. It is commonly assumed then that 'property at its core entails the right to exclude others from some discrete thing' (Merrill and Smith 2007). To professor Richard

Epstein, this individual right to exclusion is somehow naturally 'implicit in the basic conception of private property' (Epstein 1985: 63). Professor Jan Laitos also describes this individual right to exclude as one of those 'rights valued so highly, that the abolishment will result in the offending law being declared unconstitutional' (Laitos 1998 quoted in Callies and Breemer 2000: 40).

3. Some authors find it appropriate to talk about the 'three qualities' of any property right: '1. a management power, 2. an ability to receive income or benefits, 3. an ability to sell or alienate the interest' (Sheehan and Small 2002: 16). This also led Gray and Gray (1998: 18) to point out that 'Modern Capitalist-Liberal property seems to include two rights: 1) to freely dispose of the thing (capacity of accumulating and of alienating); 2) to freely use the thing and to receive its outcomes'.
4. 'Mediaeval men certainly recognized individual rights in property, but the holding of property usually involved the owner in a complex of social and economic obligations' (Tierney 1959: 24).
5. These three quotes belong to the famous speech *On Subsistence* delivered to the National Convention on 2 December 1792 (Robespierre 1957: 112). Authors' translation.
6. 'Under the shadow of the French Revolution, the English governing classes regarded all associations of the common people with the utmost alarm' (Webb and Webb 1920: 73). This climate led to invoking the repressive spirit of the *Loi Le Chapelier* (1791) into the British *Combination Laws* (1799, 1800) under the pretext that 'the workmen were the most unprincipled of mankind' (Webb and Webb 1920: 73).
7. O'Brien defined the unnatural right of property as the right to live without work upon the produce of other people's earnings (Maw 2005: 110). The 'moral economy' alluded to in these sources offers a clear parallel with the plebeian natural law tradition, and even Hodgskin, who was appreciated by Marx and who also made a distinction between 'natural' and 'artificial rights' of property, promoted a 'Popular Political Economy' in his public lectures (Hodgskin 1827).
8. 'The right of property, which is now arming the land-owner and the capitalist against the peasant and the artisan, will, in truth, be the one great subject of contention for this and the next generation; before which, it needs no prophetic vision to foretell, the squabbles of party politicians, and the ravings of intolerant fanatics will die away unnoticed and unheard' (Hodgskin [1832] 2008: 15).
9. In a common context of revision on the insufficient account about Marx and the socialist tradition in the 'neo-republican' debate, several authors have recently made rich and stimulating contributions. See Leipold (2017), Roberts (2018) or M. J. Thompson (2019) as perhaps the most relevant in English.
10. An idea with which he never ceased to be aligned according to Krätke (2018).
11. 'Our findings challenge the Hobbesian conclusion that the constitution of order is only possible by creating sovereigns who then must govern by being above subjects, by monitoring them, and by imposing sanctions on all who would otherwise not comply' (Ostrom et al. 1992).
12. 'In the progress of the division of labour, the employment of the far greater part of those who live by labour, that is, of the great body of the people, comes to be confined to a few very simple operations … He [the labourer] naturally loses, therefore, the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become … His dexterity at his own particular trade seems, in this manner, to be acquired at the expense of his intellectual, social, and martial virtues. But in every improved and civilised society this is the state into which the labouring poor, that is, the great body of the people, must necessarily fall, unless government takes some pains to prevent it' (Smith [1771] 1976: 1041).
13. In the first of the 'Three cardinal facts of capitalist production' of Capital Volume

III: 'These are the trustees of bourgeois society, but they pocket all the proceeds of this trusteeship (*Trusteeschaft*)' (Marx and Engels [1894] 2010: 265).

14. Cited in Eichhoff ([1868] 2010: 356).

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