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PROPERTY THEORY AND CONTEMPORARY MARXISM

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Property Theory and  
Contemporary Marxism

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# PROPERTY THEORY AND CONTEMPORARY MARXISM

STEPHEN R. MUNZER\*

## ABSTRACT

*Michael Hardt and Antonio Negri, notable Marxist political theorists, advance a theory that moves well beyond both capitalist property and socialist property. Their theory proposes an arrangement, called the common, that so maximizes sharing as to be almost a nonproperty system. From these dizzying heights, Hardt and Negri show unexpected interest in the idea of property as a bundle of rights.*

*This Article argues that Hardt and Negri's work, though admirable in its ambition, is insensitive to the variety of bundle theories. They perceive, correctly, that bundle theories involve plural social interests and relations. But their criticisms of critical legal studies and progressive property theory are often unpersuasive, as are their discussions of property in relation to sovereignty and coercion. This Article argues also that Hardt and Negri's grand project of the common cannot succeed without a more careful description of the common, rigorous argument in favor of the common, and the roles of domination and non-domination in their critique of private property.*

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## I. INTRODUCTION

This study of property and legal and political theory pays special attention to contemporary Marxism. In particular, it examines the work of Michael Hardt and Antonio Negri. In four magisterial volumes that includes their book *Assembly*,<sup>1</sup> they discuss property and the common. For them the “common” is mainly a democratic “nonproperty” system, though they introduce ambiguity by allowing for “individual possessions,” “new money,” and control over “most things you make yourself.”<sup>2</sup> Hardt and Negri specifically discuss property conceived of as a bundle of rights. The context of their specific discussion is Chapter 6 of *Assembly*, titled “How to Open Property to the Common.”<sup>3</sup> Property under capitalism, they say, “grants a monopoly of access and decision-making to an individual owner to the exclusion of others,”<sup>4</sup> a monopoly they vigorously oppose.

Chapter 6 comments on the training that law students in the United States usually receive to the effect that capitalist “property denotes a plural set of social interests: a bundle of rights.”<sup>5</sup> To some extent, Hardt and Negri borrow from Duncan Kennedy and critical legal studies the idea that property is a

<sup>1</sup> MICHAEL HARDT & ANTONIO NEGRI, *ASSEMBLY* 86–89, 91, 97 (2017) [hereinafter HARDT & NEGRI, *ASSEMBLY*]. Earlier volumes, in chronological order, are MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000) [hereinafter HARDT & NEGRI, *EMPIRE*]; MICHAEL HARDT & ANTONIO NEGRI, *COMMONWEALTH* (2009) [hereinafter HARDT & NEGRI, *COMMONWEALTH*]; MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2014) [hereinafter HARDT & NEGRI, *MULTITUDE*].

<sup>2</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 97, 98, 280. For an exploration of ambiguities in their account of the common see *infra* Part VI.

<sup>3</sup> *Id.* at 85–105, 308–12.

<sup>4</sup> *Id.* at 86.

<sup>5</sup> *Id.* Why did Hardt and Negri decide to comment? It appears that Duncan Kennedy and other critical legal scholars objected to HARDT & NEGRI, *COMMONWEALTH*, *supra* note 1, for neglecting contemporary work on property law and its reform, and that Hardt and Negri reacted to these objections in HARDT & NEGRI, *ASSEMBLY*, *supra* note 1. According to one account, Kennedy accused Hardt of both a conceptual error—in thinking of property as a substance or single thing rather than as a bundle of rights that pertains to many or allows for different non-exclusivity rules—and a political error—progressive legal theory and action must work from within property law to advance certain rights over others. The struggle *against* property, Kennedy argued, is naïve and counter-productive. Instead, we need to reform from within. *Praxis 5/13: The Common*, COLUM. CTR. FOR CONTEMP. CRITICAL THOUGHT (Dec. 5, 2018), <http://blogs.law.columbia.edu/praxis1313/5-13/>. (emphasis in original) [hereinafter *Praxis 5/13: The Common*]. See also Michael Hardt, *Property Law and the Common*, *European Graduate School Video Lecture*, YOUTUBE (Mar. 3, 2016), <https://www.youtube.com/watch?v=7VlcZtU1q9U> [<https://perma.cc/6RAG-W886>] (discussing property law and the common).

bundle of rights.<sup>6</sup> But their borrowing is both qualified and incomplete. It is qualified because critical legal studies requires attention to sovereignty and coercion for a bundle theory to be progressive.<sup>7</sup> It is incomplete because, I argue, a full account must look to domination and the value of non-domination for a deeper understanding of capitalist property and the harms it can create.

The central political message of Hardt and Negri's treatment of critical legal studies and progressive property theory is that neither goes far enough. Had they gone far enough, they would have reached "the common." Hardt and Negri define this expression in somewhat different ways in *Commonwealth* and *Assembly*. The Preface to *Commonwealth* says:

By "the common" we mean, first of all, the common wealth of the material world—the air, the water, the fruits of the soil, and all nature's bounty—which in classic European texts is often claimed to be the inheritance of humanity as a whole, to be shared together. We consider the common also and more significantly those results of social production that are necessary for social interaction and further production, such as knowledges, languages, codes, information, affects, and so forth.<sup>8</sup>

Chapter 6 of *Assembly* says:

The common is defined first, then, in contrast to property, both public and private. It is not a new form of property but rather *nonproperty*, that is, a fundamentally different means of organizing the use and management of wealth. The common designates an equal and open structure for access to wealth together with democratic mechanisms of decision-making. More colloquially, one might say that the common is what we share or, rather, it is a social structure and a social technology for sharing.<sup>9</sup>

The first half of this Article provides a deeper understanding of the harms some property systems can cause. It unfolds in four main steps. Part II shows that sovereignty is a weak foundation for grasping the possible harms of property. Part III argues that coercion is a highly complicated and contestable basis for examining the possible harms of property. Part IV contends that republican discussions of property shed much more light on the possible

<sup>6</sup> Bundle theories are often traced to WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., Greenwood Press 1978) (1917), who lists rights, privileges, powers, and immunities together with their respective correlatives: duties, no-rights, liabilities, and disabilities. As David Frydrych, *Hohfeld vs. the Legal Realists*, 24 *LEGAL THEORY* 291 (2018), powerfully argues, Hohfeld was not a legal realist. But such legal realists as Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357 (1954) and Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUM. L. REV.* 603 (1943), drew on Hohfeld's work. For a history of bundle theories of property, see STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 45-72 (2011).

<sup>7</sup> Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 *LEGAL STUD. F.* 327 (1991) and Joseph William Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1988) borrow from Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8 (1927) and Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *POL. SCI. Q.* 470 (1923). For an appraisal of Kennedy and Singer's articles, see Stephen R. Munzer, *Property as Social Relations*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 36 (Stephen R. Munzer ed., 2001).

<sup>8</sup> HARDT & NEGRI, *COMMONWEALTH*, *supra* note 1, at viii.

<sup>9</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 97 (emphasis in original).

harms of property than do critical legal studies and progressive property theory. And Part V suggests that contemporary Marxists such as Moishe Postone and Nicholas Vrousalis set us on a more promising path from the harms of domination to the benefits of non-domination.

The second half of this Article turns to the common. Part VI scrutinizes Hardt and Negri's somewhat different definitions of the common. Part VII tackles social production in the common and examines an argument for the common as a desirable socioeconomic space. Part VIII discusses immaterial property and biopolitics. Part IX examines the roles of affects and affective labor in enlarging our understanding of the common. Part X asks whether affects can be property. Part XI concludes.<sup>10</sup>

## II. SOVEREIGNTY AND PROPERTY AS A BUNDLE OF RIGHTS

Hardt and Negri see the legal realists as taking a step in a desirable political direction: "The legal realists' conception of property rights is particularly powerful because it combines the pluralism of the notion of a bundle with the claim that property implies sovereignty, a form of domination that is equally political and economic."<sup>11</sup>

In part, Hardt and Negri are tapping into a legal understanding of property as a bundle of legal conceptions existing between persons with regard to things (tangible or intangible). Property, in its strongest form as ownership of things, involves claim-rights to possess and use things; powers to transfer, exclude, and mortgage and pledge these things; liberty-rights to consume or destroy these things; and immunity from expropriation of these things by the government without compensation. This list, though incomplete, gives a basic account of property—both real property (in land and buildings) and personal property (in chattels). Lesser forms of property, which one can call limited property, also exist. Examples include easements, bailments, franchises, and some licenses. When Hardt and Negri discuss property or property rights, they usually have in mind property in the strong sense of the ownership of things rather than limited property.

They write as political theorists and unsurprisingly seem unaware of the variety of bundle theories. The most rigorous such theories see property as a set of normative relations between persons with respect to things. These theories come mainly from philosophers rather than academic lawyers.<sup>12</sup> The details need not detain us. Hardt and Negri also seem unaware of law professors who vigorously oppose all bundle theories and see property as the law of things. Prominent figures here include J. E. Penner<sup>13</sup> and Henry E.

<sup>10</sup> I am neither a Marxist, nor a critical legal scholar, nor a progressive property theorist. So what am I, if anyone cares? I am a moderate egalitarian with an interest in Marxism who argues for a pluralist normative theory in favor of the redistribution of income and wealth. For more on my views, see Stephen R. Munzer, *Moral, Political, and Legal Thinking*, 3, 8 APA NEWSLETTER ON PHILOSOPHY AND LAW 16 (2009) (American Philosophical Association) (responding to critics).

<sup>11</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 86–87. The sentence quoted regards sovereignty as a form of domination, which implies that domination is a broader category than sovereignty. I discuss domination later. See discussion *infra* Part V.

<sup>12</sup> E.g., LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977); JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS (1990); CARL WELLMAN, REAL RIGHTS (1995); Shane Nicholas Glackin, *Back to Bundles: Deflating Property Rights, Again*, 20 LEGAL THEORY 1 (2014); H.L.A. Hart, *Bentham on Legal Powers*, 81 YALE L.J. 799 (1972).

<sup>13</sup> J. E. PENNER, THE IDEA OF PROPERTY IN LAW (1997).

Smith.<sup>14</sup> Both emphasize property as a thing and the idea of property as centrally a right to exclude others. There are strong arguments against the views of Penner and Smith,<sup>15</sup> but if they are correct that would undermine Hardt and Negri's focus on bundle theories.

A more serious problem for present purposes is that Hardt and Negri elide the difference between analytical pluralism and normative pluralism. Because there is more than one item (rights, powers, and so forth) in any bundle theory, it is *analytically* plural. Yet it does not follow that all bundle theories are *normatively* plural, depending on what normative pluralism means. Normative pluralism can mean expressing different kinds of normativity (such as moral, political, or aesthetic), or having implications for different social domains (such as law or the economy). Neither is pertinent here.

Normative pluralism can also mean a theory of property that rests on multiple philosophical foundations such as consequentialism, desert based on labor, and a deontological account of justice. A normative pluralist theory of this last sort could fit nicely with an analytically plural bundle theory. By contrast, one could hold that some historical entitlement theories are not normatively plural in this last sense. For instance, one can plausibly characterize the historical entitlement theories of property of John Locke<sup>16</sup> and Robert Nozick<sup>17</sup> as normatively singular, even though either thinker could have used an analytically plural bundle theory in describing the property rights available through historical entitlement.

Hardt and Negri might seem on firmer ground in saying, with Morris R. Cohen,<sup>18</sup> that having property rights confers a degree of sovereignty on the owner. They qualify this point by stating that "property has sovereign effects on a social scale," not mainly on "an individual scale."<sup>19</sup> For them, an important political effect of "conceiving property as both a bundle of rights and a sovereign power is that it counters the liberal, laissez-faire arguments for property rights free from state intervention."<sup>20</sup>

I shall argue that Hardt and Negri overstate their case about property and sovereignty. To begin, let us clarify what might reasonably be understood by the passages just quoted. A sovereign and an owner have some affinities. Each can impose limitations, but the nature of the limitations differs. A

<sup>14</sup> Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

<sup>15</sup> Stephen R. Munzer, *Property and Disagreement*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 289 (James Penner & Henry E. Smith eds., 2013).

<sup>16</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT [1690] §§ 25–51 (Peter Laslett ed., Cambridge Univ. Press 2d ed., 1967) (1690).

<sup>17</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–82 (1974).

<sup>18</sup> Cohen, *supra* note 7.

<sup>19</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 87 (showing the authors to be thinking mainly of "sovereign effects on a social scale," though they would be on sounder footing to appeal to domination rather than sovereignty); see *infra* text accompanying notes 113–47.

<sup>20</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 87; ANTONIO NEGRI, SUBVERSIVE SPINOZA: (UN)CONTEMPORARY VARIATIONS 9, 17, 24, 31, 33, 36, 38, 40 (Timothy S. Murphy ed. & trans., 2004) (drawing on Spinoza for some of Negri's own positions on sovereignty and power); 1 & 2 BENEDICTUS DE SPINOZA, THE COLLECTED WORKS OF SPINOZA (Edwin Curley ed. & trans., 2016) [hereinafter SPINOZA, COLLECTED WORKS] (emphasizing 2 SPINOZA, *Political Treatise*, in COLLECTED WORKS, at 503–604 (discussing monarchical, aristocratic, and democratic sovereignty). *But cf.* GEORGES BATAILLE, THE ACCURSED SHARE (Robert Hurley trans., Zone Books 1991) (1976) (investigating contemporary Continental positions on sovereignty would take readers too far afield).



sovereign can limit what her subjects or citizens may do. An owner can limit what other people may do with respect to his property.<sup>21</sup> One should not assimilate sovereigns and owners too closely. A sovereign has to be created by proper procedures and must rule in the interests of her subjects or citizens. An owner may do largely as he pleases with respect to his property but must have acquired his property in a justifiable manner. A sovereign does not own her subjects or citizens, but she can limit their property rights in some respects.

In light of this sketch, it is inaccurate to say that “property has sovereign effects on a social scale.”<sup>22</sup> Generally speaking, only a sovereign can have sovereign effects. The property holdings of one or more owners may affect other persons individually and society at large. Usually, however, these are not sovereign effects. Also, it may be inaccurate to conceive of “property as *both* a bundle of rights and a *sovereign* power.”<sup>23</sup> Large property holdings can give power to owners, and they might exercise this power for objectionable purposes. All the same, effective countering of laissez-faire arguments cannot soundly rest on a misassimilation of property and sovereignty—in this case, by saying that property is both a bundle of rights and a sovereign power. As already explained, a sovereign could decide to limit existing property rights in a laissez-faire economy. There are multiple roads to altering existing property rights. No road should misassimilate property and sovereignty.

Attentive readers will notice the hedged claims in the preceding paragraph. The hedging avoids an actual or apparent tautology present in a claim that only a sovereign can have sovereign effects. More importantly, hedging makes room for possible incursions into, and misuses of, sovereign power. It is conceivable that some wealthy individuals could infiltrate an existing sovereign and create a plutocratic oligarchy. It is also conceivable that a sovereign leader could come into power legitimately but later divert government funds into offshore accounts and thereby create a kleptocracy. On occasion, oligarchic and kleptocratic governments could destabilize a country’s legal system.<sup>24</sup> In short, sometimes ownership power can infiltrate sovereign power, and vice versa, in such a way that the two sorts of power do not remain distinct. Infiltration of power of these sorts, however, is an exception to the rule that the two are, on the whole and considered generally, distinct.

From this discussion of property and sovereignty one can see two points clearly. First, even when property holdings give owners a power other than sovereign power, the power thus conferred may still be used for objectionable purposes. Second, even if one accepts Ripstein’s account in the qualified way done here, that does not preclude property and sovereignty conceptually so individuated from influencing each other in practice. Property holdings can still influence the internal normative principle

<sup>21</sup> See Arthur Ripstein, *Property and Sovereignty: How to Tell the Difference*, 18 THEORETICAL INQUIRIES L., 243 (2017) (setting forth an account of the differences between property and sovereignty along these lines).

<sup>22</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 87.

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> Cf. H.L.A. HART, THE CONCEPT OF LAW 114–20, 144–50 (1961) (analyzing the pathology of a legal system and uncertainty in the rule of recognition).

governing the exercise of sovereignty such that those holdings have indirect sovereign effects on a social scale. For example, in the corporate bailouts of 2008, extensive property holdings within sovereigns' jurisdictions altered how the state acted on behalf of its citizens.<sup>25</sup> Despite shortcomings in Hardt and Negri's treatment of property and sovereignty, these two points neither weaken the case for the common nor do much to advance it.

### III. COERCION

Broadly speaking, coercion is constraint that controls voluntary agents. This understanding, however, is so broad as to mask differences among various accounts of coercion and their connections to adjacent concepts such as force and domination. This section starts with relations between sovereignty and coercion; moves to connections between coercion on the one hand and compulsion, duress, and influence on the other; discusses whether only agents can coerce others; explores whether, in Marxian economics, coercion is sometimes non-agential; and finally takes up systemic coercion.

Readers should come away from this part aware of four things. First, Hardt and Negri lack a careful account of coercion. Second, agential and non-agential coercion are central to Marx's economic laws of competition. Third, there is an arc that connects sovereignty to coercion, and coercion to domination. And fourth, it is vital to distinguish between eudaimonic coercion, which causes harm to some persons but does not morally wrong them, and deontic coercion, which is a moral wrong to some persons.<sup>26</sup>

#### A. SOME RELATIONS BETWEEN SOVEREIGNTY AND COERCION

From Hardt and Negri's account of the connections between property and sovereignty, I shift to their related discussion of coercion. Regrettably, they do not define coercion. Neither do they explain how coercion differs from force, duress, domination, or influence. Hardt and Negri try, however, to use the legal realists' work on coercion to bring out two supposed characteristics of sovereign power.

The first characteristic is that property owners, *qua* sovereigns, "exert political coercion over those around them that is equivalent to forms of state coercion."<sup>27</sup> It is not evident which forms of coercion constitute state or political coercion. State coercion could refer to forms of coercion often associated with the state rather than private actors. Or state coercion could refer to forms of coercion used by the state, which might be used because of property owners' access to and influence over the state. One could understand political coercion similarly to the latter view of state coercion—that is, property owners could influence political matters of the state; this influence might have the upshot of exerting coercion through laws and law

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<sup>25</sup> Cf. MICHAEL HARDT & ANTONIO NEGRI, *DECLARATION* (2012) (renewing the case for the common after events from 2008 to 2011).

<sup>26</sup> See Michael Gamett, *Coercion: The Wrong and the Bad*, 128 *ETHICS* 545 (2018).

<sup>27</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 87.

enforcement. Property owners could also encroach on typical state practices by, for example, obtaining the authority to use privatized policing.<sup>28</sup>

I am not confident that I have captured Hardt and Negri's understandings of state and political coercion, but in any case, it is unclear how in even their eyes coercion and property relate to sovereign power. Suppose that every family owns a dwelling of the same size and quality, with some adjustment for the number of family members. If that were the case, it is hard to see how the owners of these dwellings would be coercing each other. What if most families had dwellings of modest size and modest quality, while others had dwellings that were twice as large and twice as nice? It is still not obvious how any dwelling owners are politically coercing others, or why, if there were any political coercion, it would be equivalent to state coercion. Unequal dwellings may elicit envy; but envy is not political or state coercion.

The foregoing argument, it might be said, ignores the literature on rights as demands. I disagree, for demand-rights differ importantly from coercion. Margaret Gilbert brings demand-rights front and center in philosophical inquiry.<sup>29</sup> She would observe that owners of dwellings have a legal right to exclude others and can demand that others not trespass on their property. I agree. Yet invoking the demand-right in question does not by itself amount to coercion, and I do not think that Gilbert would say otherwise.

Now it might also be said that sovereignty and coercion can overlap, and with this point I agree. True, Morris R. Cohen's article on relations and similarities between property and sovereignty<sup>30</sup> does not establish the extent to which owners of dwellings are "sovereign" over their dwellings qualifies as coercion. But even if he does not establish the extent, he does make a case for some overlap. After all, dwelling-owners can appeal to laws against trespass and can call the police to remove intruders. I hope no one will say that calling the police would amount at most to possible coercion in the offing, and not to actual coercion in the situation. Actual coercion by the police sometimes ensues. And too often police officers protect the large, expensive homes of wealthy more quickly and more vigorously than the modest homes of middle class or poor people.

It would in any event be obtuse to leave the matter at unequal dwellings. In *Citizens United v. Federal Election Commission*,<sup>31</sup> the Supreme Court held that the Free Speech Clause of the First Amendment bars the government from limiting independent expenditures for political communications by business corporations, nonprofit corporations, labor unions, and various other associations. The net effect of *Citizens United* is to allow sundry organizations generally, and corporations in particular, to spend money on electioneering communications to affect the outcome of elections.

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<sup>28</sup> *But cf.* *Colorado v. Connelly*, 479 U.S. 157, 163–67 (1986) (establishing involuntariness for purposes of the Due Process Clause of the Fourteenth Amendment requires coercive police activity rather than private conduct).

<sup>29</sup> MARGARET GILBERT, *RIGHTS AND DEMANDS: A FOUNDATIONAL INQUIRY* (2018).

<sup>30</sup> Cohen, *supra* note 7; *see supra* text accompanying notes 17–24 (explaining the case against bringing property and sovereignty too close to each other).

<sup>31</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down § 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (2006 ed.)).

The Court nowhere says that such influence amounts to coercion, though the failure to say so is not decisive on whether this influence is coercive.<sup>32</sup>

So much for the first characteristic. The second supposed characteristic of sovereign power is that “the protection of property rights and the ‘freedom’ of laissez-faire liberals require the state to wield coercive force.”<sup>33</sup> Hardt and Negri’s framing of this point seems to shift, illegitimately, the terms of the discussion. One can deploy a bundle-of-rights view of property to describe and analyze property rights, and help solve disputes over property rights, in a socialist or a communist property system. One can also use it to describe and analyze a Native American property system.<sup>34</sup> At the least, if property is a set of normative relations between persons with respect to things, thinking of property in this way lends itself to an extremely wide range of property systems. To whatever extent the common has individual possessions and rules of access to social wealth, a superior bundle theory can help describe and analyze the common. If that is correct, then it seems to be Hardt and Negri’s reference to what they regard as the unjustifiable freedom associated with laissez-faire liberalism, not their understanding of property as a bundle of rights, that does most of the work so far as sovereign power is concerned.

The point about property, sovereignty, and freedom carries over to the trio of property, coercion, and freedom. Police protection of property rights sometimes involves coercion. To a degree, the same holds for protection of property rights by private security services. In my judgment, Hardt and Negri inflate the extent to which coercion uses force rather than threats of force.

They say that “[c]oercion is *always* mobilized by property rights in order to regulate and suppress the rights of others.”<sup>35</sup> Still, there is a difference between having a right and exercising it. Coercion would not be present if, for example, a landowner does not exercise her property right to exclude another person for trespass by calling the police. Even if property rights and their exercise always coerce, it does not follow that this coercion always “regulate[s] and suppress[es] the rights of others.”<sup>36</sup> For that to be true, it would have to be the case that the person being coerced also has a property right or some other right that is being compromised by the landowner’s property right or its exercise.

Hardt and Negri sympathize with a view they ascribe to the legal realists: “[T]he recognition that property *always* involves economic and political coercion.”<sup>37</sup> But the freedom of laissez-faire liberalism—a freedom that Hardt and Negri consider unjustifiable—seems to carry the laboring oar in their argument, not their understanding of property as a bundle of rights or their analysis of coercion.

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<sup>32</sup> Cf. *Citizens United*, 558 U.S. at 470 (Stevens, J., concurring) (mentioning “coerced speech” and “domination of electioneering”; in my view, even if there was no coercion, there was domination considering *infra* Part V).

<sup>33</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 87.

<sup>34</sup> See generally E. Adamson Hoebel, *Fundamental Legal Concepts as Applied in the Study of Primitive Law*, 51 YALE L.J. 951 (1942).

<sup>35</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 87 (emphasis added).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (emphasis added).

## B. COERCION AND SOME CONNECTED CONCEPTS

Hardt and Negri's treatment of coercion is also insufficiently sensitive to the linguistic, conceptual, and philosophical aspects of coercion. They quote Hale: "In protecting property, the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to employ the thing owned."<sup>38</sup> Those who cite Hale's work often fail to notice that he thought "coercion" was an unhappy term and looked for a different word that would communicate only his limited neutral meaning.<sup>39</sup> Among the terms he considered and sometimes used were "compulsion," "pressure," "force," "influence," "duress," and "oppression."<sup>40</sup> Other words that might be relevant here but are not mentioned by Hale include "repression," "suppression," "enforcement,"<sup>41</sup> and "domination."<sup>42</sup> Perhaps these words belong on a spectrum where "coercion" and "duress" are the strongest and "influence" is the weakest. Close attention to language occasionally annoys, but it also brings light.

No single word is exactly the right word in all contexts. Suppose that David owns a Toyota sedan, and that his hot-tempered fourteen-year-old son Earl picks up the keys and is about to drive off to a neighboring town. David, knowing his son to be mercurial but not violent, calls the police. Assume that David, Earl, and Officer Frank have the same racial, ethnic, and class background. Apprised of the situation, Officer Frank comes to David's home and sees Earl in the driver's seat with the engine on. If Officer Frank draws his pistol and puts it to Earl's head, that qualifies as coercion and also as compulsion or force. It is also dismal policing. If, instead, Officer Frank keeps his weapon in its holster and politely but firmly urges Earl to turn off the ignition and step out of the car, that qualifies as influence and perhaps pressure, but it would be strained to call it coercion or force, in part because Officer Frank does not verbally threaten Earl. It is also sensible policing in the circumstances. Now, some might say that in any given interaction with a police officer there is a potential threat of force. Maybe. However, a potential threat is not the same as a threat, and a threat of force is not the same as force.<sup>43</sup>

Alas, the foregoing picture of limited and sometimes justifiable police coercion does not always reflect actual police behavior. In the United States and other countries, too often police officers use excessive force. Too often they direct such force disproportionately against minorities based on race,

<sup>38</sup> *Id.* at 87 n.8 (quoting Hale, *supra* note 7, at 472).

<sup>39</sup> Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIA. L. REV. 261, 280 (1973) ("Hale long felt that 'coercion' was an infelicitous term and sought an alternative which would convey his limited and neutral intended meaning and nothing more.")

<sup>40</sup> *Id.*

<sup>41</sup> See Scott A. Anderson, *The Enforcement Approach to Coercion* 5 J. ETHICS & SOC. PHIL. 1 (2010) (on enforcement).

<sup>42</sup> Domination, discussed in Part V, lies somewhere in between coercion, duress, and force on the one hand and influence on the other.

<sup>43</sup> See Garnett, *supra* note 26; Stephen J. White, *On the Moral Objection to Coercion*, 45 PHIL. & PUB. AFFS. 199 (2017) (exemplifying that recent philosophical work on coercion is both complicated and insightful).

class, national origin, sexual orientation, or gender identity. That has to stop. It must stop because it is morally wrong and creates unjustifiable anxiety and fear among minorities. Excessive force may not be as common in protecting private or public property as it is in traffic stops, in executing no-knock warrants, and in controlling peaceful protests. How to stop excessive use of force by police is a very important question. Answering that question, however, is outside the scope of this Article.

In any event, Hardt and Negri's appeal to coercion with respect to property is unsophisticated in at least two additional ways. First, the verb "coerce" sometimes implies an *effort* to affect another person and at other times implies *success* in affecting that person. Hale seems to use the word in the former way, as an effort-verb, in speaking of coercion by factory owners and counter-coercion by workers.<sup>44</sup> Hardt and Negri seem to use the word in the latter way, as a success-verb.

Second, Hardt and Negri seem unclear on whether, under their theory, it is property itself or property law that coerces other people. Perhaps they mean that both do. Even so, the lack of clarity raises a deeper issue of what sorts of things can coerce people. Presumably individual persons, persons acting as a group, the state, and legal entities like corporations can coerce others. It is less clear whether an unequal distribution of wealth, a social hierarchy, or capitalism as a particular kind of economic system can coerce individuals, persons acting as a group, or corporations. A sensible, though imperfect, instinct is that only entities that have *agency* can coerce, and wealth distributions, social hierarchies, and capitalism appear to lack agency.<sup>45</sup>

### C. IS COERCION EVER NON-AGENTIAL?

The answer is yes, at least in a weak sense of "non-agential." But it takes some care to see how and why.

In this context, one could appeal to Marx's language about "the coercive laws of competition" in his chapter on surplus value.<sup>46</sup> The appeal, as I see it, would claim that entities that are not agents, such as "the laws of competition," can coerce competitors. To establish this claim, they would have to take a stand on whether such laws are descriptive or prescriptive.

Some might reason in the following way. On the one hand, if these laws are descriptive, like the laws of Newtonian mechanics, then the laws of competition are verifiable or falsifiable but do not coerce anyone. On the other hand, if the laws of competition are prescriptive, like laws enacted by legislatures, then it would appear that they can be obeyed or disobeyed. It is hardly obvious that the laws of competition prevent individual competitors from disobeying even if it were in their interest to disobey. Furthermore, it matters whether "coerce" is a success-verb or an effort-verb. Marx, and

<sup>44</sup> Hale, *supra* note 7, at 473.

<sup>45</sup> See MICHAEL E. BRAITMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER 37–39 (2014); Brian Epstein, *Social Ontology*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (2018) (identifying important work in understanding that entities that lack agency might still function as causes, though one can dispute whether non-agential causation is ever coercive).

<sup>46</sup> 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 433, 436 (Ben Fowkes trans., Penguin Classics 1990) (1867) ("a coercive law of competition").

Hardt and Negri, could say that it is a success-verb, but in that case their claim is almost a foregone conclusion. If “coerce” is an effort-verb, and if contrary to my objections the laws of competition exert force on capitalists both individually and collectively, these laws are vulnerable, as Hale argues, to counter-coercion by workers and, I would argue, by the state.<sup>47</sup>

One can anticipate at least two objections to the previous paragraph. First, it will not do to simply *insist* that coercion is agential. Second, using physics rather than one of the social sciences to distinguish between descriptive and prescriptive laws is prejudicial. One cannot settle at the drop of a definition whether coercion is always agential, and using economics is more apt than physics.

What are laws in economics like? In orthodox or mainstream economics, we encounter examples such as the following. The law of diminishing marginal utility says that the marginal utility of each successive unit of a good or service for an economic actor declines as that unit serves less and less valued ends.<sup>48</sup> This law looks like a proposition of psychology. Gresham’s law says that legally overvalued currency will tend to drive legally undervalued currency out of circulation.<sup>49</sup> This law looks like a principle of monetary theory that predicts how people will choose to transact business using one currency rather than another.

These examples suggest that economic laws vary in their nature, assumptions, and effects. Economic laws are not like the law of gravity or the law that force equals mass times acceleration ( $F = ma$ ). Almost all laws in orthodox or mainstream economics are *ceteris paribus* laws (“cp-laws”).<sup>50</sup> The Latin term means “other things being equal.” Cp-laws have exceptions; they are not universal.<sup>51</sup> Economic laws thus differ from laws in physics such as  $F = ma$ .

In Marxian economics, economic laws under capitalism stem from the fact (or supposed fact) that no, or very little, harmony exists between the interests of capitalists and the interests of workers.<sup>52</sup> Disharmony results

<sup>47</sup> But see G.A. COHEN, KARL MARX’S THEORY OF HISTORY: A DEFENCE 294–95 (expanded ed. 2000).

<sup>48</sup> Will Kenton, *Law of Diminishing Marginal Utility*, INVESTOPEDIA, <https://www.investopedia.com/terms/l/lawofdiminishingutility.asp> (last updated Feb. 1, 2022).

<sup>49</sup> The Investopedia Team, *Gresham’s Law*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/greshams-law.asp> [<https://perma.cc/3TYV-5XRF>].

<sup>50</sup> MARK BLAUG, THE METHODOLOGY OF ECONOMICS: OR, HOW ECONOMISTS EXPLAIN 59–62, 137–49 (Mark Perlman & E. Roy Weintraub eds., 2d ed. 1992); Alexander Reutlinger, Gerhard Schurz, Andreas Hüttemann & Siegfried Jaag, *Ceteris Paribus Laws*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., fall ed. 2021).

<sup>51</sup> See BLAUG, *supra* note 50, at 138 (giving examples); Reutlinger, *supra* note 50, at § 2.1.

<sup>52</sup> See generally JOAN ROBINSON, AN ESSAY ON MARXIAN ECONOMICS (1942). For an excellent recent discussion of Marx, coercion, and laws of competition, see Giulio Palermo, *Competition: A Marxist View*, 41 CAMBRIDGE J. ECON. 1559 (2017). Marx discusses competition and the laws of competition in various places. In historical order, see, for example, KARL MARX, THE ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844 82–91 (Dirk J. Struik ed., Martin Milligan trans., Int’l Publishers 1964) (1844) [hereinafter MARX, MANUSCRIPTS] (discussing competition among capitalists); KARL MARX, GRUNDRISSE: FOUNDATIONS OF THE CRITIQUE OF POLITICAL ECONOMY 649–52, 657–58 (Martin Nicolaus trans., Penguin Books 1993) (1857–58) [hereinafter MARX, GRUNDRISSE] (seeing competition as reciprocal compulsion and chaotic collisions); 1 MARX, *supra* note 46, at 433, 436 (explaining how competition forces individual capitalists to behave); 2 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 250, 335, 361 (David Fernbach trans., Penguin Classics 1992) (1867) (referring briefly to competition); 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 127, 205, 257, 273, 281, 300, 310–12, 331–32, 338, 361–63, 365, 369, 426, 429, 477–78, 484–85, 569, 895, 906, 1004–05, 1014–

from workers pressing for higher wages and more desirable working conditions and from capitalists seeking higher profits. When Marx refers to the laws of competition, he is referring to pressures placed on capitalists by the nature of competition. One such law is the pressure on capitalist producers to get their workers to work harder or to work for less pay. Another law is the pressure on capitalist producers to maximize their price-cost ratio. Still another law is the pressure on capitalist producers to specialize, innovate, and accumulate surpluses.

Obviously, these Marxian laws of competition are not like the law of gravity. The latter in effect sets an inviolable constraint; there is no way to disobey it. The laws of competition, in contrast, are conditions that a particular economic system—capitalism—imposes on capitalists. Because these are in a sense descriptive laws, a particular capitalist can behave in a way that departs from them. If a capitalist departs from these laws, he or she risks decreased profit, loss of the means of production, going bankrupt, or entering the ranks of the proletariat. Marxian laws of competition, as well as other laws in Marxian economics, are cp-laws (or, as Marx often says, “tendencies”).<sup>53</sup>

A case for saying that coercion is sometimes, but only sometimes, non-agential goes like this. “Non-agential” in a strong sense would not involve human agents at any level of explanation. Assume that capitalists are well-functioning robots that invariably behave in accordance with the pressures of competition. The robots follow the laws of competition, it would seem, much as they follow the law of gravity. Yet we have already seen that the laws of competition are *not* like the law of gravity. Now, imagine that we relax the assumption by allowing for malfunctions. If a robot malfunctions by ignoring the pressures of competition and, say, goes bankrupt as a result, then the robot suffers a consequence of its behavior provided by Marx’s laws of competition. Whether we are trying to understand the behavior of the well-functioning robot or the malfunctioning robot, at no level of explanation do we have to bring in human agents.

However, a weak sense of “non-agential” would involve human agents at one level at least. Suppose that we have flesh-and-blood human capitalists. No one is holding a gun to their heads and forcing them to follow the laws of competition. They are not coerced in that way.<sup>54</sup> If their behavior accords with the laws of competition, they get their employees to work for less, maximize their own price-cost ratio, or accumulate larger surpluses. If not, they experience unwanted consequences. Among these consequences are actions taken by human agents such as the manager of a bank who forecloses on a loan, or a bankruptcy judge who orders liquidation of assets. Thus, at

15 (David Fernbach trans., Penguin Classics 1991) (1894) (discussing competition in varied contexts). The final volumes of *CAPITAL* appeared after Marx’s death in 1883.

<sup>53</sup> Cf. Steve Fleetwood, *Laws and Tendencies in Marxist Political Economy*, 36 *CAP. & CLASS* 235 (2012).

<sup>54</sup> If someone had held a gun to their heads, Laura Valentini, *Coercion and (Global) Justice*, 105 *AM. POL. SCI. REV.* 205, 210 (Feb. 2011), would refer to this act as “interactional coercion,” which she defines in this way: “An agent A coerces another agent B if A foreseeably and avoidably places nontrivial constraints on B’s freedom, compared to B’s freedom in the absence of A’s intervention (other things being equal).”



least at the level of a bank manager or a bankruptcy judge, there is some coercion against capitalists by human agents.<sup>55</sup>

I began this discussion of non-agential coercion by noting that one might appeal to Marx's laws of competition. But Hardt and Negri do not do so.<sup>56</sup> Why not? There are a number of possible answers. Perhaps they think the matter is obvious. Perhaps they disagree with Marx. Perhaps they figure that American and Canadian property professors interested in issues of sovereignty and coercion would be uninterested in a specifically Marxist discussion of laws of competition. I do not know which of these answers, if any, is or are correct.

#### D. SYSTEMIC COERCION

Systemic coercion merits discussion. In this context, a *system* could involve as few as three persons: A, B, and C. A and B are free to buy and sell, and each deals with the other to better his or her own position in a market exchange. Unknown to them, their exchange has an adverse third-party effect on C. As a system grows to include thousands or millions of people, many of them experience detriments that are not offset by benefits to them of countless market exchanges. Net detriments need not rise to the level of exploitation.<sup>57</sup> But they can still constrain the freedom of some persons without exploiting them and qualify as "systemic coercion" as defined by Laura Valentini.<sup>58</sup>

Market exchanges as described thus far can occur in a wide range of economies, including barter systems and various pre-capitalist economies discussed by Marx.<sup>59</sup> Here, it is important to focus on market exchanges in capitalism, including performing labor in return for wages. Michael Garnett says Marx claims that "proletarian labor is 'coerced.'"<sup>60</sup> In fact, the relevant passage in Marx does not use the word "proletarian" and only in passing says that, because of alienation, "His [the worker's] labor is therefore not voluntary but coerced; it is *forced* labor."<sup>61</sup> Marx does not provide an

<sup>55</sup> Valentini would apparently refer to the action of the bank manager and the judge as interactional coercion provided that the capitalists are agents. *Id.* She contrasts interactional coercion with "systemic coercion," which she defines as "[a] system of rules [that] is foreseeable and avoidably places nontrivial constraints on some agents' freedom, compared to their freedom in the absence of that system." *Id.* at 212. If capitalism is interpreted as a system of rules, and if capitalists and workers count as agents with respect to each other, then one may have a specimen of systemic coercion. See discussion *infra* Part IV. If this interpretation is not correct because capitalists and workers are not agents, even though they coerce each other, then we may have a subtler example of non-agential coercion. Cf. Garnett, *supra* note 26, at 570-73 (discussing capitalist wage relations and coercive offers).

<sup>56</sup> Negri writing on his own mentions "the law of competition" briefly. ANTONIO NEGRI, MARX BEYOND MARX: LESSONS ON THE *GRUNDRISSE* 158 (Jim Fleming ed., Harry Cleaver, Michael Ryan & Maurizio Viano trans., 1984). He neither cites nor discusses MARX, *GRUNDRISSE*, *supra* note 52, at 649-52, 657-58.

<sup>57</sup> "Persons are exploited if (1) others secure a benefit by (2) using them as a tool or resource so as (3) to cause them serious harm." STEPHEN R. MUNZER, A THEORY OF PROPERTY 171 (Jules Coleman ed., 1990).

<sup>58</sup> Valentini, *supra* note 54, at 210, 212.

<sup>59</sup> KARL MARX, PRE-CAPITALIST ECONOMIC FORMATIONS (E.J. Hobsbawm ed., Jack Cohen trans., 1964).

<sup>60</sup> Garnett, *supra* note 26, at 553.

<sup>61</sup> MARX, MANUSCRIPTS, *supra* note 52, at 110-11 (emphasis in original). Garnett and I use different editions of Martin Milligan's translation of the *Manuscripts*, which accounts for our different page references.

extended treatment of coercion (*Zwang*) and in other works speaks of domination (*Herrschaft*) rather than coercion.<sup>62</sup>

Nevertheless, Garnett contributes importantly to our understanding of systemic coercion by distinguishing between deontic coercion (a moral wrong) and eudaimonic coercion (a moral bad).<sup>63</sup> Utilitarian, socialist, and communist writing on coercion invokes mainly the latter.<sup>64</sup> Granted, a capitalist factory owner could threaten to fire workers who seek to organize a union. That could interfere with workers' moral rights, and the interference could be a moral wrong: In regard to capitalist wage relations, Garnett pays less attention to coercive threats than coercive wage offers; the latter may create a moral bad.<sup>65</sup> He sets up the following case:

*Proletarian.* *B* lives in a pure capitalist system and owns no property other than himself. *A*, who bears no direct responsibility for *B*'s situation, offers *B* a hazardous job at paltry wages. *B* has no prospects of other work or assistance, and if he declines the job, he will likely starve. For this reason, *B* accepts the job.<sup>66</sup>

Garnett writes principally as a moral philosopher rather than as a political philosopher. He says that "it is difficult to sustain the claim that transactions like that in *Proletarian* are generally coercive in a weighty deontic sense."<sup>67</sup> He concludes: "The upshot of all this is that capitalists and socialists are likely both right: it is both true that workers like *B* are coerced (in the primarily eudaimonic sense) and true that they are not (in the weighty deontic sense)."<sup>68</sup>

Where does this leave us in regard to systemic coercion as a moral bad? We need to think this question through as a matter of political morality and political theory. There is not likely to be a single answer that holds for modified forms of capitalism as distinct from the nineteenth-century capitalism with which Marx was familiar. Moreover, to assess the moral gravity of systemic coercion under modified capitalist economies, it is vital to investigate alternatives. The assessment must include constraints on freedom in Hardt and Negri's common. It is not plausible to think that the common will involve zero coercion of various sorts.<sup>69</sup>

#### IV. CRITICAL LEGAL STUDIES AND PROGRESSIVE PROPERTY THEORY

When Hardt and Negri turn to the critical legal studies movement,<sup>70</sup> their analysis of coercion does not improve. They are somewhat intellectually sympathetic to Kennedy and Singer. However, Hardt and Negri appear to be

<sup>62</sup> See *infra* text accompanying note 98. On domination generally, see *infra* Part IV.

<sup>63</sup> Garnett, *supra* note 26, at 545–46.

<sup>64</sup> *Id.* at 546, 550–54 (mentioning Bentham and Marx).

<sup>65</sup> *Id.* at 570–73. *Contra* White, *supra* note 43 (focusing chiefly on coercive threats). *But see id.* at 224–27 (addressing wrongful coercion that does not involve wrongful threats).

<sup>66</sup> Garnett, *supra* note 26, at 570 (emphasis in the original).

<sup>67</sup> *Id.* at 571 (emphasis in original).

<sup>68</sup> *Id.* (emphasis in original).

<sup>69</sup> The comments and research of Jacob Metz and Kyle Scott markedly improved Part III on coercion. They are not answerable for any shortcomings.

<sup>70</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 88–90.

unaware that Kennedy's and Singer's discussions of property and coercion are as unsuccessful as Hale's.<sup>71</sup>

The central political message of Hardt and Negri's treatment of critical legal studies and progressive property theory is that neither goes far enough. Both would have been enough had both reached the common. As Part I explains, Hardt and Negri define the common differently in *Commonwealth* and *Assembly*.

The *Commonwealth* account separates the material world from the output of social production. It specifies certain results of production and social interaction, such as knowledges and affects. The *Assembly* account explicitly separates property from the "nonproperty" of the common and concentrates on democratic means of sharing the common.

These accounts require considerable unpacking,<sup>72</sup> but their scope and ambition make abundantly clear why Hardt and Negri think critical legal studies and progressive property theory fall short. Legal realists and critical legal scholars might have argued for the abolition of private property, or for the democratic management of social wealth, but they did neither. Instead, "[t]hey mobilize the fact that coercion and the state are always already involved in property rights, which undermines laissez-faire claims to freedom, in order to legitimate the actions of the state to address and protect the full plurality of other social actors whose rights are part of the bundle."<sup>73</sup> This reasoning, claim Hardt and Negri, supports New Deal legislation but not the radical transformation of society that they seek.<sup>74</sup>

Critical legal scholars, write Hardt and Negri, try to "reform property from the inside" by deploying "the pluralism of property law to affirm the rights of the subordinated."<sup>75</sup> This deployment, according to Hardt and Negri, issues in some neatly cabined practical projects. An example is the creation of non-profit housing co-ops in which residents have rights of participation and significantly limited opportunities to benefit from equity increases or adjustments for inflation.<sup>76</sup> Related practical measures such as the Creative Commons project, they say, have only modest utility.<sup>77</sup> And statements in favor of "Progressive Property," which Hardt and Negri see as another "use[] of the bundle of rights,"<sup>78</sup> are nothing more than "pallid appeals to values and ethics."<sup>79</sup> Critical legal scholars, they add, "do not extend the implications of their arguments toward an abolition of property."<sup>80</sup>

Insofar as Hardt and Negri take up Duncan Kennedy's suggestion that they should think of property as a bundle of rights,<sup>81</sup> it is evident that on the merits they are unrepentant. Progressive property theorists, they say, fail to

<sup>71</sup> See Munzer, *supra* note 7, at 46–52 (criticizing Kennedy and Singer as well as Hale on coercion).

<sup>72</sup> Part VI tries to clarify the nature of the common.

<sup>73</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 88.

<sup>74</sup> *Id.* at 88.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 88–89.

<sup>77</sup> *Id.* at 89.

<sup>78</sup> *Id.* at 89 n.15 (referring to Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009)). Singer has ties to both critical legal studies and progressive property theory.

<sup>79</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 89–90 nn.13, 15–16.

<sup>80</sup> *Id.* at 88.

<sup>81</sup> See *supra* note 5 and accompanying text.

recognize “that property is a form of sovereignty,” and “despite their recognition of the plural and political nature of property, offer little help to think beyond it.”<sup>82</sup> If the common is the promised land, then, in the eyes of Hardt and Negri, neither critical legal scholars nor progressive property theorists will ever get there.

By contrast, I suggest that critical legal scholars and progressive property theorists can reasonably respond that if the common is the ultimate goal, they at least create a realistic steppingstone to the common. They could point out that the abolition of both capitalist property and socialist property, to make way for the common, is unlikely in the foreseeable future. The common of Hardt and Negri, they might say, is currently no more than pie-in-the-sky thinking. My suggestion recalls Kennedy’s apparent objection to Hardt and Negri: “[T]o reform property from within” makes more sense than engaging in a “counter-productive” assault against property.<sup>83</sup>

## V. FROM DOMINATION TO NON-DOMINATION

My careful amendments to Hardt and Negri’s accounts of sovereignty and coercion should aid their project, but it is the following thoughts on domination and non-domination that offer a much more substantial contribution to that project. In my view, Hardt and Negri, and for that matter some critical legal scholars, would be wise not to substitute domination for sovereignty and coercion, but rather to bring in domination as an even more fruitful category alongside sovereignty and coercion.

Now, in one passage in *Assembly*, Hardt and Negri seem to understand sovereignty and perhaps coercion as a *form* of domination,<sup>84</sup> and it might seem that they have already accounted for domination in their criticisms of property under capitalism. However, they never develop the idea of domination, and the word seems almost to be a throwaway reference in *Assembly*. Whether they understand domination as an umbrella term that encompasses sovereignty and coercion is anyone’s guess. Coercion requires agency, except in very specific contexts such as weak non-agential behavior in Marxian competition.<sup>85</sup> Domination and coercion occasionally overlap at the margin but are different concepts.

Philosophers and other theorists have advanced competing conceptions of domination and non-domination. Part V shows how Hardt and Negri, as well as progressive property theorists and critical legal scholars, can take advantage of these competing conceptions. In what follows *domination* is usually an unjust condition to be avoided and *non-domination* is usually a just condition we ought to establish. So, the term “non-domination” is negative only in appearance and applies to a positive, just condition. I start with republican theories proposed by such figures as Frank Lovett and Philip Pettit, whom most would see as political liberals.<sup>86</sup> Later, I come to Marxist

<sup>82</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 90.

<sup>83</sup> *Praxis 5/13: The Common*, *supra* note 5.

<sup>84</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 86–87.

<sup>85</sup> See *infra* Part V.

<sup>86</sup> Some thinkers prefer the term “civic republicanism” or “neo-republicanism” to “republicanism.” Contributors to this field include philosophers, political theorists, intellectual historians, academic lawyers, and others.

thinkers who suggest more radical forms of domination and non-domination. In both cases, I explore concrete payoffs of their theories.

According to Lovett, domination is a condition of substantial unjust, arbitrary social power of some persons and groups over other persons and groups.<sup>87</sup> Similarly, Pettit sees domination as the subjection of some to the arbitrary or unchecked power of others.<sup>88</sup> A central reason for concentrating on domination is its explanatory value, namely that in this context domination better explains the implications and consequences of property, property holdings, and property law vis-à-vis competitors. How does it do so? A general answer is that property as a bundle of rights confers on owners the power to dominate those who do not own even part of a given item of property, such as a city lot on which no house has yet been built. If A owns the lot, A can prevent B from pitching her tent on it. A thus has a legal power to restrict B's freedom to pitch her tent wherever she pleases.

Scholars and theorists can point to a further advantage of focusing on domination over sovereignty and coercion: wide applicability. Domination applies to forms of social injustice that coercion does not. The weight of this reason hinges partly on the specific forms of injustice present in various property systems. In analytical political philosophy and ethics, controversy exists over who, and what, can dominate.<sup>89</sup>

Republican domination is a sort of unfreedom, whereas non-domination is a sort of immunity or security against the arbitrary interference by others,<sup>90</sup> which differs from the mere absence of interference as famously discussed by Isaiah Berlin.<sup>91</sup> Republican non-domination, then, is a sort of freedom that occupies a middle position between Berlin's negative and positive liberty.

Republican theories of domination and non-domination have concrete payoffs in regard to those who have, and those who lack, property. Those who own mansions, expensive jewelry, yachts, and large investment portfolios sometimes dominate those who own much less or who are poor. The former can dominate the latter even if they do not coerce.

To illustrate, domination and non-domination throw light on the differential regulation of homeless people. Obviously, the homeless need to be *somewhere*. They encounter actual legal interference with many daily activities: sleeping, urinating, defecating, and, to some extent, eating and moving about. People who are housed usually run up against no such interference with their daily activities.

Less obviously, those without homes must think about how to avoid possible inference by the police and other civil authorities. Terry Skolnik writes perceptively of domination and non-domination, as articulated by

<sup>87</sup> FRANK LOVETT, A GENERAL THEORY OF DOMINATION AND JUSTICE 2-3 (2010); *see also* Christopher McCammon, *Domination*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 8, 2018) (surveying various accounts of domination). Anderson's enforcement approach to coercion requires agency; domination as understood by Lovett does not. *See supra* note 41.

<sup>88</sup> PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 22 (1997); *see also* QUENTIN SKINNER, LIBERTY BEFORE LIBERALISM 70 (1998) (arguing that domination involves the dependence of some on the arbitrary will of others).

<sup>89</sup> McCammon, *supra* note 87, at § 2.

<sup>90</sup> PETTIT, *supra* note 88, at 52, 69.

<sup>91</sup> *See* ISALAH BERLIN, FOUR ESSAYS ON LIBERTY 169 (1969) (distinguishing between negative liberty as an absence of interference or constraint and positive liberty as an ability to pursue one's aims and choices).

Pettit, regarding differential regulation of the homeless compared to the housed. Skolnik identifies four specific ways in which housing “protects individual freedom” through state regulation of “public property.”<sup>92</sup> For instance, if an ordinance “prohibits camping in public,” people who lack homes may have to “submit[] to a homeless shelter’s restrictive rules” to be able “to stay there overnight.”<sup>93</sup> Further, those without homes sometimes need to “urinate, defecate, or sleep on public property.”<sup>94</sup> Moreover, at times “to comply with laws that govern public property . . . homeless people must risk their physical safety . . . in homeless shelters.”<sup>95</sup> Finally, “[t]o lack access to housing is to live with a heightened sense of vigilance” and often with “a subjective awareness that one can be interfered with at any moment by others.”<sup>96</sup> Rarely are the housed subject as a practical matter to similar constraints on their liberty. In sum, the housed enjoy a significant measure of non-domination while homeless persons often experience domination.<sup>97</sup>

Because Hardt and Negri might say that republicanism is insufficiently radical for their purposes, I want to show how the Marxist tradition contributes, theoretically and practically, to our understanding of domination and non-domination. Sometimes Marx and Engels write of domination (*Herrschaft*).<sup>98</sup> And in an impressive contribution to Marxist scholarship, Moishe Postone places social domination at the center of his reinterpretation of Marx’s critical theory.<sup>99</sup> Postone provides an incisive analysis of the social relations and varieties of domination in contemporary postindustrial capitalism. He points out that in recent decades society has witnessed major global transformations including climate disruption, severe financial crises, structural exploitation, and growing economic inequality.<sup>100</sup> Traditional Marxism, Postone thinks, errs in criticizing contemporary capitalism based on the role labor played in nineteenth-century capitalism.<sup>101</sup> That approach roots class relations in private property.<sup>102</sup> He argues that the varieties of domination seen in contemporary capitalism cannot always be adequately understood in terms of class domination.<sup>103</sup>

<sup>92</sup> Terry Skolnik, *Freedom and Access to Housing: Three Conceptions*, 35 WINDSOR Y.B. ACCESS JUST. 226, 226, 240–41 (2018).

<sup>93</sup> *Id.* at 240.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 241.

<sup>96</sup> *Id.* (footnote omitted).

<sup>97</sup> For development of this perspective, see Terry Skolnik, *How and Why Homeless People Are Regulated Differently*, 43 QUEEN’S L.J. 297 (2018).

<sup>98</sup> KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* pt. 1, § 3 (1845–1846) (distinguishing between natural elements of production (for example, a field, or water) and instruments of production created by civilization (for example, a factory with a division of labor)). In the first case, therefore, property (landed property) appears as direct natural domination, in the second, as domination of labor and capital. In the first case, the domination of the proprietor over the propertyless may be based on a personal relationship; in the second, it must have taken on a material shape in a third party, money. *Id.* The German text does not use the word *Zwang*, which can mean coercion, constraint, compulsion, or force depending on the context.

<sup>99</sup> MOISHE POSTONE, *TIME, LABOR, AND SOCIAL DOMINATION: A REINTERPRETATION OF MARX’S CRITICAL THEORY* (photo. reprt. 2003) (1993). Postone does not use the concept of coercion.

<sup>100</sup> Moishe Postone, *The Task of Critical Theory Today: Rethinking the Critique of Capitalism and Its Futures*, in *GLOBALIZATION, CRITIQUE AND SOCIAL THEORY: DIAGNOSES AND CHALLENGES*, 33 CURRENT PERSPS. SOC. THEORY 3, 4–5 (2015).

<sup>101</sup> POSTONE, *supra* note 99, at 7–15.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Postone conceives of capitalism, and the form that labor takes in capitalism, as a historically specific kind of social interdependence. In his view, social domination has an abstract, impersonal character.<sup>104</sup> Individuals are dominated by abstract, objective social structures of capitalist society. It is the many abstract and impersonal forms of domination, not only class domination, that he claims to be the fundamental relations of capitalist society.<sup>105</sup> He contends that these varieties of domination illuminate the ongoing historical development of capitalism and current global transformations.

The concept of domination is important both to traditional Marxist theory and to Postone's analysis. Hardt and Negri could profit by focusing more on domination than on coercion to explain the implications of property. By never developing the idea of domination in *Assembly*, Hardt and Negri seem insufficiently alive to the fact that the common might have its own varieties of abstract and impersonal domination even if it lacks class domination.

In the work of Nicholas Vrousalis, a philosopher and analytical Marxist,<sup>106</sup> we see a different theory of domination. He writes: "A dominates B if A and B are embedded in a systematic relationship in which [1] A takes advantage of his power over B, or the power of a coalition of agents A belongs to, in a way that [2] is disrespectful to B."<sup>107</sup>

This definition differs from standard republican definitions of domination—to wit, that domination is a form of *unfreedom* because it is the subjection of some persons to the arbitrary or unchecked power of others. Both definitions attend to power over others. But Vrousalis is also concerned with whether that power *disrespects* another individual even if it does not cause her a lack of freedom. Because coercion can entail a lack of freedom, Vrousalis's definition may help to distinguish domination from coercion more clearly than republican definitions. He allows that exploitation and domination need not be intentional<sup>108</sup> and that capitalism can be "cleanly generated"; that is, capitalism sometimes "does not arise from 'primitive accumulation,' through massacre, plunder, forced extraction"<sup>109</sup> or other nefarious means. Elsewhere, Vrousalis argues that "[s]ocialists should oppose capitalism not because it is distributively unjust, but because it unjustly confers on some unilateral control over the productive purposiveness of others."<sup>110</sup>

Let us bring these ideas down to earth. Domination applies to kinds of social injustice that coercion sometimes does not, and one such injustice is

<sup>104</sup> *Id.* at 158–59.

<sup>105</sup> *Id.* at 78.

<sup>106</sup> Roughly, analytical Marxism is the use of (non-Marxist) techniques of mainly Anglophone analytic philosophy to advance Marxist positions and theories. Founders of analytical Marxism include G.A. Cohen, Jon Elster, and John Roemer. G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENCE xvii–xxviii (expanded ed., 2000).

<sup>107</sup> Nicholas Vrousalis, *Exploitation, Vulnerability, and Social Domination*, 41 PHIL. & PUB. AFFS. 131, 139 (2013).

<sup>108</sup> *Id.* at 133, 135–44.

<sup>109</sup> *Id.* at 149.

<sup>110</sup> Nicholas Vrousalis, *Socialism Unrevised: A Reply to John Roemer on Marx, Exploitation, Solidarity, Worker Control*, 49 PHIL. & PUB. AFFS. 78, 109 (2020). NICHOLAS VROUSALIS, EXPLOITATION AS DOMINATION: WHAT MAKES CAPITALISM UNJUST (2023) came into my hands only as this Article was going to press, and I have not been able to take his study into account.

at the root of the decline in rural black landownership. After emancipation the government promised black Americans the ability to seek out land of their own. Agricultural census records reveal that by 1910 black Americans had acquired between sixteen and nineteen million acres of rural land.<sup>111</sup> Since then, rural black landownership has steadily declined.<sup>112</sup> By the beginning of the twenty-first century, black Americans had lost more than ninety percent of the land their predecessors had acquired.<sup>113</sup> This shocking decline was the result of, and helped to further prop up, white domination. White Americans took advantage of their economic, political, and legal power over black Americans so as to disrespect their equal status as persons.

To see concretely how the decline of rural black landownership resulted from domination, consider partition sales. Owing to a lack of access to legal services and estate planning, many rural black Americans held their property in tenancy in common and transferred it from one generation to the next under state intestacy laws.<sup>114</sup> As property in land passed down by intestacy, it often led to a large number of co-owners with little connection to one another and to a diminution in the value of each individual's ownership interest.<sup>115</sup> White attorneys and land speculators took advantage of this fractionation by purchasing small interests in black-owned tenancy-in-common properties and then forcing the sale of the land by filing a partition action to terminate the cotenancy.<sup>116</sup> This maneuver was a variety of domination because white Americans used their power—namely, their access to legal services and favorable laws and courts—to acquire black-owned property against the wishes of many black landowners. White Americans preyed upon the vulnerability of black Americans to gain property and to maintain racial subordination, which were blatant efforts to disrespect the status of black Americans. Because partition sales are often wealth-depleting, white domination of rural blacks contributed to the racial wealth gap.<sup>117</sup>

To sum up: domination is an unjust condition to be avoided, and non-domination is a just condition that we ought to establish. There is, however, no account of non-domination accepted by everyone. Disputes exist over whether non-domination is more intimately connected to equality or to freedom. Other disputes address whether non-domination centrally concerns only citizens (often a neo-republican understanding) or all persons who

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<sup>111</sup> Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557, 563 (2005).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 563–64.

<sup>114</sup> Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 517 (2001).

<sup>115</sup> *Id.* at 517–18.

<sup>116</sup> Mitchell, *supra* note 111, at 566.

<sup>117</sup> Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589, 617–19 (2010). Mitchell's work as the Reporter for the Uniform Partition of Heirs Property Act (2010) is a major reason why white partition actions can no longer dominate black-owned tenancy-in-common property. Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014).



reside in a country (a wider understanding). This is complicated theoretical and practical terrain, which cannot be mapped here.<sup>118</sup>

## VI. THE COMMON AND IMMATERIAL PROPERTY

As observed earlier, Hardt and Negri define the common in broadly similar but not identical ways in *Assembly* and *Commonwealth*.<sup>119</sup> Part VI clarifies both accounts and indicates how the descriptive problems with each call for much further refinement of the common. I assess a possible argument for the common in its rough-and-ready form. Next, I pivot to Hardt and Negri's treatment of immaterial property in the common. Finally, I take up their views on affective labor in social production and examine how we might enlarge our understanding of the common.

To paint with a broad brush, in *Assembly* Hardt and Negri frame the common in contrast to less radical views of property. They oppose traditional understandings of property, as defended by Locke, and criticized by Marx, with their heavy emphasis on owners' power to exclude others. They also oppose systems of public property in which the State owns most property, monopolizes its use, and controls decision-making. The common differs from both. It involves equal and open access rather than the exclusionary rules of private property. The common also involves the dispersed democratic management of resources rather than the central control characteristic of state property.<sup>120</sup>

Nevertheless, it is difficult to get a grip on the nonproperty clause in the *Assembly* account.<sup>121</sup> The difficulty arises from qualifying language that Hardt and Negri insert parenthetically on the very next page of *Assembly*: "(Keep in mind, to avoid confusion, that this conception of the common is aimed at social wealth, not individual possessions: there is no need to share your toothbrush or even give others say over most things you make yourself.)."<sup>122</sup>

<sup>118</sup> For articles offering a broad discussion, see Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293, 293 (2012) (seeing non-domination as "the bedrock of justice" and favoring "power-based resourcism" as the best understanding of non-domination), discussed by David Dyzenhaus, *Response to Ian Shapiro, "On Non-Domination,"* 62 U. TORONTO L.J. 337 (2012) (offering criticisms). For emphasis on freedom and neo-republicanism, see M. Victoria Costa, *Neo-Republicanism, Freedom as Non-Domination, and Citizen Virtue*, 8 POL. PHIL. & ECON. 401 (2009). I do not see non-domination as a supreme value in political theory, in part for the reasons given by Patchen Markell, *The Insufficiency of Non-Domination*, 36 POL. THEORY 9 (2008). On extending non-domination to some non-citizen residents ("denizens"), see Meghan Benton, *The Problem of Denizenship: A Non-Domination Framework*, 17 CRIT. REV. INT'L SOC. & POL. PHIL. 49 (2014). The research of Jacob Metz greatly improved this discussion of domination and non-domination.

<sup>119</sup> See *supra* notes 8–9 and accompanying text.

<sup>120</sup> This paragraph condenses in different words the manifesto in HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 85. Their understanding of democracy builds in part on the discussion in SPINOZA, *Political Treatise*, ch. XI, in 2 SPINOZA, *COLLECTED WORKS*, *supra* note 20, at 601–04. See NEGRI, *supra* note 20, at 28–58, 101–11 (making use of Spinoza on democracy). As for Spinoza and the common, ANTONIO NEGRI, *SPINOZA FOR OUR TIME: POLITICS AND POSTMODERNITY* 94 (William McCuaig trans., 2013) says "In sum: the individualistic genesis of society as described by natural law doctrine is here transformed into a performative or normative theory of the social and the political, into an effective construction of the common." *Id.* at 94–95, 106 n.5 (citing scattered passages from Spinoza's *Ethics* but not articulating how Spinoza's passages support the Negri's claim).

<sup>121</sup> "The common . . . is not a new form of property but rather *nonproperty* . . ." HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 97 (emphasis in original).

<sup>122</sup> *Id.* at 98 (parentheses in original).

It appears, then, that Hardt and Negri do not intend the common to be a form of society in which no person has even limited property in a comb, underwear, or an inexpensive wedding ring.<sup>123</sup> At the beginning of this Article, I called attention to ambiguities created by allowing individual possessions, control over things you make yourself, and new money.<sup>124</sup> I explore these ambiguities in order.

In the category of individual possessions, the sole item specifically mentioned by Hardt and Negri is a toothbrush.<sup>125</sup> It seems reasonable to add prescription eyeglasses, sunglasses, house and apartment keys, watches, shoes, sex toys, and smartphones. It is unclear if the common sets limits on expense (a Casio watch is one thing, a Rolex watch is quite another) or amount (five pairs of shoes per person is one thing, but a shoe collection like that of Imelda Marcos is quite another). Hardt and Negri would likely regard Christian Louboutin pumps and a Tiffany three carat diamond engagement ring as disgustingly bourgeois. They might debate whether a minor Picasso is an individual possession or a part of social wealth. It is unclear whether the common would allow a handgun for personal protection or a rifle for hunting.

Hardt and Negri say that you may control most things you make yourself.<sup>126</sup> It appears that a person could cut her hair to make a wig for her own use. However, questions arise about one's ownership of material resources. If you pick up a piece of driftwood or some straw blown about by the wind, you can fashion the driftwood into an art object and the straw into a hat. But if you want to make a shirt or a dress, you may need to acquire fabric from someone else. There are also questions about tools. Would the common permit you to buy or rent a sewing machine? If you want to make a dining room table, is it permissible to buy wood, a saw, and a plane? When Hardt and Negri say that you need not "even give others say,"<sup>127</sup> it is unclear whether this holds only if you are making something solely for your own use, or if you may lease or sell whatever you make to others. When they assert that you may control "most"<sup>128</sup> things you make, it would help if they were to describe or give examples of things you may make but not control. In their books, Hardt and Negri often discuss sophisticated immaterial property,<sup>129</sup> which suggests that they are not seeking to propel members of the common back into early modern unskilled, semi-skilled, or artisan labor in the material sphere.

Lastly, we come to the "new money"<sup>130</sup> that Hardt and Negri permit in the common. Money of some sort is obviously superior to barter as a medium of exchange. At an individual level, it is not clear whether an artist may buy

<sup>123</sup> See *supra* text accompanying note 11.

<sup>124</sup> See *supra* text accompanying note 2.

<sup>125</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 98.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *infra* Part VIII.

<sup>130</sup> "What we need is to establish a new social relation—based on equality and freedom in the common—and then (and only then) can a new money be created to consolidate and institutionalize that social relation." HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 280. The characteristics of this "new money" are left unstated in the remainder of their discussion of money. *Id.* at 196–200, 224, 280–84, 324–25, 335.

materials (canvas, oil paints) and sell her paintings to others at 100 or 1,000 times the price of the raw materials. At a socioeconomic level, Hardt and Negri might have drawn on Marx's views on money, which elicit commentary to this day.<sup>131</sup> They do not do so. Nor do they discuss whether the common would have a central bank as an instrument of monetary policy.

In *Assembly*, then, the common respects self-ownership insofar as it allows individual possessions, money of some sort, and control over most things you make yourself. These allowances create ambiguity over the extent to which the common is truly a nonproperty system. It would be unhelpful for Hardt and Negri to respond that inhabitants of the common will sort out the details through democratic practices, for at least some of the details have to be resolved in order for the common to exist. True, Hardt and Negri remind the reader that "property is always already social, affecting others in the universe."<sup>132</sup> Indeed, to see property—whether ownership or limited property—as a bundle of claim-rights, liberty-rights, powers, and immunities is to see it also as creating correlative duties, no-rights, liabilities, and disabilities on others. If, as Hardt and Negri insist, "[t]he rights that this notion of a bundle introduces are really counterrights empowered to operate as balances or challenges within property,"<sup>133</sup> then property marks out "a plural set of social interests."<sup>134</sup> And if that is correct, it is unclear how one is to draw the distinction between "individual possessions" and "social wealth."<sup>135</sup> It is not enough to say that individual possessions are piddling things and social wealth is serious stuff. My point is not that Hardt and Negri are incapable of distinguishing between individual possessions and social wealth, only that they neglect to do so.

## VII. SOCIAL PRODUCTION IN THE COMMON

I turn now to the common as defined in *Commonwealth*. In that work, the reader will recall,<sup>136</sup> the common is a composite concept. On the one hand, it applies to natural resources that are broadly good or desirable, such as plants, land, and water. On the other hand, the common includes many things that humans produce and, moreover, produce in concert with others. The material output of factories is one example. Social production also includes largely abstract or immaterial goods. Languages and information are examples. So are codes for computers and confidential communications.<sup>137</sup>

Hardt and Negri severely limit private property in the common and emphasize social cooperation and social wealth in the common. "The common designates an equal and open structure for access to wealth together

<sup>131</sup> See MARX'S THEORY OF MONEY: MODERN APPRAISALS (Fred Moseley ed., 2005) (containing essays on Marx on money and value, commodity and credit theories of money, and world money); Michael Williams, *Why Marx Neither Has Nor Needs a Commodity Theory of Money*, 12 REV. POL. ECON. 435 (2000).

<sup>132</sup> See *supra* Part II.

<sup>133</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 86.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 98. On the same page Hardt and Negri discuss various forms of the common. *Id.* But the discussion sheds no light on the distinction between individual possessions and social wealth.

<sup>136</sup> See *supra* note 8 and accompanying text.

<sup>137</sup> See *supra* Part VI.

with democratic mechanisms of decision-making.<sup>138</sup> They applaud Elinor Ostrom's case for democratic management of common-pool resources.<sup>139</sup> They disagree, though, with her insistence on small, limited communities. Instead, they favor "more expansive democratic experiences that are open to others."<sup>140</sup>

Before Hardt and Negri's many readers can have a secure understanding of the nature of the common, they need a careful exposition of the exclusionary rules, if any, that regulate individuals' access to the common. Inhabitants of the common are members of the multitude.<sup>141</sup> They are said to share in productive work and the governing of society. They are equal, though "equality of what sorts?" is an open question. Further, without a centralized state, for equality to exist much will depend on inhabitants of the common having an egalitarian ethos that guides their choices in daily life. They do not seem to belong to any distinct class, save perhaps one based on their jobs.

A great deal remains unclear. Hardt and Negri say almost nothing about marriage and the family. Neither do they say much about dissent, political protest, religious freedom, or leisure. Whether there is enough connectedness among members of the multitude to avoid anarchy and to hold a society together is unclear. Readers may wonder what happens to persons who slack off or refuse to work altogether. Would the common treat the idle and the industrious equally even if each had the same initial advantages, or would it permit inequality so that one inhabitant does not have to sacrifice for another's truly optional resources? As noted earlier, Hardt and Negri object to the coercion they regard as rampant in capitalism.<sup>142</sup> They need to consider how much coercion and domination would exist in the common. It will not do for Hardt and Negri to people the common entirely with human beings who are sympathetic to radical democracy.

Because so much is left unspecified about the nature of the common, it is hard to construct an argument for the common as a desirable

<sup>138</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 97.

<sup>139</sup> *Id.* at 99. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 20 (1990), argues that common-pool resources should use "a self-governed common property arrangement in which the rules have been devised and modified by the participants themselves and also are monitored and enforced by them." Hardt and Negri do not connect their understanding of the common to the tragedy of the commons, anticommmons property, or the tragedy of the anticommmons. Relevant literature in chronological order includes Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968); Michael A. Heller, *The Tragedy of the Anticommmons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 625 n.17 (1998); Stephen R. Munzer, *The Commons and the Anticommmons in the Law and Theory of Property*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 148, 151–52 (Martin P. Golding & William A. Edmundson eds., 2005).

<sup>140</sup> HARDT & NEGRI, ASSEMBLY, *supra* note 1, at 99.

<sup>141</sup> Spinoza does not often use the term *multitudo* (multitude) but that does not stop Negri from using ideas he attributes to Spinoza. NEGRI, *supra* note 120, at 69–82; ANTONIO NEGRI, THE SAVAGE ANOMALY: THE POWER OF SPINOZA'S METAPHYSICS AND POLITICS 7–8, 21, 194–202, 204–10 (Michael Hardt trans., 1991). Supposedly Spinozist positions are reflected in HARDT & NEGRI, COMMONWEALTH, *supra* note 1, at 43, 279, 392 nn.48–49, 417 n.15 (a multitude comprises all persons but especially the poor); and HARDT & NEGRI, MULTITUDE, *supra* note 1, at 190, 194, 221, 387 n.104 (2004) (a multitude consisting of sundry individuals is both ontological and political). If MULTITUDE conceives of the multitude as the masses in search of liberation, one might argue that HARDT & NEGRI, ASSEMBLY, *supra* note 1, conceives of it as an empowered entrepreneurial democratic network. Samuel A. Chambers, Book Review, 47 POL. THEORY 724 (2019) (reviewing HARDT & NEGRI, ASSEMBLY, *supra* note 1) so argues.

<sup>142</sup> See *supra* Section III.B.

socioeconomic space.<sup>143</sup> One does not see in Hardt and Negri's pages careful arguments of the sort deployed by political theorists such as Thomas Hobbes<sup>144</sup> or John Rawls.<sup>145</sup> Perhaps the best one can do is to assemble considerations that favor the common over other socioeconomic arrangements.

Here is a set of consequentialist considerations that rest on informed preferences.<sup>146</sup> Inhabitants of the common, let us suppose, prefer equal and open access to resources over the exclusionary rules of private property. They prefer equality of access, opportunity, and resources over equality of welfare. They prefer the dispersed democratic management of resources over the central control characteristic of state-owned property. They prefer the sharing of material and immaterial social production—including knowledges, codes, and information—over privatizing material resources and issuing copyrights and patents to individuals. Because unmanaged open access can lead to the overuse and deterioration of resources, members of the multitude prefer collective decision-making over both capitalist and socialist regimes. And they prefer empowering the entire multitude over delegating the management of the common to political leaders, central banks, labor unions, political parties, and specialists in political economy.

These considerations, though, are vulnerable to attack from all sides. Hardt and Negri might react with horror to preference-based consequentialism. Others may claim that *informed* preferences stack the deck in favor of the common and in any case would be difficult and costly to obtain; they may claim also that individuals are often better at acquiring information that matters to them than would be the common's fellow inhabitants and collective decision-makers. Philosophers identify many sorts of equality and may question *why* inhabitants of the common prefer some sorts over others. Critical legal scholars may object that at present the common is so amorphous and unwieldy as to be a counter-productive pipedream. Progressive property theorists may insist that justifying property holdings requires values and ethics, which are much more than "pallid appeals."<sup>147</sup> Moreover, private property can give persons some control over their lives, a degree of privacy with respect to others and the State, and a basis for developing their individuality.<sup>148</sup> To some readers, the common may seem to lack much in the way of, well, common sense. Aristotle, a model of common sense, puts it this way: "Property should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct

<sup>143</sup> Forerunners of this problem are familiar from earlier forms of Marxism including that of Marx himself. Bertell Ollman, *Marx's Vision of Communism: A Reconstruction*, 8 CRITIQUE: J. SOCIALIST THEORY 4 (1977) takes the problem seriously even though he does not solve it.

<sup>144</sup> See generally THOMAS HOBBS, *LEVIATHAN* (London, Andrew Croke 1651).

<sup>145</sup> See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1996); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>146</sup> A preference, as understood here, disposes a person to one thing (such as living in the common) over another (such as living in a capitalist or a socialist society) in his or her ranking. A preference is informed if it corrects, as needed, for misinformation, disinformation, self-deception, and false consciousness.

<sup>147</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 90.

<sup>148</sup> MUNZER, *supra* note 57 at 88-119 (discussing control, privacy, and individuality).

interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business."<sup>149</sup>

Hardt and Negri are not likely to be rendered speechless by these complaints about their lack of argumentation for the common. Nevertheless, these objections should prompt them to articulate a more developed account of the nature of the common and to make a better case for it. A bundle-of-rights approach to property may aid in clear thinking about which rights to include in the common.

### VIII. IMMATERIAL PROPERTY AND SOCIAL PRODUCTION: TENDING TOWARD THE COMMON

In Hardt and Negri's political writings, the transition from capitalism to the common takes several steps. It goes from immaterial property to biopolitics and reproducibility, and finally to knowledges and the transformation of social production.

Hardt and Negri's treatment of immaterial property develops from *Multitude* (2004) to *Assembly* (2017). Let us begin with *Multitude*. Immaterial property obviously contrasts with material (tangible) property, whether the material property is immobile like land or mobile like tools and cars.<sup>150</sup> Marx concentrated on material property, especially land, buildings, and the products turned out by factory workers: pins, hats, clothing, reapers, locomotives, and so on. Examples of immaterial property include computer programs and data banks, copyrights and patents, and assigned wavelengths on the electromagnetic spectrum.<sup>151</sup> Hardt and Negri concentrate on immaterial property that is reproducible, such as patents on microorganisms (for example, bacteria), cell lines, and life-forms such as the Oncomouse.<sup>152</sup> They pay less attention to immaterial property that is not reproducible, like air rights,<sup>153</sup> the right of publicity,<sup>154</sup> and the moral right of artists.<sup>155</sup>

But why do Hardt and Negri bestow so much more attention on biologically-related immaterial property than on other varieties of immaterial property? The answer is twofold. First, their version of Marxism builds in part on the biopolitics of Michel Foucault.<sup>156</sup> Foucault did not coin

<sup>149</sup> ARISTOTLE, *Politics*, Book II, § 5, in 2 THE COMPLETE WORKS OF ARISTOTLE 2004 (Jonathan Barnes ed., Benjamin Jowett trans., 1984).

<sup>150</sup> HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 179.

<sup>151</sup> *Id.* At 180–83.

<sup>152</sup> *Id.*, at 180–83, 311.

<sup>153</sup> Air rights include the right to build structures on one's land and in a more qualified way the right of private persons, airlines, and the government to fly above land owned by others. For a history of airspace in the U.S., see STUART BANNER, WHO OWNS THE SKY? THE STRUGGLE TO CONTROL AIRSPACE FROM THE WRIGHT BROTHERS ON (2008).

<sup>154</sup> The right of publicity is particularly important for celebrities, but it applies to non-celebrities as well. GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW: A CONCISE HORNBOOK 247–53 (2008).

<sup>155</sup> Many European countries recognize the moral right of artists of all sorts, whereas the United States ordinarily does so only to a limited extent. See, e.g., Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible*, 38 VAND. L. REV. 1 (1985) (discussing a rapprochement). The moral right includes the rights of disclosure (divulagation), paternity (recognition), integrity, withdrawal, prevention of malicious criticism, and assaults on the artist's personality. *Id.*

<sup>156</sup> MICHEL FOUCAULT, THE BIRTH OF POLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–1979 (Graham Burchell trans., 2008); HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 13, 284–85, 361 n.17, 398 n.76.

the term “biopolitics,” but the field that he helped create stands at the crossroads of biology and politics. Foucault was particularly concerned with governments that carefully control their citizens and residents by regulating most aspects of human life. Nevertheless, Hardt and Negri take Foucault to task in fundamental ways. In their earlier work *Empire* (2000), for instance, they write that “if at this point we were to ask Foucault who or what drives the system, or rather, who is the ‘bios’, his response would be ineffable, or nothing at all. What Foucault fails to grasp finally are the real dynamics of production in biopolitical society.”<sup>157</sup> In this respect, they favor Gilles Deleuze and Félix Guattari over Foucault.<sup>158</sup>

Second, Hardt and Negri hold that the multitude needs to contest capitalist forms of control, pay special attention to bioethics, and oppose various biotechnological inventions. It is therefore no surprise that they focus on cell lines, newly created microorganisms, and genetically modified life-forms such as the Oncomouse.<sup>159</sup> It hardly follows that Hardt and Negri are oblivious to problems caused by or associated with other sorts of immaterial property. Their mention of computer viruses and data theft illustrates as much.<sup>160</sup> Still, the two preceding points help to explain why they concentrate on immaterial property rights in biotechnological inventions and the impact of these rights on human life in society.

If *Multitude* elucidates various sorts of immaterial property, compares it to material property, and ties it to biopolitical Marxism generally, *Assembly* emphasizes the rising importance of immaterial property and its reproducibility. “Today,” write Hardt and Negri, “the center of gravity of the property world is shifting”<sup>161</sup> from material to immaterial property. They mention rights to “ideas, images, culture, and code,” and suggest that these rights “are in some respects immediately plural and social.”<sup>162</sup> In their view, the increasing reproducibility and importance of immaterial property have several consequences. First, it is more difficult to have effective means of exclusion and maintaining scarcity for immaterial compared to material property.<sup>163</sup> Second, “[i]mmaterial property, along with the forms of freedom and cooperation opened by network culture, helps us glimpse the potential for a nonproperty relation to social wealth.”<sup>164</sup> Third, there is also “potential for sharing material wealth through nonproperty relations.”<sup>165</sup> Hardt and Negri distill these three points as follows: “[F]orms of wealth that are primarily immaterial . . . already strain against the exclusions imposed by property relations and *tend toward the common*.”<sup>166</sup>

Hardt and Negri’s frequent mention of languages, codes, and information brings us to their discussion of knowledges and what they understand by

<sup>157</sup> HARDT & NEGRI, *EMPIRE*, *supra* note 1, at 28.

<sup>158</sup> *Id.* But see Nicholas Tampio, *Assemblages and the Multitude: Deleuze, Hardt, Negri, and the Postmodern Left*, 8 EUR. J. POL. THEORY 383, 383 (2009) (“challeng[ing] the widely held assumption that Hardt and Negri carry forth Deleuze’s legacy”).

<sup>159</sup> HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 180–83.

<sup>160</sup> *Id.* At 180.

<sup>161</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 90.

<sup>162</sup> *Id.*; see also *id.* At 197 (adding “information,” “knowledges,” and “cultural products”).

<sup>163</sup> *Id.* At 90.

<sup>164</sup> *Id.* They do not discuss misinformation on the web or harmful misuses of social media such as bullying.

<sup>165</sup> *Id.* It is not evident how nonproperty relations might conduce to the sharing of material wealth.

<sup>166</sup> *Id.* At 98 (emphasis added).

them. The word “knowledges,” in the plural, is somewhat uncommon in English usage compared to “forms of knowledge.” But “knowledges” does have some uses in contemporary English,<sup>167</sup> and is related to semi-technical plural words in other languages, especially *épistémès*.<sup>168</sup>

These forms of knowledge have led to a dispute over Marx’s seemingly prescient idea of a knowledge economy. A passage in the *Grundrisse* reads: “The development of fixed capital indicates to what degree general social knowledge has become a *direct force of production*, and to what degree, hence, the conditions of the process of social life itself have come under the control of the general intellect and been transformed in accordance with it.”<sup>169</sup> If I understand Hardt and Negri correctly, “general intellect” in the form of technical knowhow and collaborative knowledge-based work are inputs into production, especially immaterial production.<sup>170</sup> In opposition, a commentator argues that they err in attaching so much importance to a short passage in the *Grundrisse* because it conflicts with views that Marx advances elsewhere in that work and in *Capital*.<sup>171</sup>

However this debate is settled, in *Assembly* Hardt and Negri hold that cognitive capitalist production yields both material and immaterial property. And they seem to leverage the contribution of “the general intellect” or “general social knowledge”—using these phrases interchangeably—to claim that ideas of property based on excluding others are untenable as a matter of political theory. However, they need more in the way of independent argument to support this claim.

## IX. AFFECTS AND AFFECTIVE LABOR

This Part examines the role of affects and affective labor in contemporary economies, enlarges our understanding of the common, and considers whether affects “can be privatized and controlled as property.”<sup>172</sup> Collaborative work in knowledge economies often involves and sometimes requires emotions of one sort or another. In psychology, the noun “affect” (singular) sometimes means “the conscious subjective aspect of an emotion considered apart from bodily changes.”<sup>173</sup> To some readers, Hardt and

<sup>167</sup> See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1253 (Philip Babcock Gove ed., 2002) [hereinafter WEBSTER’S], s.v. “knowledges.” *Id.* At 1252, s.v. “knowledge,” sense 3d.

<sup>168</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS* 168 (Alan Sheridan trans., 1973). At first Foucault defined *épistémè* as an historical but non-temporal condition that grounds all knowledge in a particular culture. Later, he maintained that multiple *épistémè* can exist and interact simultaneously in a particular culture as a condition of what counts as scientific knowledge. See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977*, 197 (Colin Gordon ed., 1980). In these later works, one can write the plural as either *épistémè* or *épistémès*, or in English as *epistemes*.

<sup>169</sup> MARX, *GRUNDRISSE*, *supra* note 52, at 626 (emphasis in original).

<sup>170</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 28, 78, 130, 147, 173, 175, 213; see also NEGRI, *supra* note 56, at 53 (“Capital is immediately social capital”) (emphasis omitted). The general intellect is a salient feature of “workerist” and “autonomist” writing in the Italian Marxist tradition to which Hardt and Negri belong.

<sup>171</sup> Martin Spence, *Marx Against Marx: A Critical Reading of the Fragment on the Machines*, 17 *TRIPLEC* 327 (2019).

<sup>172</sup> Michael Hardt, *The Common in Communism*, 22 *RETHINKING MARXISM* 346, 349 (2010).

<sup>173</sup> WEBSTER’S, *supra* note 167, at 35.



Negri's use of "affects" (plural) may seem an unusual choice in place of emotions.

#### A. SPINOZA TO THE RESCUE?

However, Hardt and Negri often use "affects" to capture both bodily changes and corresponding subjective states, and they invoke Spinoza (1632-1677) in their discussion of affects. So, what does Spinoza say in his *Ethics* besides using "affects" in the plural?<sup>174</sup> His Latin text distinguishes between *affectus* ("affect") and *affectio* ("affection").<sup>175</sup> "By affect," he writes, "I understand affections of the Body by which the Body's power of acting is increased or diminished, aided or restrained, and at the same time, the ideas of these affections."<sup>176</sup>

In Spinoza's physico-mental account, an affect is both (1) a power-altering affection of the body and (2) the idea of that affection in the mind. The former is a bodily mode, such as shedding tears. The latter is, roughly, a mental (cognitive) mode, such as sorrow, which is an emotion. The two are simultaneously in parallel with each other. Spinoza lists forty-eight affects. Fifteen of these are positive such as love and hope, and fifteen are negative such as hate and fright. Other affects, such as gluttony, greed, and lust, concern desire. Spinoza scholars disagree over the best English translations of his three primary affects: *laetitia* (joy? pleasure?), *tristitia* (sadness? unpleasure?), and *cupiditas* (desire? attraction?).<sup>177</sup>

Some readers may find it odd that Hardt and Negri bring in Spinoza to aid their Marxist analysis of contemporary economies. As it happens, Spinoza has a devoted following among many postmodern philosophers and political theorists.<sup>178</sup> In *Multitude* (2004), Hardt and Negri faithfully echo Spinoza in saying: "Unlike emotions, which are mental phenomena, affects refer equally to body and mind. In fact, affects, such as joy and sadness, reveal the present state of life in the entire organism, expressing a certain state of the body along with a certain mode of thinking."<sup>179</sup>

Thirteen years later, however, Hardt and Negri seem to depart from Spinoza and their own earlier understanding of affects. *Assembly* uses "affects" as a synonym for "subjectivities" or "passions."<sup>180</sup> They apparently see affects only as subjective states. That makes affects more or less like emotions or feelings but leaves out simultaneous corresponding bodily states. I have been unable to resolve the apparent ambivalence in Hardt and Negri's work between a Spinozist physico-mental understanding of affects and a mental-emotional understanding of affects.

Hardt and Negri's discussion of Weberian and neoliberal administrative bureaucracies indicates that administrators try, unsuccessfully, to exclude

<sup>174</sup> SPINOZA, *Ethics*, pt. III, in 1 SPINOZA, COLLECTED WORKS, *supra* note 20, at 408, 491-543.

<sup>175</sup> The standard Latin edition is BENEDICTUS DE SPINOZA, SPINOZA OPERA (Carl Gebhardt ed., 1925) (4 vols.). The *Ethics* is in vol. 2. The margins of Curley's English translation contain the corresponding pages and lines in Gebhardt's edition.

<sup>176</sup> SPINOZA, *Ethics*, pt. III D3, in 1 SPINOZA, COLLECTED WORKS, *supra* note 20, at 493.

<sup>177</sup> See, e.g., JONATHAN BENNETT, A STUDY OF SPINOZA'S *ETHICS* 253-71 (1984) (listing and explaining Spinoza's affects).

<sup>178</sup> See *supra* notes 20, 120 for works on Spinoza by Negri.

<sup>179</sup> HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 108 (citing Spinoza's *Ethics* at 374 n.9).

<sup>180</sup> HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, at 81, 129-30.

affects from their own subjectivity and to avoid reckoning with the affects of those who work for them.<sup>181</sup> In Hardt and Negri's view, production under capitalism creates affects, sometimes deliberately and sometimes not, in workers and consumers.<sup>182</sup> A similarity exists between an administrative bureaucracy and a capitalist system of production: each tries to set a value on affects, they say, yet affects (and for that matter the common) are immeasurable.<sup>183</sup> "Modern bureaucracy is a particularly adequate complement to the rule of capital, in other words, because capital, too, functions primarily through measure (the measure of value) and, like bureaucracy, capital is threatened by the immeasurable."<sup>184</sup> The immediate aim here is expository, but some readers may question whether affects and capital assets are beyond meaningful measure in all contexts, and whether capital can be threatened.

### B. AFFECTS, KNOWLEDGES, AND THE COMMON

Two papers by Hardt shed light on their concepts of the common and of affects.<sup>185</sup> Hardt's understanding of the common includes "both natural good and human product."<sup>186</sup> He rejects the idea that the only alternatives are capitalism (private property) and socialism (public property). A third alternative is communism (the common). "The primary argument," Hardt says, "is that capitalist production is increasingly reliant on and oriented toward the production of the common and yet the common is destroyed (and its productivity reduced) when transformed into either private property or public property."<sup>187</sup> His article is limited to "the critique of political economy."<sup>188</sup> But Hardt offers modest criticism of laissez-faire capitalism and some engagement with Marx. Hardt's main point is that while Marx in his day rightly emphasized the importance of rent over profit and immobile property (land) over mobile property, today we must give pride of place to profit over rent and mobile over immobile property.<sup>189</sup> Mobile property today is best understood, he thinks, as "immaterial" property that results from biopolitical production and is "reproducible."<sup>190</sup>

At this point, Hardt leads readers back to the common:

The emerging dominance of [immaterial and reproducible] property is significant, in part, because it demonstrates and returns to center

<sup>181</sup> *Id.* at 128–31, 212–13.

<sup>182</sup> *Id.* at 212.

<sup>183</sup> *Id.* at 129, 213.

<sup>184</sup> *Id.* at 129.

<sup>185</sup> Michael Hardt, *Production and Distribution of the Common: A Few Questions for the Artist, OPEN! PLATFORM FOR ART, CULTURE & THE PUBLIC DOMAIN* (Feb. 6, 2006) (The Art Biennial), <https://onlineopen.org/production-and-distribution-of-the-common>; Hardt, *supra* note 172. These articles appeared less than a decade before HARDT & NEGRI, *ASSEMBLY*, *supra* note 1, and one cannot be sure that Hardt's position in these articles tallies exactly with Negri's views on these matters. Hardt, *supra* note 172, is more useful in the present context than Hardt, *supra*.

<sup>186</sup> Hardt, *supra* note 172, at 346 (emphasis omitted). *But see* Hardt, *supra* note 185, at 1, 2 ("No longer today, however, can we consider the common as quasi-natural or given. The common is dynamic and artificial, produced through a wide variety of social circuits and encounters.")

<sup>187</sup> Hardt, *supra* note 172, at 346 (emphasis omitted).

<sup>188</sup> *Id.* at 347.

<sup>189</sup> *Id.* at 348.

<sup>190</sup> *See id.* at 348–49. Hardt, *supra* note 185, at 27–28, extends social production to artistic production.

stage of [sic] the conflict between the common and property as such. Ideas, images, knowledges, code, languages, and even affects can be privatized and controlled as property. There is a constant pressure for such goods to escape the boundaries of property and become common. If you have an idea, sharing it with me does not reduce its utility but usually increases it. In fact, in order to realize their maximum productivity, ideas, images, and affects must be common and shared.<sup>191</sup>

A central thought in this passage, couched in different language, is that information is a “nonrival” good. That is, one person’s use of information does not lessen the ability of other persons to use the same information. One can find this thought in other theories of intellectual property across the political spectrum. Henry E. Smith’s analysis of information costs in copyright and patent law is a good illustration.<sup>192</sup>

Beyond that, the quoted passage runs together many things—ideas, images, affects and so forth—that require careful discrimination. Although Hardt is right that ideas, when shared, generally increase their utility, few legal systems allow property rights in ideas themselves. Typically, legal systems allow property rights only if there is something beyond an idea. Leo Tolstoy could have had an idea for a massive novel to be titled *War and Peace*, but only when he put this idea into prose could he get a copyright.

## X. AFFECTS, LABOR, AND PROPERTY

### A. AFFECTIVE LABOR AND FEMINISM

Hardt and Negri stress the significance of affective labor. *Multitude* defines affective labor as “labor that produces or manipulates affects such as a *feeling* of ease, well-being, satisfaction, excitement, or passion.”<sup>193</sup> The word “manipulates” is important here, for they go on to say: “One can recognize affective labor, for example, in the work of legal assistants, flight attendants, and fast food workers (service with a smile). . . . A worker with a good attitude and social skills is another way of saying a worker adept at affective labor.”<sup>194</sup>

For some time, thinkers have attended to this manipulation as it pertains to differences between labor performed mainly by men and labor performed mainly by women. Steelworkers and miners, who were and are mainly men, stereotypically did their work stoically. Flight attendants and paralegals, who until recently were mainly women, stereotypically did their work with a positive affect—say, cheerful competence. Work done mainly by women in

<sup>191</sup> Hardt, *supra* note 172, at 349. *But cf.* Hardt, *supra* note 185, at 1-2 (distinguishing between sharing as simultaneous possession and sharing as division).

<sup>192</sup> Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 *YALE L.J.* 1742, 1799-1814 (2007). Smith takes pains to explore the differences between copyright law and tort law on the one hand and between patent law and the law of tangible property on the other. *Id.* at 1755, 1757-58, 1783-1814.

<sup>193</sup> HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 108 (emphasis added). The word “feeling” suggests that even in *MULTITUDE*, Hardt and Negri do not always adhere to Spinoza’s theory of affects. Affective labor is a kind of immaterial labor. They recognize two kinds of immaterial labor in *id.* at 108 but three kinds in HARDT & NEGRI, *EMPIRE*, *supra* note 1, at 292-93.

<sup>194</sup> HARDT & NEGRI, *MULTITUDE*, *supra* note 1, at 108.

the service sector demanded considerable emotional investment and often a sense of being commodified and exploited.<sup>195</sup>

Hardt and Negri were hardly the first thinkers to notice these phenomena but their account of affective labor deepened understanding of them. As Johanna Oksala points out, they correctly saw certain jobs as “disproportionately required of women” and independent of “reified gender identities” (because some men also do such jobs).<sup>196</sup> She credits them with rightly rejecting the distinction between “material production and social production.”<sup>197</sup>

Oksala nevertheless has reservations about Hardt and Negri’s treatment of affective labor in relation to Marxist feminist politics.<sup>198</sup> She considers their theories “highly problematic” for the role of work “in feminist politics.”<sup>199</sup> She seeks to expose the “shortcomings” of their “concept of affective labor.”<sup>200</sup> She takes issue, I think, with the ways in which they and other Marxist theorists seek to collapse the distinctions (1) between unproductive labor and productive labor and (2) between productive labor and reproductive labor. Oksala faults Hardt and Negri’s account of commodities and subjectivities as “an economic model of production: . . . the way power produces subjects appears essentially no different from the process through which commodities are produced.”<sup>201</sup>

Some of her criticisms, insofar as they are leveled at Hardt and Negri rather than other Marxist thinkers, are less persuasive than others. First, she asks, how if at all can “we monetize affective labor”<sup>202</sup> in, for example, care work? But Hardt and Negri, in my reading of them, seem unconcerned to monetize affective labor. They seek to move away from private property and perhaps wage labor altogether. Still, Oksala is correct to say that moral problems can arise when certain affects are marketized. It seems morally objectionable for some affects to be subjected to equal and open access. For example, it would be morally objectionable to say that *cupiditas* (desire or attraction) must be common and shared.

Second, she raises “the ethical question of whether [certain affective services] should be available for sale in the first place.”<sup>203</sup> Here, she is especially concerned about “[s]ex work and commercial surrogate pregnancy.”<sup>204</sup> Yet, so far as I can see, Hardt and Negri stake out no position one way or another on this question.

<sup>195</sup> See BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, *GLOBAL WOMEN: NANNIES, MAIDS, AND SEX WORKERS IN THE NEW ECONOMY* (2003) (discussing the occupations mentioned); ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1979 ed. 2012) (discussing flight attendants).

<sup>196</sup> See, e.g., Johanna Oksala, *Affective Labor and Feminist Politics*, 41 *SIGNS: J. WOMEN CULTURE & SOC'Y* 281, 285 (2016) (discussing works by HARDT & NEGRI, including *EMPIRE* (2000), *supra* note 1; *MULTITUDE* (2004), *supra* note 1; and *COMMONWEALTH* (2009), *supra* note 1; *ASSEMBLY* (2017) appeared after her article was published).

<sup>197</sup> *Id.* at 286.

<sup>198</sup> See *id.* at 282, 283, 288–93, 297.

<sup>199</sup> *Id.* at 282.

<sup>200</sup> *Id.* at 283.

<sup>201</sup> *Id.* at 288.

<sup>202</sup> Oksala, *supra* note 196, at 292.

<sup>203</sup> *Id.* at 293.

<sup>204</sup> *Id.*

Third, sexual reproductive labor, as a kind of both productive labor and affective labor, could require a radical feminist program that makes inroads into an otherwise defensible Marxism in its battle with capitalism. Why? Because, Oksala says, “babies are not positive externalities of biopolitical production that add value to commodities.”<sup>205</sup>

My understanding of the sentence just quoted is as follows. The context is the effort to collapse the distinction between productive labor and reproductive labor that Oksala ascribes to Hardt and Negri. Productive labor adds value to commodities—by, for example, a carpenter’s using \$100 worth of wood to make a table worth \$1,000. Sexual reproductive labor takes gametes to create a zygote that, when implanted and carried to term and born, and then raised by competent parents, yields a cheerful, psychologically well-adjusted worker. This worker has greater exploitable labor value, all else being equal, than a grumpy, ill-adjusted worker. It is far from clear to me that Hardt and Negri would endorse such a view of sexual reproductive labor.<sup>206</sup> But if they did, Oksala would insist that no radical feminist could accept this commodified view of babies nurtured to become cheerful, reliable workers.

One might dispose of Oksala’s reservations by rejecting her radical feminism. Her analysis reveals, however, some of the downsides of doing so for some Marxists.

#### B. CAN AFFECTS BE PROPERTY?

Hardt thinks that many things can be property but shouldn’t: “Ideas, images, knowledges, code, languages, and even affects can be privatized and controlled as property, but it is more difficult to police ownership because they are so easily shared or reproduced.”<sup>207</sup> Here, I concentrate on affects. Consider two individuals, George and Harriet. George’s open countenance (an affect) conveys an impression of trustworthiness. Harriet’s equally open countenance (an affect) also conveys an impression of trustworthiness. Even if their affects are not identical in all respects, with some effort one might press these affects into service as property. Let us make George and Harriet used-car salespersons—which is not a job thought to be populated by trustworthy people. George and Harriet decide to rent out their open countenances to a used-car dealership. They earn four times as much on commission as other used-car salespersons precisely because they appear trustworthy to customers. So, Hardt is correct to say their specific affects can be privatized and controlled as property. He might wonder how long they can continue to do so. Perhaps some corruption of their characters will take hold as they continue to sell used cars year after year.

Yet, Hardt says, the items on his list are not easily corralled: “There is a constant pressure for such goods to escape the boundaries of property and become common.”<sup>208</sup> This observation may not apply to affects. The open

<sup>205</sup> *Id.* at 297.

<sup>206</sup> I suppose a dour Marxist could argue that because commodity production under capitalism aims to produce both surplus value and the conditions of further production, the sexual reproduction of babies could do the same.

<sup>207</sup> Hardt, *supra* note 172, at 349.

<sup>208</sup> *Id.*

countenances possessed by George and Harriet, though not unique to them, are not easily developed by others, even if they strain to do so. It may, though, be true of other affects. Think of the cheerful competence often thought to characterize flight attendants and paralegals. This affect may be easier to produce, but we noticed earlier that it requires much emotional investment and often leads to a sense of being commodified.<sup>209</sup> In general, affects are less easily shared and reproduced than ideas or images.

Hardt adds that affects, along with other items on the list, “must be common and shared” if they are “to realize their maximum productivity.”<sup>210</sup> But he offers little argument or evidence that *maximum* productivity arises from sharing all affects, if that is even possible. Indeed, it is unclear whether a sharing economy of affects has *greater* productivity than an economy of affects that permits some licensing.

Of course, there is a division of labor between political theorists and legal philosophers. One should not expect Hardt and Negri to mince finely how a legal system should handle affects and affective labor. I do understand them to insist that all labor, including cheerful competence in doing one’s job, should be fairly compensated.

Nevertheless, an example can reveal what is at stake. Suppose that Isaiah has a sunny, open disposition and conveys genuine concern for others. Jeremiah is polite but reserved and somewhat aloof. The Kind Care Company wants to hire a worker for its eldercare facility. If Isaiah and Jeremiah are equally competent, may the company legally offer the job to Isaiah because his affects will appeal to elderly persons, and not offer the job to Jeremiah even if Isaiah declines because Jeremiah’s affects will not resonate well with the elderly?

In this context, Isaiah’s affects are a definite asset and Jeremiah’s affects are a mild liability. Isaiah’s affects, but not Jeremiah’s, are likely to stimulate positive affects in elderly persons, such as comfort, optimism, and gratitude. Isaiah’s and Jeremiah’s respective affects are genuine. Isaiah is not faking his sunniness, openness, and concern; and Jeremiah refuses to fake such qualities. In these circumstances, it seems bizarre to have a legal rule regarding employment discrimination that delivers an affirmative answer to the question posed above. However, Hardt and Negri’s critical attitude toward the “affective face” of much “immaterial labor”<sup>211</sup> suggests that they might be sympathetic to such a legal rule. Whatever legal rules govern these and related situations, remember that no legal rules are frictionless, and hence there will be costs in creating and enforcing these rules.

### C. CODA

Hardt and Negri’s account of the common brings together their views on property (material, immaterial, reproducible), biopolitics, affective labor and social production, knowledges and affects. However, it falls short of knitting them together into a broad picture of the common. Part X endeavors to create such a picture, though it may not be *the* picture they envision. I have tried to

<sup>209</sup> See EHRENREICH & HOCHSCHILD, *supra* note 195, at 104.

<sup>210</sup> Hardt, *supra* note 172, at 349.

<sup>211</sup> HARDT & NEGRI, *EMPIRE*, *supra* note 1, at 293.

assemble their shards of exposition as best I can, while pointing out places where the pieces do not seem to fit. The various metaphors—knitting, pictures, pieces, shards—underscore my difficulties. They also indicate why Hardt and Negri should try to make their account of the common more unified.

## XI. CONCLUSION

Since the turn of the millennium, Hardt and Negri have published four major works of political theory: *Empire* (2000), *Multitude* (2004), *Commonwealth* (2009), and *Assembly* (2017). All four books belong to a strand in the Marxist tradition. There are other strands in that tradition, and other Marxists will not agree with everything Hardt and Negri say. Their ambitious project is well worth the time and attention of non-Marxist political and legal theorists. They drive home the timeliness of a revitalized Marxist project on property and its connections to theories of property.

This Article has devoted special attention to Hardt and Negri's engagement with the idea of property as a bundle of rights. They display more than a passing knowledge of bundle theories. Upon inspection, however, the bundle theory that receives most attention in their corpus is the idea, associated with the legal realists and critical legal scholars, that property is a set of social relations. This particular focus, unfortunately, fails to make much use of the idea, championed mainly by legal philosophers in the analytic tradition, that property is a set of normative relations between persons with respect to things.

All the same, Hardt and Negri do not argue that a legal realist bundle theory standing alone yields a straight path to the common—their radically democratic society in which almost no private property exists. As to critique, they stress that it is property-generated sovereignty and coercion that make private property morally and politically objectionable. This Article has shown that both sovereignty and coercion are far more complicated than Hardt and Negri allow. It is, in fact, the ideas of domination and non-domination that are vastly more important in understanding the deficiencies of private property. Hardt and Negri say virtually nothing about domination, or about non-domination and its positive payoff, and thus miss key tools for criticizing and improving many property systems.

The least satisfactory element in their bold Marxist vision is their account of the nearly-propertyless common. This Article has shown that Hardt and Negri are vague on which highly limited property rights are allowed, fail to draw a meaningful distinction between individual possessions and social wealth, and do not explain convincingly how social production would work in the common. Moreover, argument on behalf of the common as a desirable socioeconomic space is almost nonexistent. Hardt and Negri do not explain how coercion can be absent from the common. I have made constructive efforts to show how they might argue more effectively for the common. These efforts, however, require use of the ideas of domination and its positive counterpart, non-domination. Though Marxist versions of domination are available, it is unclear whether Hardt and Negri would embrace them.

In the end, an account of which system of property we ought to have—be it a capitalist, a socialist, a communist, or some hybrid system—requires carefully crafted independent moral and political argument.