that a parent feels for a child or teachers toward their students. It is also possible, Milosz wrote,

> that *storge* may be applied to the relationship between a poet and generations of readers to come: underneath the ambition to perfect one's art without hope of being rewarded by contemporaries lurks a magnanimity of gift-offering to posterity.

This is really the same lesson that another laureate, the Italian Eugenio Montale, took from his study of Dante. "The greatest lesson Dante left us," Montale wrote, is "that true poetry is always in the nature of a gift, and that it therefore presupposes the dignity of its recipient."

In closing out my introduction with this brief tour of ideas about creativity from other times and other places, I have meant simply to get a bit of distance on the idea of "intellectual property." It is an idea not just new but historically strange. It belongs to our times, to be sure, but if we are to examine it with any care it helps to know how new it really is; it's newer than automobiles, newer than lightbulbs, newer than jazz. Bowing however briefly to other ways of imagining human creativity also helps us see how much any unthinking discussion of "intellectual property" will crowd out: not just the kinds of examples I have just rehearsed, but also much of what lies ahead in this book. "The field of knowledge is the common property of mankind": what precisely were Jefferson's assumptions when he made a claim like that? And what, for that matter, did he mean by "common"?

# 2

## WHAT IS A COMMONS?

The argument: It would be wise for most creations
of human wit and imagination to lie in a cultural commons
rather than be subject to the rules of private property.
But what is a commons?

•

The rights of man are liberty, and an equal participation
of the commonage of nature.

—PERCY BYSSHE SHELLEY, "DECLARATION OF RIGHTS," 1812

### A RIGHT OF ACTION

The "commons" means many things to many people. Take John Locke's *Second Treatise of Government* (1690), in whose chapter "Of Property" the commons is not to be found in the contemporary English countryside but in a time and place more reminiscent of the Book of Genesis. "God . . . *has given the earth* . . . to mankind in common," writes Locke. Nature is "the common mother of all," albeit a "wild common," for she lacks the improving hand of man. For Locke, that original wilderness resembles a thing called "America," whose "wild woods and uncultivated waste" call to mind the world before it was first peopled by "the children of Adam, or Noah." "In the beginning all the world was *America* . . . ; for no such thing as *money* was any where known." Call it America or call it Eden, in this seminal document of modern liberalism the commons bespeaks an aboriginal first condition, one that existed

before labor, before cultivation, before the cash economy, and before the constitutional state with all its apparatus for the protection of property.

Among other things, then, the commons is sometimes the name of a primordial state, or of the longing for its return. If only the original, commodious world could be recovered, perhaps we could all be quit of the dry skin of scarcity. Perhaps life could be endlessly generative, supportive. Even a fine modern theorist of the commons like Lawrence Lessig, usually an admirably pragmatic activist, can be found drawn into dreams of plenitude. "The realist in all of us refuses to believe in Eden," he once wrote, only to add: "But I'm willing to believe in the potential of essentially infinite bandwidth." Invocations of the commons can carry with them a promise that more than air can be like air, always there for the inhaling lung: infinite bandwidth, unlimited acorns and deer, all of literature instantly available on the computer screen, unfenced prairies stretching to an unowned ocean, "that great and still remaining common of mankind" (Locke again). There are psychological, spiritual, and mythic elements to "the commons" and it is worth marking them at the outset so as to be alert to how they might refract our thinking about other, more concrete commons.

As for these last, I shall here elaborate one image of actual commons using specifics from the kind of English agricultural villages that John Locke ignored. Before entering that history, however, it will help to sketch a few matters of definition. I take a commons to be a kind of property (not "the opposite of property" as some say) and I take "property" to be, by one old dictionary definition, *a right of action*.

Consider some simple object in your house, a pencil say, and imagine all the actions that you might take in regard to it. You can use it to write a letter, but you can also give it away, or sell it, or rent it, or bequeath it to your heirs, or use it to stir soup, or break it in half, or burn it, or bury it in the backyard. We don't normally separate out all possible actions in this manner because normally



what we mean by "property" is the whole bundle. If the pencil is my property, I can do anything I want with it. William Blackstone, the eighteenth-century British jurist, defined "the right of ownership" as such: "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." The word "dominion" here, by the way, was the same word that John Adams chose to describe the political power that some men hold over others, and in Adams's politics the opposite of dominion is liberty. If I own a pencil in Blackstone's sense, I am its despot; it has no liberty.

Enslaved pencils aside, if we return to this atomizing idea of a right of action, it soon becomes apparent that ownership rarely consists of the entire set of possible actions. To move from the pencil to the house where the pencil lies: if I own a house in an American city, I have many rights of action, many properties, in it, but not all. In the city where I live, for example, I cannot put a herd of cows in my yard; I cannot convert my home into a soap factory; I cannot build a tower ten stories high; I cannot even rent an office to a friend, for I live in a noncommercial zone. And all these are things I cannot do even if I own the house outright, a rare case, for most homeowners have mortgage contracts that further restrict their rights of action.

We have moved from a pencil to a house to the city where the house is found, and this last widening of the focus allows me to suggest a right of action that will complicate the picture. Adult citizens in American cities have the right to vote and this, too, can be thought of as a property. It is certainly a right of action, and one of the few remaining for which there is no market. The right to vote comes with citizenship and though there are ways in which citizens can lose it, in the normal course of events we consider it inalienable. You cannot sell your vote; you cannot give it away. There is no material property, only an action that expresses the political agency of persons who have it as a right. In fact, by its inalienability it is one of the things that makes such persons who they are.

Something along these lines is what James Madison was getting at when he wrote in a 1792 essay that "as a man is said to have a right to his property, he may be equally said to have a property in his rights." Madison's prime example was freedom of speech: "A man has a property in his opinions and the free communication of them." The right of free speech, like the right to vote, we usually think of as a "civil" rather than a property right, but the distinction begs the question of where to draw the line between the material and the social worlds. Defining property in terms of actions keeps that question open so that property is never just some physical thing (pencil or house), nor a person's rights of action, nor the social regime recognizing those rights, but some combination of these joined together. And different combinations allow, or disallow, different ways of living and acting in the world. How we imagine property is how we imagine ourselves.

In this line, note that by adding Blackstone I have begun with two related points of departure for defining what we mean by property—as rights of action or of exclusion—the one stressing the agency of owners and the other stressing limits to the agency of nonowners. Most property combines both of these in varying degrees. If I own a car, not only do I have a right to drive it, but that right depends on my ability to forbid others from doing the same. Even traditional common property, as we will shortly see, combined the right to use and the right to exclude: local villagers had access to their fields and woodlands, but by the same token all others did not.

Blackstone's chapter "Of Property" begins with "exclusion";* I began at the other end of the spectrum, with action, because questions of agency, both civic and cultural, are going to matter in the chapters that follow and thus it matters that we start by noting how our imaginings of property encourage agency rather than block it.

*Blackstone's point of departure still holds in many quarters. In a 1999 Supreme Court decision, Justice Antonin Scalia declared: "The hallmark of a constitutionally protected property interest is the right to exclude others."



I want "common" to be available as a verb (as in this from an old book on British law: "Generally a man may common in a forest").

What might be called the active-verb part of property will be especially marked in those areas of social life where participation is essential. In a viable self-governing nation, for example, citizens can only know themselves by way of their civic agency. True citizens are not the audience of their government, nor its consumers; they are its makers. The same may be said of a viable culture. Culture is always arising, and those who participate in its ongoing creation will rightly want to question any cultural expression that comes to them wrapped in a right to exclude.

But let us leave culture and self-governance aside for now and come back to mere pencils and houses: my point is that the idea of property as a right of action suggests, as a simple first definition, that a commons is a kind of property in which more than one person has rights. You and your spouse might own a mutual fund as "tenants in common"; your account is a commons with two commoners. In Puritan New England, the family was called "the little commonwealth"; family property was the commons of all members.

Couples and families are, however, among the smallest of possible commons, the simplest compounds, the sand and gravel of the landscape I hope to chart. To describe the more complicated commons that the term usually denotes, let us now expand on this simple definition through a look at one set of historical conditions that gave rise to the term in the first place.

## ESTOVERS IN COMMON

Traditional English commons were lands held collectively by the residents of a parish or village: the fields, pastures, streams, and woods that a number of people, none of them an owner in Blackstone's sense, had the right to use in ways organized and regulated by custom. Those who held a common right of *pasturage* could

graze their cattle in the fields; those with a common of *piscary* might fish the streams; those with a common of *turbary* might cut turf to burn for heat; those with a common of *estovers* might take wood necessary to heat, furnish, or repair their houses. Everyone, the poor especially, had the right to glean after the harvest.*

In fact, in regard to provisioning the poor, all these rights have larger meanings, estovers especially. The word comes from the French *estovoir*, "to be necessary"; a common of estovers is actually a right of subsistence. In 1217, when the Magna Carta guaranteed that a widow "shall have . . . her reasonable estovers in the common," it meant more than a right to firewood; it meant she should never lack for food, fuel, or shelter. Rights in common assured a baseline of provision; they were the social security of the premodern world, the "patrimony of the poor," a stay against terror.

Systems of common rights were the norm in most premodern communities. The Roman historian Tacitus, detailing the customs of first-century German tribes, indicates that they had no private property in agriculture: "Lands . . . are taken for tillage by the whole body of cultivators." Alpine grazing fields in Switzerland were village commons for millennia. Early landholding practices among Native Americans offer other parallels, as with this description in regard to California Indians:

> Sometimes people owned plots of land, particular trees, or special fishing places outright; in other situations they owned "rights." One family, for example, might own salmon-fishing rights from a particular place along a river; another family might own the eel-fishing rights there; and a third family might own the rights to cross the river at the same place.

*Theorists similarly describe any modern commons as a complex bundle of possible rights. Charlotte Hess offers this list: *access rights* (the right to enter an area and enjoy nonsubtractive benefits, e.g., to hike, canoe, enjoy nature); *extraction rights* (the right to obtain resources, e.g., to catch fish, divert water); *management rights* (the right to regulate internal use patterns and to make improvements); *exclusion rights* (the right to determine who will have rights and how those rights may be transferred); *alienation rights* (the right to sell or lease management and exclusion rights).



In this case, no one absolutely owns that "place along a river"; it is, rather, the object of a set of use rights, multiply owned and embodying or reflecting the fact that communities have many interrelated members with many interrelated needs. In both this and the traditional English case, the commons is not so much the land in question as the land plus the social relations and traditional institutions that organize its use.

The system of English common land tenure lasted for over a thousand years, a span of time that can roughly be broken into three periods. In the Saxon age before the Norman conquest, it is assumed that all village lands were held and worked in common, except for a few enclosed gardens and orchards. No one person or family was the ultimate owner; what belonged to people were use rights, the commons being the place those rights were expressed. During the many centuries after the Norman conquest, the lands of any village were more likely associated with a local manor, the assumption being that the soil belonged ultimately to the lord of the manor and that rights of common were granted on condition of fealty to him and attendant acts of tribute (military service especially). The third period, the age of enclosure, ran from the early eighteenth century to the end of the nineteenth. During these two hundred years, as much as one seventh of all English common land was divided up, fenced, and converted into private property in the modern sense.

It should be said that the notion that feudal commons ultimately belonged to the lord of the manor is more likely a legal fiction promulgated during the age of enclosure than an accurate description of how feudal peoples themselves understood their situation. It would be hard to find a case during all those many centuries in which any overlord acted as owners today might act (evicting

tenants, say, so as to sell land to speculators). The commons were managed collectively; no overlord alone could set in motion any significant change in how they operated. To alter any long-standing use rights, for example, required consensus agreement among the commoners and that meant, for one thing, that the commons was a very stable form, unaltered for centuries. It also meant that when landlords finally moved to enclose the land they could not simply do so; they had to go to Parliament and persuade the legislators to change the rules of the game. Most enclosure in England was "parliamentary enclosure," a legally sanctioned act of appropriation often justified by the convenient notion that the landlord's ancestors had anciently bestowed use rights upon the commoners, the idea being that if someone granted the rights in the past, his descendants might recover them in the present.

Later in this story, we will come to the colonial American idea that the best kind of property to own is "lands in fee simple," as Noah Webster wrote in his 1787 "Examination" of the Constitution, and it will be useful to pause here to explain what the phrase means because it arose by contrast to true feudal ownership. In the Middle Ages, an estate in land granted by a lord to a vassal was called either a "feud" or a "fee." A fee was not a sum of money; it was an estate held on condition of the vassal's loyalty and service. A "fee simple," on the other hand, was an estate held subject to no such obligations. A fee simple is a simple estate, an unconditional or unencumbered estate, one held free of the many reciprocal duties that were the mark of medieval hierarchy. Such a fee was also called an allodium, a term that I'll return to in a few chapters because with it comes an interesting nuance in regard to the issue of civic responsibility. For Thomas Hobbes, an allodium was land which "a Man holds," not from some king or overlord, but "from the gift of God only," the implication being that although owners of allodial land are free of feudal obligation, they are not at the same time free to ignore spiritual or public duty.



In all the grain and complexity of the story of land tenure in England before enclosure, several things are worth marking if we want these older commons to inform our thinking about more modern ones. First, a point already touched on bears stating more fully. The commons are not simply the land but the land plus the rights, customs, and institutions that organize and preserve its communal uses. The physical commons—the fields and woods and so forth—are like a theater within which the life of the community is enacted and made evident. A bit more detail about the medieval case will illustrate what I mean. Under the manorial system, an overlord had obligations to the free tenants of the manor; the tenants had rights to meadowland and so-called wastes (land not cultivated), and the lord could not alter those rights, nor diminish the amount of land involved. On the other side, these tenants typically owed the lord military service and other kinds of tribute. Below the free tenants were serfs, or "villeins," who, again, had rights in the common land, but whose obligations to the lord were fuller and more burdensome.

A serf's holdings obliged him in money, labor, and kind. Of money, for example, he was obliged to give the lord a sum upon the marriage of one of his (the serf's) daughters. Of labor, he was obliged to come with his own plow and oxen to plow the lord's acres, and when the plowing was done there was harrowing, reaping, threshing, and so forth, for an allotted number of days in the year. Of kind, he might be required to provide honey, eggs, chickens, and the like. Such a commoner had use rights in the land, but certainly no fee simple. He lived under what Daniel Defoe called "the great law of subordination." Manorial commons were the land, yes, but more substantively the land was a place where an aristocratic society staged and displayed its rigorous and inescapable hierarchies.

Feudal commons are only one case, of course; different societies will have different kinds of commons, even when at some level they all involve multiple use rights in land. English commons before

the Norman conquest were much more egalitarian in practice, for example, at least according to the stories the English tell about their Saxon past.

Such historical cases aside, the idea that attention must be paid as much to social life as to the land means there are some simple questions to ask of any commons, existing or proposed: What social structures do its use rights embody? What political form does it support? Given that the commons arose in premodern agrarian villages, to what degree can the form be translated into modern contexts? If there are commons in the United States today, can they be continuous with our inherited politics and ideas about property? Can they, for example, be combined with our love of individual autonomy? Can they be democratic, pluralist, egalitarian . . . ? Can there be capitalist commons, or commons inside of or adjacent to capitalism?

## BEATING THE BOUNDS

These questions aside, in addition to highlighting how commons and community map each other, the medieval case can usefully inform the modern when we turn to the question of durability. English commons lasted for centuries, possibly for millennia. To what might we attribute such remarkable longevity?

All who are in the least familiar with literature on the commons know that no discussion of that question can proceed without addressing Garrett Hardin's influential 1968 essay, "The Tragedy of the Commons." Hardin was an ecologist with a special concern for the problem of controlling human population growth; in the course of a thoughtful meditation on that topic, he digressed to consider why it so often happens that human beings find themselves destroying their own resources.

Fisheries such as those off the coast of New England are one of the examples Hardin used to illustrate the diagnosis he offered.



The fish stocks in question could be treated as a common property for centuries, so long as "the commoners" were limited in number. But there came a time when unlimited fishing with unlimited means threatened fish populations with utter collapse. Most every commons has a *carrying capacity*, a limit on its use beyond which the commons itself will begin to suffer. A forest where commoners gather wood will replenish itself so long as the commoners never exceed the forest's carrying capacity. The moment they do, the forest will die out.

As many have since pointed out, Hardin's tragic model may have been well applied to modern fisheries but it had little to do with how commons were managed historically. Hardin began, for example, by asking us to "picture a pasture open to all," and then to imagine this "all" invading it beyond its carrying capacity. But no commons was ever open to all; access was always limited in some way, a point I'll come back to shortly. Beyond this, Hardin had people using the commons who seem to have no neighbors they know or care about:

> The rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy.

Hardin was prompted to this individualist daydream by his reading of an 1832 lecture on population control given by an amateur mathematician, William Forster Lloyd. Offered during the height of the enclosure period in England, Lloyd's analysis included a supposed story that Hardin did not reproduce but which is worth citing for the parallel strangeness of its assumptions:

> Suppose two persons to have a common purse, to which each may freely resort. The ordinary source of motives for economy is a foresight of the diminution in the means of future enjoyment

> depending on each act of present expenditure. If a man takes a guinea out of his own purse, the remainder, which he can spend afterwards, is diminished by a guinea.
>
> But not so, if he takes it from a fund, to which he and another have an equal right of access. The loss falling upon both, he spends a guinea with as little consideration as he would use in spending half a guinea, were the fund divided . . . Consequently . . . , the motive for economy entirely vanishes.

Just as Hardin proposes a herdsman whose reason is unable to encompass the common good, so Lloyd supposes persons who have no way to speak with each other or make joint decisions. Both writers inject laissez-faire individualism into an old agrarian village and then gravely announce that the commons is dead. From the point of view of such a village, Lloyd's assumptions are as crazy as asking us to "suppose a man to have a purse to which his left and right hand may freely resort, each unaware of the other." The "prisoner's dilemma" is the label that game theorists now give to one of the conundrums that can arise when self-interest and common purpose are set at odds. The name is telling: difficulties are not hard to generate if you assume the parties cannot communicate and it is handy therefore to begin your parable in a prison, almost as handy as assuming a herdsman who acts as if reason is blind to the presence of other commoners.

Both Hardin and Lloyd posit a kind of freedom that custom never allowed to those who held use rights in the commons. The simple fact is that the commons were a form of property that served their communities for centuries because there were strict limits on the use rights. The commons were not open; they were *stinted.* If, for example, you were a seventeenth-century English common farmer, you might have the right to cut rushes on the common, but only between Christmas and Candlemas (February 2). Or you might have the right to cut the branches of trees, but only up to a certain height and only after the tenth of November. Or you might



have the right to cut the thorny evergreen shrubs called furze, but only so much as could be carried on your back, and only to heat your own house.

And these are simple restraints; most stints were more fully elaborated. If you were a farmer who held what were called "rights of common, appendant," you were constrained in the following ways: you must own land within the manor; you must actively cultivate your own land, your rights to the common pasture on "the lord's waste" arising out of your need to pasture your cattle in summer when you are cultivating; you may only pasture beasts needed in agriculture (oxen and horses to plow, sheep and cows to manure); you may only pasture your beasts during the growing season, when your land is under cultivation; you must not put more animals on the lord's land in summer than your own land can feed for the winter. In short, you must own and cultivate land distinct from the commons, and your use of the commons is limited by the size of your holding, limited in the kind of animal you may pasture, and limited to certain times of year.

In sum, use rights in the common were typically stinted, rarely absolute. No common was "open to all" and no "rational herdsman" was ever free to increase his herd at will. A true commons is a stinted thing; what Hardin described is not a commons at all but what is nowadays called an unmanaged common-pool resource.

It should be noted, too, that as the commons were stinted, so was the market in goods (especially in grain). Markets could not operate without regard for the provisioning of commoners and the poor. Farmers, for example, were obliged to bring grain to market rather than sell it in the field to wholesalers, and markets themselves were fenced, as it were, so that speculators couldn't outbid the poor. A description of "the orderly regulation of Preston market" dated 1795 reads:

> The weekly markets . . . are extremely well regulated . . . None but the town's-people are permitted to buy during the first hour,

> which is from eight to nine in the morning: at nine others may purchase: but nothing unsold must be withdrawn from the market till one o'clock, fish excepted . . .

In another town, "hucksters, higlers, and retailers" were excluded from eight in the morning until noon.

These days it would be hard to find a time or a place where there *wasn't* an available market, and certainly it would be hard to find a market carefully fenced to make sure the poor could provision themselves. But in premodern England a market was a limited thing, a stinted thing. In a seven-day week, only one day was "market day," and on market day only the afternoon hours were a free market where anyone could buy.

As with the constraints on the commons, markets were stinted for social and moral ends. No one was left to follow his or her own ends without regard for the group. In *Customs in Common*, the historian E. P. Thompson cites a pamphlet from 1768 that, he says, "exclaimed indignantly against the supposed liberty of every farmer to do as he likes with his own. This would be a 'natural,' not a 'civil' liberty." The pamphlet itself declares that such liberty

> cannot then be said to be the liberty of a citizen, or of one who lives under the protection of any community; it is rather the liberty of a savage; therefore he who avails himself thereof, deserves not that protection, the power of Society affords.

To these eighteenth-century eyes, a stinted market, one constrained by moral concerns, is a social market, while a wholly free market operating without limits is savage.

There is one last point to make about the way that the commons operated in premodern England. Only certain persons could use the commons, and only for limited purposes, but once established



these uses were not to be cut off. In general no one could erect barriers to customary common rights, not the lord of the manor, not even the king. In fact, if encroachments appeared, commoners had a right to throw them down. Once a year, commoners would "beat the bounds," meaning they would perambulate the public ways and common lands armed with axes, mattocks, and crowbars to demolish any hedge, fence, ditch, stile, gate, or building that had been erected without permission. If someone sowed grazing land with wheat, villagers would destroy the crop by turning their cattle out to feed. If someone installed rabbit warrens where they did not belong, villagers would arrive with spades and dogs to root them out (one such act of resistance preserved as a commons the golf links at St. Andrews in Scotland).

Such interventions and perambulations were convivial affairs. In the north of England, laborers, crowds of boys, and the local constable made up the annual procession, the village providing them with cakes and beer. They walked their rounds during Ascension Day week, which is to say that protecting the commons and celebrating Christ's entry into heaven were one and the same. Annual perambulations assured the longevity of the commons; most of their history is therefore comic rather than tragic, if by comedy we mean a story with a social basis, a festive mood, and a happy ending.

The right to throw down encroachments was mostly a matter of local custom, but written law spelled out similar protections. As early as 1217 the Great Charter of the Forest forbade anyone to fence "arable ground" if such enclosure would be "to the Annoyance of any . . . Neighbors." Five centuries later, William Blackstone's *Commentaries on the Laws of England* enumerated the remedies available when a common right "is incommoded or diminished" or when land is "so enclose[d] . . . that the commoner is precluded from enjoying the benefit to which he is by law entitled." As late as 1827, we find a court repeating the old understanding: "If the Lord

doth inclose any part, and leave not sufficient commons . . . the commoners may break down the whole inclosure."

This last pronouncement contains an echo of what is known as "the Lockean proviso," a philosopher's version of these safeguards. John Locke, in developing his theory of private property, famously claimed that things lying in the aboriginal commons become our property when we mix our labor with them, notwithstanding that they were once "common to all." Our labor removes things from "the common state" and in so doing it "excludes the common right of other men." Everyone else may then be denied access, "at least"—and here is the proviso—"at least where there is enough, and as good, left in common for others." Long before Locke, both law and custom had found ways to enact just this qualification, preserving what needs be left in common against any too intrusive exclusivity.

And how might perambulation, legal remedies, or the Lockean proviso be mapped onto the problem of preserving a cultural commons? What recourse is there if, as one scholar of intellectual property puts it, "courts or legislatures violate the proviso by creating private rights that impair the public's access to the common"? I shall let such questions hang for now, except to say that if we carry this analogy forward from the age of Locke into the nineteenth century, and return to the tangible commons for our cues, the answer would have to be "very little." This was the era of "lawless law's enclosure," as the poet John Clare called it, when Parliament could afford to turn a deaf ear on the claims of the old moral economy. To catch the tone of that unresponsive ear, witness the following exchange of letters. The date is 1824, and a commoner complains to his landlord: "Should a poor man take one of your sheep from the common, his life would be forfeited by law. But should you take the common from a hundred poor men's sheep, the law gives no redress." To which the landlord replies: "As your language is studiously offensive I must decline any further communication with you."



## ALIENABLE PLOTS

With the advent of parliamentary enclosure, the old harmony between law and custom broke down and village perambulations necessarily took on an extralegal air. Often they turned into riots, and regularly they had to deal not with literal encroachments but with the abstract fences and hedges of the bureaucratic state. Beating the bounds now meant tearing notices of enclosure bills from church doors, disturbing surveyor's markers, stealing field plans and land valuation books, and, in one case, the actual burial of a court injunction in a ditch along with the offending hedge it was meant to protect.

All this was to no avail, of course. By the mid-nineteenth century, common right had been extinguished throughout England, the bulk of the commons converted to private land. Many forces lay behind the change. An emerging wool market encouraged fenced, single-use pastures for sheep, for example, while a rising industrial economy introduced rural peoples to wage labor, the freedoms of which many found preferable to the obligations of village life. The claim was also made that enclosure promoted agricultural efficiency. Separated fields could be planted with single crops to improve the soil or they could be drained to improve the health of livestock, changes which were almost impossible to effect in land held by many different people for many different uses.

The early modern phase of enclosure coincided with many other changes in how persons, their work, and their public lives were imagined, and in an associative sense the meaning of "enclosure" lies in those changes as much as in the overt fencing of fields. Enclosure meant a shift away from lives guided by customs preserved in local memory toward those guided by national law preserved in writing. It meant a shift in the value of change itself, once suspect and associated with decay, now praised and linked to growth. It meant a change in the measurement and perception of time. In the mid-eighteenth century, factory time—coordinated,

precise, and finely divided—arrived to judge agrarian life and find it wanting. Enclosure took the village sundial, hung it on the wall, and added a minute hand. Before too long, it would strap the wall clock to the wrist and add a second hand. We who wear those watches, skilled now in what Wordsworth called "the usury of time," are the late inheritors of enclosure.

To my mind, though, the central meaning of enclosure's erasure of the commons lies in the way it carved those thousand-year-old beings, the commoners, into their constituent parts, then reshaped them for the new world of efficiency, law, progress, and time-as-money. A commons depends on a special sort of property that can, in theory, be broken into three parts: there is the use right, there is the commoner who acts on that right, and there is the land where the right is exercised. In theory, yes, this division can be made, but not in practice, at least not if the goal is to preserve a viable world of common holdings, for in that world these three things are one thing, and if they were picked apart that thing would cease to exist.

To illustrate by an analogy to a kind of "property" I suggested some pages back, in the United States, if you have a home in the state of Florida, say, you have the right to vote in that state's elections. All such elections have some sort of residency requirement, so the home helps establish your right. Again, we have three things (a physical place, a person, a right of action), and in a viable democracy, these things cannot be separated one from the other. In theory, perhaps, we could design a system where the right to vote belongs to the house and not the householder, but then we would have created a situation in which the rich can multiply their votes by buying up houses. Or we could, perhaps, say that the right to vote is a property that the citizen can transfer at will, though again by doing so we would open the door to the kind of plutocracy where the rich can buy more votes than the poor. Residency, resident, and right are bundled together to produce a "citizen of the



state of Florida." No part can be split off as a separable property, not if we wish to preserve our kind of democracy.

But exactly this kind of severing attended the enclosure of common lands in England. During the days of parliamentary enclosure, the understanding was that people holding use rights in a commons should receive something—cash or some equivalent in private land—in exchange for the loss of those rights. In the abstract, this seems fair; it is hard to imagine how enclosure could have proceeded without some such conversion. In practice it amounts to a sea change in how persons and communities are imagined and given their agency.

To flesh this out with but one example, in 1812 the eight-thousand-acre Delamere Forest in Cheshire was enclosed, half of the land going to the king. Except in regard to a few moss pits and peat bogs, all rights of common in the forest were extinguished. The chief forester and his assistants, whose uses had included a right to raise rabbits in the woods, were given cash. Local landowners had their use rights exchanged for alienable plots of land. The tenants of these landowners, who had enjoyed a centuries-old right of estovers, got nothing, though the landowners were instructed to offer cash compensation. Such a conversion severs the land, the users, and the use rights, commodifying the first and last of these and leaving the middle term—the human being who once used the forest—changed from a commoner into a modern cash-economy individual. Thus do our practices in regard to property fit us or unfit us for particular ways of being human.

I myself find that most stories of enclosure wake in me a resistant pastoralist and therefore, just to be sure that nostalgia does not fog the edge of thought, it may be worth pausing here to say a few words in favor of the modern and against these agrarian commons. I mentioned above those feudal vassals who owed their lord the service of their swords, and below them those simple commoners obliged in honey, chickens, eggs, and time at the plow. Such

people have no employers; they have lords and masters, and little or no freedom to alter the terms of their work. The great stability of the old agrarian commons was a great confinement, too; those with inherited rights to common land were the fortunate heirs of a world resistant to change, but by the same token they had little power to modify that world should they so desire.

Wage labor unsettled all that. It brought its own kinds of confinement, to be sure, but it also brought a promise of mobility and choice. To illustrate with a classic American case (to which I'll turn in a later chapter), no one wants to be Benjamin Franklin apprenticed to his bullying brother the Boston printer; everyone wants to be Franklin the runaway, setting up his own shop in Philadelphia, and advertising his do-it-yourself self by wheeling a barrow of printer's paper through the streets at dawn.

Early modern political thought long linked personal mobility with the mobility of property or, more specifically, linked political liberty with the right to hold an estate in "sole and despotic dominion." After the Puritan Revolution, the distinction between the vassal and the freeholder became marked and full of meaning. A vassal's land and sword were not his own; they were his lord's, and therefore so was he. For the freeholder, both land and sword were unencumbered and consequently so was he. A right to own land in fee simple and the "free" individual appeared together, each knit to the other. Wool was not the only crop to be taken from postfeudal fields; the modern Englishman grew there as well, a new kind of citizen—at least in the rhetoric of the time—bred to be an actor in the public sphere.

It is not hard to feel attachment to the premodern commons, but the sentiment should at least be informed. Let us not elide the fact that agrarian commoners lived embedded in a set of obligations most of us would find onerous if not actually oppressive. Enclosure and all its attendant meanings loosened up Defoe's "great law of subordination" and brought modern choice and political agency. Even



E. P. Thompson, in general a defender of the commons, is willing to concede that "the older . . . culture was in many ways otiose, intellectually vacant, devoid of quickening, and plain bloody poor."

All this said, I have not offered this short sketch of one country's actual commons in order to weigh it against the modern; the point has been to flesh out a representative image of the institution so as to bring it forward and make it new, make it an available tool for thinking about the fresh forms of common property that are now arising. To summarize, then, I began with a simple assertion: a commons is a kind of property in which more than one person has a right of action. We can now expand on this by summarizing the ground just covered. A commons is a social regime for managing a collectively owned resource. Moreover, although it is not hard to split a commons into the parts that make it up—the commoners, their use rights, the "fields" where those rights are enacted—in actual practice these parts cannot easily be separated one from another because it is the parts *bundled* that constitute the commons, that bring it into being. The things (fields, fish, songs, ideas, Internet protocols) are where common use rights meet, and that means that the things are encumbered, not readily available for private appropriation or trade. Likewise, because use rights are in an important sense what make the commoners who they are, these rights are not to be commodified either, at least not if the people and the community wish to preserve their identities. The agrarian commons I've been reviewing were not alienable things, nor were use rights alienable, nor did commoners think of market alienability as an important marker of their identity. In fact, by virtue of their common rights, commoners then and now are not individuals in the free market sense but a species, rather, of public or collective being.

Another feature of all durable commons is their stints, the constraints placed on use in the name of longevity; without these there is no true commons, only things belonging to no one or pools of

resources no one manages.* Moreover, primary among the stints that sustain the commons must be counted the right to tear down encroachments. The commons is never the only kind of property at large in the land; there is always some form of despotic dominion and some form of market nearby, and for the commons to endure it must be protected from these. It needs some kind of built-in border patrol or annual perambulation, a defense against the undue conversion of use rights into rents or the fencing of open fields into sheep pastures. Almost by definition, the commons needs to stint the market, for if the "free market" is free to convert everything it meets into an exchangeable good, no commons will survive.

*Garrett Hardin has indicated that his original essay should have been titled "The Tragedy of the Unmanaged Commons," though better still might be "The Tragedy of Unmanaged, Laissez-Faire, Common-Pool Resources with Easy Access for Noncommunicating, Self-Interested Individuals."

# 3

# THE ENCLOSURE OF CULTURE

The argument: Enclosure now threatens the commons of art and ideas.

## "THE ENCOURAGEMENT OF LEARNING"

The idea that durable commons may need to be stinted makes a good point of entry into what the legal scholar James Boyle has called "the second enclosure," the modern case in which "the commons of the mind" have been more and more converted into private preserves where someone's right to exclude comes before everyone else's right to common. At first glance, it ought to seem strange that any of the issues that arise with tangible, agricultural commons—stinting, management, enclosure—would come into play in regard to the creations of human wit and imagination, for, unlike sheep meadows or fishing grounds, these things are not generally in danger of being destroyed by overuse.

"If you have an apple and I have an apple and we exchange apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas." That is supposedly George Bernard Shaw's formulation of an old idea about ideas, and about works of art (incorporeal ones, that is—poems, tunes, ancient myths . . . ). The *Iliad* and the *Odyssey* can be spread throughout the world without anyone being deprived of them as a consequence. As Henry