The Great Awakening
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In recent years, the power and diversity of commoning in contemporary life has increased dramatically. Commoning is both an ancient and rediscovered social form that can be seen in the stewardship of forests, fisheries, and farmland, especially in subsistence and indigenous contexts. It lies at the heart of community land trusts, local currencies, mutual aid networks, and cohousing. It is embodied in community-supported agriculture, agroecology, and permaculture, and in digital spaces that produce open source software, hardware, and design. Commoning is at work in open access scholarly journals, crowdfunding tools, and platform cooperatives, and in academia, arts and culture, and many other realms.

Because commons are strongly inclined to respect ecological limits and devise fair-minded, flexible governance through inclusive participation, they hold great promise in dealing with many societal problems. However, commoning as a legal activity faces an uncertain future. Its practices and values are philosophically alien to many aspects of the liberal market and state and their mutual focus on individualism, calculative rationality,
material gain, and market growth. Commoning therefore has trouble gaining legal recognition and support. Indeed, the state is predisposed to ignore the commons, criminalize its activities, or exploit its resources in alliance with the business class.

The commons may be a pariah within the world of conventional politics because it challenges the foundational terms of ideological debate, which presumes that the market and state are ideological adversaries — the “private sector” battling the “public sector.” This is a specious binary because market and state are in fact deeply interdependent and both subscribe to the grand narrative of “social progress through economic growth.” The state looks to the market for economic growth, tax revenues, and social mobility for its citizens, while market players look to the state for a stable legal order, subsidies, state support and privileges, and the mitigation of market abuses (pollution, social disruption, inequality). State and market are so utterly symbiotic it is entirely warranted to speak about the market/state system.

From within this dominant worldview, it is almost a foregone conclusion that collective management of wealth would be seen as a “tragedy of the commons — ” the over-exploitation and ruin of a resource. To the guardians of the market/state, after all, individual agency and rights are supreme. Collective action is not perceived as feasible or attractive. By definition, human beings are defined as atomistic individuals, not as co-participants in

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shared histories, cultures, interests, and values. When people are conceived of as “rational individuals” with boundless “incentives” to take as much as they can, it should not be surprising that heedless consumption and the reckless “externalization of costs” follows.4

Now, however, this convenient fiction is starting to fall apart. Critics are increasingly calling out the claim that a commons is simply a selfish free-for-all when, in fact, this scenario more accurately describes what we might call the tragedy of the market.5 The commons is in fact a durable social form that orchestrates shared intentionality to steward wealth responsibly and inclusively over the long term. In a commons, people willingly negotiate rules of peer governance, resolve group conflicts, and enforce rules. They develop ways to pool and share (or divide up or mutualize) their collective wealth, without resort to a state Leviathan to maintain law, order, and personal safety.

Precisely because commoning is a stable, generative mode of governance and social organization, it represents a potentially disruptive alternative to the market/state system, whose dysfunctions are becoming more abundantly evident. As a social form, commoning does not have the same imperatives of market capitalism to maximize production, consumption, economic growth, and capital accumulation. Nor do commoners look primarily to liberal governance — centralized, hierarchical organizations, bureaucracies, amoral markets — to meet their needs. This is why they have been able to develop an astute perspective on the prevailing system. When they “withdraw” from market consumption — through, for example, their self-created software commons (Linux and scores of open source programs), healthier, more accountable local food markets (community

5 Among the critics of the “tragedy of the commons” fable are scholars associated with the International Association for the Study of Commons, members of the Degrowth movement, the Peer to Peer Foundation, and assorted activists and scholars working on commons-based projects for food, water, land, forests, fisheries, academia, and creative works.
supported agriculture, Slow Food, agroecology), and affordable housing projects (community land trusts, co-housing, etc.) — they withdraw from the circuits of capitalism to create their own quasi-sovereign alternatives. Decommodifying access to essential resources and sharing the risks and benefits of self-provisioning are radical acts.

But as people attempt to grow the Commonsverse, a major challenge is imagining how law might affirmatively support commoning. Law in the modern liberal state is mostly geared to serve market priorities and norms through private property rights, legal privileges, state subsidies, and a prescriptive set of socio-legal identities such “consumer,” “producer,” “business executive,” “investor.” Given its deep institutional and legal commitments, we must ask whether modern states are truly capable of recognizing commoning in law, and in what forms.

In this essay, I wish to explore the tension between commoning and modern state law, and suggest ways in which the two might become more functionally compatible. In the mid-term, the chief vehicle for reaching a *modus vivendi* will be creative adaptations of existing law. I call these workarounds “legal hacks,” a term that borrows from the world of software development, in which brilliant, eccentric programmers (“hackers”) use whatever coding strategies are at hand to devise elegant solutions to difficult problems (“hacks”). Legal hacks have been proliferating in recent years as commoners discover that state legal institutions — legislatures, courts, regulatory bodies — are simply too closely aligned with corporate interests to offer genuine support to commons. Hence the keen interest in some quarters in coming up with clever hacks of state law to protect the social practices of commoning.

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1. Commoning and the Problem with State Law

Let us start by unpacking the notion of commoning. Conventional economics and social sciences generally focus on the commons, the noun, not commoning, the verb. This reflects the prevailing epistemology of the standard economics and politics, which is focused on individual agents and the market exchange of goods and services. This worldview, obsessed as it is with market exchange, has only secondary concerns for human relationships, the inner wellbeing of people, care work, and the complex dynamics of ecosystems. The engine of market exchange, in short, is profoundly divorced from many realities of life itself. It is narrowly concerned with monetary transactions carried out via the price system, to which all else is considered peripheral.8

This helps explain why the commons has been mischaracterized for decades as an inventory of unowned resources. In a world of isolated, “utility-maximizing” individuals, there is no social regime for taking care of shared resources that we all depend upon. While the state throughout history has made game attempts to protect common wealth (as “public goods”),9 the neoliberal economic regime has largely abandoned this commitment. “Private opulence and public squalor,” in John Kenneth Galbraith’s phrase, are the prevailing themes of policy and economics today. This is a natural outcome under free-market ideology, which usually regards public wealth as a free or underleveraged resource whose value could be enhanced by converting it to market uses. The private appropriation and commodification of our shared wealth is seen as “progress” because value is purportedly maximized by expanding individual property rights and market activity. Given these premises, standard eco-

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nomics cannot help but conclude that commons (understood as unowned resources) are little more than “wastelands” awaiting the magic touch of the market.

Over the past ten to fifteen years, however, an emerging generation of activists and younger scholars has developed a very different narrative of the commons, with different ontological premises. They have rediscovered the commons as a social system. In open source software communities and community forests, for example, people realize that the heart of commoning consists of peer governance, provisioning, and social life. Rather than assuming society is a libertarian free-for-all kept in check by a state Leviathan, commoners recognize the historical reality that self-organized institutions of cooperation can stymie free-riding and enclosure. This is the essential conclusion of Elinor Ostrom’s landmark 1990 book, Governing the Commons, which painstakingly documents how human communities have created effective social institutions for the stewardship of shared wealth. Ostrom won the Nobel Prize in Economic Sciences for this work in 2009.

Many scientists are increasingly concluding that the drama of making and maintaining commons has been a salient part of human evolution. Even if the thought-categories and logic of modern economics cannot grasp this reality, history shows that commoning is something that human beings inevitably,

10 Bollier and Helfrich, Free, Fair and Alive.
irresistibly do. 13 While the culture of market industrialism and the modern state has eclipsed the very idea of the commons for nearly two centuries, the general social form remains remarkably persistent and alive. Its practices, ethical commitments, and traditions are still enacted by billions of people around the world, especially in subsistence and indigenous cultures. An estimated 2.5 billion people around the world manage about eight billion hectares of land through community-based ownership systems, according to the International Land Coalition, 14 and commons are pervasive in industrial countries of the North as well, even if they are not culturally visible. 15

The ontological shift in understanding commons that is now underway—commons as social system, not as unowned resource—is significant because it helps reveal an important dimension of the commons that is widely overlooked. Commons are alive and generative. They are not an ideological abstraction. They are social vessels of lived experience that meet elemental human needs. Over generations, commoning manifests its own customary practices, social norms, and traditions. The ancient ways of indigenous peoples, the consensual agreements of wiki communities, the rules that people devise to manage a local currency—all are examples of socially grounded peer governance and provisioning. All are quasi-sovereign ways of meeting needs outside of the market and of state power. (There may be some

14 Fred Pearce, Common Ground: Securing Land Rights and Safeguarding the Earth (Land Rights Now, International Land Coalition, Oxfam, Rights + Resources, 2016). The report concludes: “Up to 2.5 billion people depend on indigenous and community lands, which make up over 50 percent of the land on the planet; they legally own just one-fifth. The remaining five billion hectares remain unprotected and vulnerable to land grabs from more powerful entities like governments and corporations.”
interaction with market and state, but mostly in minimal, transient ways.)

2. Commoning as Vernacular Law

In effect, commoning is itself a form of law because it serves to organize people into orderly wholes to achieve shared ends. People are able to generate consensual rules, practices, and ethical norms that preserve both shared wealth and the community. I call this form of law and governance Vernacular Law, taking a cue from social critic Ivan Illich who celebrated vernacular practice as a way to re-humanize people caught up in systems of institutional domination.16

Today, most forms of Vernacular Law have been eclipsed by positive law enacted by legislatures to serve the interests of capital and the market economy. Custom has little stature here. Intent on building globally integrated value-chains to enhance capital accumulation, the leaders of market capitalism regard Vernacular Law as a vestigial oddity, a bothersome “friction” impeding market efficiency and growth. Ecologically minded or locally committed behaviors are often seen as hostile to business interests, which is one reason why World Trade Organization treaties seek to supersede state, provincial, and local self-determination.17 The mandarins of global trade regard the idea of subsidiarity — assigning authority at the lowest, most appropriate level in a system, or indeed, robust democratic sovereignty — as derailing the quest for a globally integrated system of commerce and law. (Not incidentally, it would also splinter and diminish corporate political influence over legislatures.)


In the face of such realities, the idea that the commons can effect transformational change from within the market/state system may seem quixotic. After all, commoners are not a terribly well-organized or visible constituency, at least in the traditional political sense. Their influence in elections, political parties, policy, and law is barely discernible. However, the unappreciated power of commoning is its ability to incubate durable new forms of consciousness, culture, and (in time) political power.

In *The Human Condition*, Hannah Arendt wrote that power is something that “springs up between men when they act together and vanishes the moment they disperse.” By this reckoning, power arises whenever people come together and organize themselves, and so it is always capable of being “created” and expanded. In effect, that is what commoning does. It is a quasi-sovereign, living social organism that empowers people to know, act and be, in ways unknown to the market/state system. When a community builds and manages its own Wi-Fi system (Guifi.net in Barcelona), controls its coastal fishery through peer governance (Maine lobsterman), shares services with each other via a timebank (hundreds of places around the world), or uses a local currency to keep value within a community (scores of examples around the world), a meaningful shift in experience and consciousness occurs. People do not enact and reproduce their roles as consumers and producers, or even as state-focused citizens. They enter into commoning and its ethos, logic, and sense of inclusive fairness. Everyone who participates in commoning incrementally contributes to the growth of a different culture. A shared discourse makes shared intentionality more feasible.

This development has political implications over time because, in a world of commoning, people are quite emotionally attached to the “care-wealth” that they love and depend upon. They do not have relationships with commodities or resources, but with things that belong to them in a deeper sense: ancient

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lands, beloved traditions, stable livelihoods, a sense of purpose and meaning. People’s lives become somewhat more enmeshed with each other; new social circuits emerge and proliferate. The iron grip of capital recedes, if only a bit, as people recover a sense of the local, affective, and collective. Life becomes more relational, and not merely transactional. Commoning becomes an enactment of Thomas Berry’s insight, “The universe is not a collection of objects, but a communion of subjects.”¹⁹ A sense of belonging and shared meaning emerges.

Commoners who manage their own fisheries, or contribute to open access scholarly journals, or steward scarce supplies of irrigation water, or participate in CSA farms, or contribute to mutual aid networks, tend to realize how their activities offer relief from the relentless demands of neoliberal capitalism. Many see the commons as counter-hegemonic, as McCarthy writes, because it asserts “collective ownership and rights against relentless privatization and commodification” and resists the “neoliberalization of nature.”²⁰ Such ideas are not policy opinions; they are convictions based on personal experience.

Geographer Andreas J. Nightingale notes how Scottish fishermen who manage their fisheries have developed “nonrational subjectivities” that stand in stark contrast to the market-based “rationality” of state policymaking.²¹ Working on small fishing vessels in the ocean is dangerous, difficult work, and so fishermen have learned the importance of cooperation and interdependence. Their lives are defined by “community obligations, the need to preserve kinship relationships [with fellow villagers], and an emotive attachment to the sea,” writes Nightingale. Vernacular law is an attempt to validate and protect the “nonrational subjectivities” of local commoners. State law, by contrast,

¹⁹ Thomas Berry, Evening Thoughts: Reflecting on Earth as a Sacred Community (Berkeley: Counterpoint, 2015), 17.
often attempts to use law to impose a very different worldview on people using rigid rules and coercion. The crude limitations of state law are especially evident in clashes with indigenous peoples. In her account of conflicts between Maori communities and the New Zealand state over how ocean fisheries shall be used, scholar Anne Salmond notes that disagreements are not really political, economic, or policy-based. They are ontological. She calls the decades of conflict over the proper uses of ocean spaces as “ontological collisions at sea.” Where the state sees extractive resources, the Maori see living systems and sacred beings.

One reason that Vernacular Law is so potentially powerful is because commoning reveals that power—which is presumed to inhere in state institutions and officials—really resides in all of us, if only we can organize the collective institutions, social practices, and shared language to sustain it. Power is revealed as more immanent than we may imagine it to be. As geographers J.K. Gibson-Graham memorably put it, “If to change ourselves is to change our worlds, and the relation is reciprocal, then the project of history making is never a distant one but always right here, on the borders of our sensing, thinking, feeling, moving bodies.” Commoning is significant in catalyzing and manifesting this inner awareness while building new archipelagos of proto-political power. One sees this in various transnational federations: diverse digital commoners that work loosely with each other (Creative Commons, free and open source software, open access scholarly publishing, open science, and more); coordination among indigenous peoples worldwide (UN Working

Group on Indigenous Populations); the global peasant-farmer network known as La Via Campesina; the Brazilian Landless Rural Worker Movement (known by its acronym MST); the fledgling network of urban commoners, especially in European cities; the Transition Town movement seeking to relocalize economies.

While these movements often feel compelled to seek supportive, or at least non-threatening, policies from state power, their primary long-term goal is the exercise of Vernacular Law. This means having the capacity to function as living social organisms capable of addressing unique situational realities using flexible, self-determined practices. A vexing question arises for conventional law and commoners alike: Can law in its current forms can provide sufficient authority and “epistemological awareness” to help commoning flourish? Belgian scholar Serge Gutwirth explains the challenge:

The commons demand a law that takes seriously the way they weave practices, sensibilities, modes of cooperation, vernacular habits, and interdependence into a local and self-sustainable, thus dynamic, whole... The commons demand an inductive topic and “becoming” law, rather than the one we know, which is abstract, axiomatic, deductive. The “law of the commons” would rather have case-law and customs, than legislation and “doctrine” as sources, since they [commons] generate their own law responding to the practical

Conventional law posits universal principles that are presumptively binding in all localities and circumstances. But Vernacular Law enacted by commons recognizes a great many behaviors and circumstances that are local, time-specific, and not capable of being generalized. It is precisely the imposition of a rough-hewn universal law designed to impose state priorities and power that commoners find objectionable.

3. Market/State Enclosures and the Necessity of Legal Hacks

As commoners chafe under the terms of the market/state order — and as the market/state itself aggressively expands its regime of individual property rights, market exchange, and the commodification of nature, social life, and beyond — state law is becoming an arena of intensified conflict. The trend is driven by global capitalism marching into the most remote corners of human and biophysical existence, often using new technologies. Nanomatter engineering, CRISPR genetic engineering of life, artificial intelligence, and data analytics that manipulate perception and behavior are among the tools being used to enlarge the imperium of the capitalist order, provoking social disruption and conflict in their wake. Enclosures are proceeding apace, too, through land grabbing, expansions of copyright and patent law, privatization of groundwater, plans to commercialize deep-sea minerals and the moon, and through corporate takeovers of the Internet infrastructure. Sometimes commoning is explicitly prohibited or criminalized, as we see with laws prohibiting seed sharing, information sharing, and music sampling. More typically, commoners find that their shared wealth — land, water,
forests, fisheries, genes, cultural heritage, and more — is simply seized by corporations, often with the full cooperation of the state.

An urgent practical question for commoners is how to stop enclosures and protect their commoning practices, if possible through law. *But can commoning be affirmatively protected via conventional state law while respecting the integrity of commoning as a post-capitalist social form?* Can Vernacular Law and modern law be artfully blended, if only as a makeshift venture?

The primary burden for imagining transformations along these lines will rest, as it always does, on the subaltern — in this case, on commoners. The guardians of the market/state order have little interest or expertise in exploring such change. Indeed, state power has a strong inclination to centralize and regularize control through bureaucratic systems and universal law, as political scientist James Scott has made clear:

> [T]he modern state, through its officials, attempts with varying success to create a terrain and a population with precisely those standardized characteristics that will be easiest to monitor, count, assess and manage. The utopian, imminent and continually frustrated goal of the modern state is to reduce the chaotic, disorderly, constantly changing social reality beneath it to something more closely resembling the administrative grid of its observation.30

While there is affirmative value in regularizing many aspects of a society, a state armed with digital surveillance technologies and bureaucratic systems can also assert far-reaching, authoritarian control over its population. Law is, of course, a vital instrument in this agenda.

But here we face a problem. Modern law is not equipped to recognize the role of customary practice or collective choices,

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especially in the face of positive law. Nor are there any means for the state to “attribute rights to dynamic collectives without legal personalities,” in Serge Gutwirth’s words. Nor are there legal concepts or analytic traditions that can recognize commoning on its own terms.31 As Gutwirth elaborates:

Today there exists no right that can or could meet the needs of a collective that is characterized by “generative commoning,” neither is it thinkable to consider the commoning practice as the source of the emergence and institutions of an entitlement that would protect the commoners as a collective against the claims of other rights holders (such as owners/proprietors), not even in terms of proportionality. So, what should be done in legal terms in order to protect and stimulate the culture of the collective intelligence that learns to detect and take into account, the consequences of one’s activity for the others, for the commons?32

There is yet another issue, which has less to do with legal pragmatics than with state power itself. The state has a keen interest in asserting the supremacy of its terms of legality over and against the legitimacy of alternative orders claimed by commoners.33 Political and corporate elites use state power — which includes formal law, bureaucratic rules, and jurisprudence — to fortify a market/state system around which their lives revolve. The guardians of state power, understandably, have a big stake in defending legality. They have far less interest in the vernacular norms, practices, and experiences of ordinary people that embody a different vision of “law.” Commoners may not have legality on their side, but they often command a great deal of street cred.

31 Gutwith and Stengers, “The Law and the Commons.”
32 Ibid.
33 This distinction was brought to my attention by Étienne Le Roy, who writes about it in “How I Have Been Conducting Research on the Commons for Thirty Years Without Knowing It,” in Bollier and Helfrich, Patterns of Commoning, 277–96.
The discrepancy between legality and legitimacy is the space of vulnerability that holds opportunities for counter-hegemonic legal strategies, or legal hacks. Creative legal draftsmanship can often repurpose state law in ways not originally imagined or intended by lawmakers. The attempt to use law to serve different, unanticipated ends is not just a matter confined to the legal universe. The point is to hack out a new zone of legality from within existing law, and then to fill that zone with social and political action. This can leverage popular legitimacy and community practice to establish a “new legality.” The remainder of this chapter will review several examples.

4. Creative Hacks on Copyright Law: Two Iconic Successes

Perhaps it is helpful to start with two of the most seminal and effective legal hacks in recent history — the General Public License (GPL) for software and six Creative Commons (CC) licenses for digital and other content. Copyright law is intended to privatize control over all creative works and information, based on the premise that would-be creators need the incentive of monopoly control over their work in order to produce in the first place and earn revenue. These two legal hacks, the GPL and CC licenses, dramatically reverse the intentions of copyright law by making works legally shareable in perpetuity, without any permission or payment required. The copyright holder merely affixes the license notice to his or her work (software code, music, text, etc.), which thereby grants formal legal permission to anyone to copy, re-use, modify, and share a work under the terms specified by the license. Both of these hacks, instigated by Richard Stallman

35 Creative Commons licenses, https://creativecommons.org/licenses.
36 For a history of the development of the Creative Commons licenses, see Bollier, Viral Spiral.
of the Free Software Foundation and Professor Lawrence Lessig and a merry band of legal scholars and activists, represent bold private hacks on a well-established legal form.

The introduction of the GPL in 1985 (and more significantly, its second iteration in 1991) and the CC licenses in 2004 has had an enormous impact in legalizing the sharing of works. Both have empowered people to share their works with the general public without having to pay the costs that cash-hungry market gatekeepers (such as publishers, broadcasters, or film studios) levy on creators. The licenses arrived just as network effects were becoming a significant marketplace and cultural phenomena. This is the idea, barely understood in the early 2000s, that making works freely available on open networks greatly enhances their value, rather than diminishing it. One wag, channeling Oscar Wilde, observed, “The only thing worse than being sampled on the Internet is not being sampled.”

The GPL gave rise to a burgeoning world of free software (meaning “freely available,” not necessarily no-cost). In time, the GPL inspired the birth of a cousin, open source software, based on similar licenses that have revolutionized software development by decommodifying a central resource of the trade. The Linux computer operating system emerged out of nowhere to compete with proprietary systems like Windows, and countless open source programs have become the engines powering the Internet and digital marketplaces.

As for the CC licenses, they initially spurred a burgeoning video mashup and music remix scene, and went on to catalyze the rise of more than 12,000 open access scholarly journals, the open educational resources (OER) movement, open data

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39 See the OER Commons website, https://www.oercommons.org.
initiatives, and open textbooks, among many other projects to make knowledge more accessible. An estimated 1.4 billion works worldwide used the CC licenses in 2017, providing an enormous pool of legally shareable books, reports, Web content, photos, videos, music, and more. Behind all this “open content,” and not necessarily seen, are thousands of commoners engaging in a mode of provisioning known as “commons-based peer production.”

While the impact of the GPL and CC licenses has been enormous, the actual impact of legal hacks is variable and unpredictable. Some attempts fizzle, perhaps because they are not truly defensible in courts; others may have negligible impact because as a practical matter they may not attract people to participate in new zones of commoning. That said, many artfully designed and well-timed legal hacks do end up unleashing powerful social energies and even forge movements. One might say that the “master’s tools” can be used to dismantle the master’s house, at least in the sense that they may trigger a dynamic dialectic between law and social action. The jolts of new possibility caused by legal hacks may attract new players to a scene, induce creative experimentation, or in other ways open up new affordances for change. Consider how the fairly prosaic legal innovation of CC licenses have brought legal sharing to a variety of unexpected corners, including major websites such as Google Images, YouTube, Flickr, Wikimedia Commons, Jamendo, and Europeana.

The short history of the GPL and CC licenses is instructive in showing how, even though a legal hack may not effect a legal revolution or transform capitalism, it may nonetheless propel transformational behaviors. In the early 2000s, some left-

43 The term was coined by Yochai Benkler, author of The Wealth of Networks. See also Wikipedia, s.v. “Commons-based peer production,” https://en.wikipedia.org/wiki/Commons-based_peer_production.
ists criticized the CC licenses as mere reformism because the licenses are based on capitalist property law (copyright). Yet the licenses’ greatest impact may have been outside of the law, in building a diversified social, academic, and cultural movement based on everyday sharing practices. The true significance of legal hacks may lie in their capacity to facilitate social action and movements. That is no small thing when commoners, immured within a stifling market/state order, have few options but to play the cards they are dealt. Improvisation and opportunistic brilliance make the most of necessity. Progress does not proceed along straight lines, but from zigs and zags through an uncharted frontier. Sometimes the results are impressive.

5. Legal Hacks as a Strategy for Social Change

It may be premature to try to theorize about the dynamics of legal hacks or to develop a coherent typology of them. Part of the point is that unpredictable experience, not theory or other regularities, drives the process. It is not always clear when legal feasibility will intersect with social need and interest, nor how special circumstances and individual leadership may prove critical. Furthermore, the actual significance of a legal hack may not initially be known, and post hoc assessments may be skewed as well. The CC licenses are now so widely accepted and commonplace that an Internet user in 2019 might never realize that it took a heroic mobilization of law scholars and activists in the early 2000s to develop and popularize the then-daring idea.

With these caveats in mind, I wish to introduce other legal hacks to suggest the breadth of possibilities. I focus on three general areas—catalyzing new social norms, innovative organizational forms, and commons/public partnerships—which constitute a small subset of the areas for which legal hacks are being invented.44

44 Other areas include cooperative law, stakeholder trusts, urban commons, platform cooperatives, digital ledger technologies that enable “smart con-
5.1 Catalyzing New Social Norms
The GPL and CC licenses are clearly prime instances of using a legal hack to validate and popularize new social norms. There are others worth mentioning. The Open Source Seed Initiative (OSSI)—launched by a number of farmers, seed breeders, and others—clearly attempts to emulate the free licenses used by free and open source software. The OSSI license gives a user the right to share the seed and any future derivations so long as the user makes them available for public use. (A fuller description of the OSSI, by Maywa Montenegro, can be found in Chapter 7.) This license is a significant legal hack because it challenges the standard industry practice of locking up seeds through patents and subjecting their genetic information and use to restrictive proprietary licenses.

As Montenegro explains, a companion effort by like-minded farmers and seed breeders has chosen to eschew patent licensing and instead use a quasi-legal pledge to “ensure that germplasm can be freely exchanged now and into the future.” As Montenegro explains, the pledge abandons the putative power of formal law—legality—and boldly embraces moral suasion, normative practice, and public shaming as the best way to protect seeds from enclosure. In other words, commoning, not state law, is seen as the more practical, powerful tool. According to seed activist Jack Kloppenberg, “The Pledge is much simpler and much more powerful as a discursive tool […] The license approach is cumbersome [and] over-legalized in our view.”

The Community Environmental Legal Defense Fund (CELDF), based in Pennsylvania, has pioneered a fascinating strategy to use local ordinances to change social and political views. Its general approach is to use municipal ordinances,
home-rule charters, and other legal strategies to preserve local governance over things that matter to the community. CELDF has, for example, helped communities enact local ordinances that recognize the “rights of nature,” prohibit fracking, and ban big-box retailers. Even though courts at the state and federal levels are unlikely to uphold many of these legal gambits, CELDF apparently sees them as a powerful way to provoke potential test cases and call into question the moral and political credibility of state law.

5.2 Organizational Forms
Within the framework of law that governs corporations, cooperatives, and nonprofits, for example, there is often sufficient leeway to develop legal regimes that are hospitable to commoning as a dynamic, evolving social form. One of the pioneering explorers of new possibilities is Janelle Orsi, founder of the Sustainable Economies Law Center, in Oakland, California. The SELC specializes in developing innovative governance regimes for cooperatives, digital communities, land trusts, shared housing, and other commons. By changing the bylaws and financial structures governing cooperatives, for example, Orsi and her team attempts to build movement cooperatives, not just consumer cooperatives; decentralized organizations designed to grow from the grassroots; self-managed staff collectives; and permanent community ownership. To enhance this process, SELC makes the boring, arcane aspects of organizational bylaws more accessible through plain English, cartoons, and diagrams. While such legal hacks may not sound dramatic, they are a frontier in rethinking organizational governance. They have also

started to raise ambitions for enlarging the scope of democratic peer governance.

One of the most creative uses of organizational forms to protect commoning may be the Indigenous Biocultural Heritage Area, or Potato Park, created by indigenous Quechua people of Peru. This is a *sui generis* legal regime that authorizes the Quechua to act as stewards of the unique biodiversity of the region, which features more than 900 different types of native potatoes.50 By having a legal instrument that can be recognized by Peruvian courts to protect the agrobiodiversity of some 12,000 hectares, the Quechua have greater assurance that they can live in their ancient ways, in intimate reciprocal relationship with the land, each other, and the spirit world.51 Equally important, the Quechua’s legal protections help them protect their ancient commons against ag-biotech companies that wish to appropriate and patent the genetic information of rare varieties of potatoes.

5.3 Commons/public Partnerships
A favorite scheme for many neoliberal politicians is to create public/private partnerships, or PPPs, that attempt to address pressing social problems through businesses/government collaboration in building infrastructure, providing services and so forth. However, many PPPs amount to little more than disguised giveaways. The state showers generous sums on companies that take on traditional state functions such as running prisons, healthcare systems, and schools, or they buy the right to privatize revenues generated by public infrastructures such as toll-roads, bridges, and parking garages.

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51 The Potato Park does not have state recognition within either Peruvian national law or the International Union for the Conservation of Nature, but the IBCHA agreement is nonetheless legally compatible with existing systems of national and international law. In this respect, it provides some measure of legal protection bolstered by the moral claims of historical, traditional use rights. For more, see Bollier, “The Potato Park of Peru.”
A clever twist on the public/private partnership is the *commons/public partnership* in which commoners act as working partners with municipal governments in tackling important needs. An early example of this is the Bologna Regulation for the Care and Regeneration of Urban Commons. This initiative of the municipal government of Bologna, Italy, established a system whereby the city bureaucracy provides legal, financial, and technical support to projects initiated by commoners. These projects have included the management of eldercare centers, kindergartens, and public spaces as well as rehabilitating abandoned buildings. The Bologna Regulation — developed by the Italian think tank LabGov — has evolved into the Co-City Protocols, a methodology for guiding co-governance initiatives.\(^52\)

The protocols are based on five design principles: “collective governance, enabling state, pooling economies, experimentalism, and technological justice.”

The point of the Co-City Protocols as a legal innovation is to leap beyond the known limitations of bureaucratic administration and leverage the social and creative energies of commoning. Numerous cities in Italy have adopted the Protocols as a way to rethink and enlarge the relationship between city bureaucracies and residents. It is an insight that the City of Ghent, Belgium, has taken to heart as well. In 2017, it commissioned an intensive study of scores of commons-based projects within its borders. It wanted to learn how it might augment the work of a neighborhood-managed church building, a renewable energy coop, and a temporary urban commons lab that provides space to many community projects.\(^53\)

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\(^52\) The protocols are based on “field-experiments designed, analyzed and interpreted by LabGov in several Italian cities, together with 200+ global case studies and indepth investigations run in more than 100 cities from different geopolitical contexts.” See https://labgov.city/co-city-protocol.

ships that result are likely to require legal hacks to define the shifting contours of state collaboration with commons.

6. Conclusion

The future impact of legal hacks in empowering commons and transforming state power remains an open question. Much will depend upon the beleaguered fortunes of the market/state system in the years ahead as well as on the tenacity of commoners in pressing for new modes of governance and provisioning. Still, as a mid-term strategy that seizes available opportunities to decriminalize commoning and create protected spaces for it, legal hacks are an important, promising tool. They can exploit state legality in unexpected ways to open new zones for commoning. And they can disrupt the inertia and staid thinking that so often afflicts mainstream political life, policymaking, and progressive activism.

Legal hacks stand as a way to revivify Vernacular Law, giving it standing and impact. This has great appeal in its own right. While legal hacks remain fairly rare and underdeveloped, they open up attractive ways for people to gain greater direct control over important aspects of their lives. They help people insulate themselves from the predatory forces of capital-driven markets. And hacks may also serve to weaken the influence of unaccountable state power, which indirectly helps strengthen democratic sovereignty.

Finally, legal hacks begin a process to bridge the chasm that separates state legality and vernacular legitimacy. At this point it is unclear where such a process might lead, and how rapidly. But legal hacks can be effective strategies for changing the exercise of state power, making it more supportive of commoning.