



CHAPTER ONE

Introduction

[The bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade.

Karl Marx, The Communist Manifesto (1848)

In a communiqué from the Lancandan jungle of Central America Subcomandante Marcos, the spokesman of the revolt of indigenous people that burst upon the world in 1994, referred to Magna Carta. The brilliant postmodern revolt of Mexico cited a tedious premodern source of England in 1215. That reference prompted this book. To be sure its overall genesis lay within the emergency posed by the autocratic aggressions of the Bush regime but what actually prodded me to put pen to paper on this subject was a mistake in translation, or rather an absence of translation altogether, because in Mexico it so happens everybody calls the constitution the *magna carta*. The semantic error revealed a deeper truth: indeed, the clue to Magna Carta lay upon the two winds Marcos described, the wind from above (these are the forces of the

rulers) and the wind from below (these are the forces of the indigenous, the campesinos, and the workers). Marcos explains how the wind from above daily sucks out 92,000 barrels of oil, leaving behind “ecological destruction, agricultural plunder, hyperinflation, alcoholism, prostitution, and poverty,” while the wind from below causes the campesinos in Ococingo to cut wood to survive.¹ The *ejido*, or village commons, was destroyed, and its legal protection, Article 27 of the Mexican Constitution, repealed.

The story is repeated around the world.

Nigeria: in the summer of 2003 hundreds of women seized the Chevron Escravos Oil Terminal (*escravos* means slavery in Portuguese). The Americans plan to obtain 25 percent of their oil soon from Africa. Chevron’s engineers have widened Escravos River in the Bight of Benin, and this act is destroying the mangrove forest and the village of Ugborodo. Women can no longer hew wood for fuel or draw water for drink. Prostitution is the only “decent-paying job for a woman.”² Woods, forests, and mangrove are destroyed while propane, gasoline, kerosene are substituted. As a result of this “advance,” the people are expropriated.

Vietnam: in the upland hamlets women collect firewood, bamboo shoots, medicinal plants, and vegetables from forest areas. Some of these products are sold locally, most are used directly. Broom

1. “The Demands Submitted by the Zapatistas during the February 1994 Dialogue” refer to Magna Carta. The document is easily accessible on the Internet where Marcos’s great speech, “The Southeast in Two Winds: A Storm and a Prophecy,” is also found. But see *Zapatistas! Documents of the New Mexican Revolution* (New York: Autonomedia Press, 1994).

2. Norimitsu Onishi, “As Oil Riches Flow, a Poor Village Rises Up,” *New York Times*, 22 December 2002.

grass makes charcoal in Trang Tri. Rice and cassava are food staples and both are obtained by *swidden* farming (a Yorkshire dialect term for land that has been cleared by slashing and burning the vegetation cover). Free-range domesticated animals provide sources of protein. The forest reserves have recently been enclosed by metal fence. The women of the hamlets suffer especially.³

New York: to the communities of Iroquois Indians and French Canadians in the Adirondacks, the conservation movement of the 1880s meant “the transformation of previously acceptable practices into illegal acts: hunting or fishing redefined as poaching, foraging as trespassing, the setting of fires as arson, and the cutting of trees as timber theft.” These inhabitants were charged by state officials with looking upon the forests as “a piece of commons,” or as “a public crib where all may feed who choose.” The Forest Commission “endeavored to strike terror, as it was, into the people who trespassed in that way.”⁴

Ireland: following the despoliations of the plantations and the demographic and settlement history of conquest in the seventeenth century, which destroyed the Gaelic order and denuded the landscape, the Irish lamented,⁵

3. Tuong Vi Pham, “Gender and the Management of Nature Reserves in Vietnam,” *Kyoto Review of Southeast Asia* (October 2002).

4. Karl Jacoby, *Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservatism* (Berkeley: University of California Press, 2001), 2, 50.

5. Roy Tomlinson, “Forests and Woodlands” in *Atlas of the Irish Rural Landscape*, ed. F. H. A. Aalen, Kevin Whelan, and Matthew Stout (Cork: Cork University Press, 1997), 122.

What shall we do without timber
The last of our woods is gone?

The woods were the location of visions, or the *aisling*, and of the *fiána*, or the defenders of Ireland. Hence the conquerors cut them down. It is a lament of early modern history, partially answered in modern times by the coal mine, then the oil pump, for these were truly the three ages of history, at least if you divide it up according to hydrocarbon energy sources—wood, coal, and oil.

India: Akbar the Great accounted the cutting down of forests a major achievement of his advance into Kashmir. The colonial government of Britain just took over the *dharma khandams*, or community common lands, and asserted its control over collection of fuel, leaf manures for composting, and wood for agricultural implements.⁶ A huge rise in wood thefts preceded the national upsurge of 1919–20. A nationalist song from the time asks,

Three hundred years back
Company man descended
You have kept quiet
He robbed the whole nation
He claims all forests are his
Did his father come and plant?

6. Atluri Murali, “Whose Trees? Forest Practices and Local Communities in Andhra, 1600–1922,” in *Nature, Culture, Imperialism: Essays on the Environmental History of South Asia*, ed. David Arnold and Ramachandra Guha (Delhi: Oxford University Press, 1995), 97. See also Ramachandra Guha, *The Unquiet Woods: Ecological Change and Peasant Resistance in the Himalaya* (Berkeley: University of California Press, 1989).

The Amazon: from the sixties until today the entire region has been convulsed by an enormous enclosure movement. The bulldozer and the chain saw led the attack. The workers and Indians fought back. In 1976 they came up with the *empate*, or “standoff.”⁷ The struggle is old. The teacher of young Chico Mendes of the rubber tappers’ union worked with Carlos Prestes, the revolutionary of the 1920s and 1930s. It is old and it is transatlantic: the Forest People’s Manifesto of 1985 has been compared to Winstanley and the Diggers, whose defense of the English forest commons we discuss in chapter four.

From such stories three tendencies emerge. First, as an aspect of the recent enclosures, planetary woodlands are being destroyed in favor of commercial profit.⁸ Second, petroleum products are substituted as the base commodity of human reproduction and world economic development. Third, indigenous people worldwide—commoners all—are expropriated. Michael Watts has dubbed “petro-violence” the terror, dislocation, separation, poverty, and pollution associated with petroleum extraction.⁹ War intensifies these tendencies. In Iraq the petroviolence of the Basra oil field has exterminated the commoning ecology of “the people of the reeds,” the so-called Marsh Arabs.

7. Susanna Hecht and Alexander Cockburn, *The Fate of the Forest: Developers, Destroyers and Defenders of the Amazon* (London: Verso, 1989).

8. See particularly Midnight Notes, *Midnight Oil, Work, Energy, War, 1973–1992* (New York: Autonomedia, 1992), 303–33.

9. Michael Watts, “Petro-Violence: Community, Extraction, and Political Ecology of a Mythic Commodity,” in *Violent Environments*, ed. Michael Watts and Nancy Peluso (Ithaca: Cornell University Press, 2001), 189–212.

The indigenous voice from the Lancandan rainforest suggests that Magna Carta concerns both juridical rights of the accused and the extraction of hydrocarbon energy resources. How can this be? Marcos is right. There were two charters forced on King John at Runnymede. Beside the great charter with which we are all vaguely familiar, there was a second charter known as the Charter of the Forest. Whereas the first charter concerned, for the most part, political and juridical rights, the second charter dealt with economic survival. Historians have always known the Charter of the Forest existed but many of its terms—for example, *estovers*,¹⁰ or subsistence wood products—seem strange and archaic, and have prevented the general public from recognizing its existence and understanding its importance. The message of the two charters and the message of this book is plain: political and legal rights can exist only on an economic foundation. To be free citizens we must also be equal producers and consumers. What I shall call the *commons*—the theory that vests all property in the community and organizes labor for the common benefit of all—must exist in both juridical forms and day-to-day material reality.

In the pages that follow I employ four kinds of interpretation of Magna Carta, documentary, legal, cultural, and constitutional. First, the *documentary* interpretation introduces significant emendations to the charter of 1215, such as “widow’s estovers,” along with the entire Charter of the Forest. They lead to the concept of the commons, which is grasped as an anchor of hope in the storm. The recovered charter and its addition was confirmed on 11 September in the year 1217, as chapter two shows.

10. Italicized archaic or technical terms are explained in the glossary.

Second, I trace the *legal* interpretation largely in chapter eight, in the history of the United States via the interpretations of chapter 39 and habeas corpus, trial by jury, prohibition of torture, and due process of law, which all are derived from it.

The third type of interpretation is *cultural*. It takes as its evidence music, murals, theater, painting, architecture, and sculpture. Sometimes these representations can be iconic or quasi-sacral. They have easily led to chauvinism and to barely concealed notions of racial superiority whose origins are described in chapters four and five.

Fourth, Magna Carta has a *constitutional* history, arising from its character as an armistice between belligerent powers, and as a treaty concluding rebellion. Magna Carta expressed a deal between church and state, barons and king, city merchants and royalty, wives and husbands, commoners and nobles. It was the proud product of rebellion. The U.S. Declaration of Independence of 1776 was the result of Tom Paine's suggestion for an American magna carta. In May 2006 the British people, when polled, preferred that a Magna Carta day become the national day.¹¹ Chapters eleven and twelve attempt to renew this interpretation.

If Magna Carta is to be recovered in its fullness, we must bring with it all that can be obtained from these interpretations. The first one calls for the abolition of the commodity form of wealth that blocks the way to commoning. The second one gives us protection from intrusions by privatizers, autocrats, and militarists. The third one warns us against false idols. The fourth renews the right of resistance. In the 1620s Edward Coke, Speaker of the House of

11. "Magna Carta Date Tops Poll as Best Choice for a National Day," *The Guardian*, 30 May 2006.

Commons and attorney general, provided the interpretations of these charters that paved the way for the English revolution of the 1640s. In 1759 William Blackstone, the magisterial Oxford professor of law, provided the scholarship of Magna Carta that helped prepare the mind for the American revolution of the 1770s. To them the “Great Charters of the Liberties of England” formed a unified instrument of law. This book explores that unity. The first three chapters present a problem, the middle six chapters tell the history, and the last three chapters indicate materials for a solution.

Rather than the separation of economic or social rights and civil or political rights that is familiar to us from the United Nations’ Declaration of Human Rights (1948) and its Covenant on Economic, Social and Cultural Rights (1966), in the two charters political rights in restricting autocratic behavior paralleled common rights in restoring subsistence usufructs (goods or usages required for well-being). Thus the charters limited expropriations, as with honey, the common sweetener.¹² The 13th chapter

12. The Elizabethan exchequer decreed against usurped customs and loss of “windfall wood, rootfall trees, and inbowes,” where these latter were defined “also only to so much thereof as the bees do light on, and the honey that shall be found in the tree, but not to cut any main bough or tree itself by color thereof.” Percival Lewis, *Historical Inquiries concerning Forests and Forest Laws with Topographical Remarks upon the Ancient and Modern State of New Forest* (London: T. Payne, 1811), 186. See also Clarence J. Glacken, *Traces on the Rhodian Shore: Nature and Culture in Western Thought from Ancient Times to the End of the Eighteenth Century* (Berkeley: University of California Press, 1967), 322.

The complete text of both Magna Carta and Charter of the Forest may be found in the appendix. Over the centuries there have been many English translations from the Latin, and so readers will find slight inconsistencies of spelling and wording.

of the Charter of the Forest states, “Every freeman may in his own woods have eyries of hawks, sparrow hawks, falcons, eagles, and herons; and he may also have honey that is found in his woods.”

That was the thirteenth century. In the nineteenth century the Forest Bill of India (1878) was objected to because “the powers proposed to be given to the police are arbitrary and dangerous, arrest without warrant of any person suspected of having been concerned at some unknown time of being concerned in a forest offence (taking some wild bee’s honey from a tree or skin of any dead animal).”¹³ In twentieth-century Kenya, Karai Njama, a peasant in the independence struggles, remembered family expropriations. “One day I was sitting down on our homestead lawn when my grandfather pointed to a small hill in the middle of the forest just above the juncture of the Gura River and the Charangatha River and asked me, ‘My grandson, do you see that hill?’ ‘Yes, grandfather,’ I replied. ‘That is where I used to hunt before the arrival of the *Chomba*—the European. That hill is still called Karari’s Hill. If you went there, you could see my cooking pots in my cave. I have many beehives on that hill which would yield a lot of honey. . . . Oh! My beloved beehives will rot there.’”

In the cries of Njama’s grandfather we do not hear “the tragedy of the commons,” as the title of an influential essay by the American sociobiologist Garrett Hardin (1915–2003) puts it. His biological and mathematical arguments concluded, “Freedom in a commons brings ruin to all” and “injustice is preferable to total ruin.” Hardin’s premise depends on absolute egoism and denies several millennia of experience in the mutuality and negotiation

13. D. Brandis, *Memorandum on the Demarcation of the Public Forests in the Madras Presidency* (Simla, 1878).

of commoning.¹⁴ If anything, we hear the cries of the victim of theft.

In 2004 the Nobel Peace Prize was awarded to Wangari Maathai of Kenya, who led the grassroots Green Belt Movement to plant thirty million trees for subsistence—wood fuel, fencing, and building—to restore a forest ecology, to prevent Kenya from becoming a dried-out desert. The spirit was expressed in the word *harambee*, meaning “let us all pull together!” At each tree planting the community committed itself to preserving for future generations “the bounty which is the birthright and property of all.”¹⁵

The robbery of the honey and the robbery of our safety, the robbery of commoning and the taking of liberties, have gone hand in hand. How are subsistence rights related to civil rights that protect us against detention without trial?

Subcomandante Marcos asked us to remember the *ejido* of the Mexican Constitution in the struggle against neoliberalism. This voice from the Lacandán rainforest in Chiapas caused me to ask: what does the Magna Carta actually say? While I was thinking this over in the summer of 2001, the movements summed up by the slogans “The world is not for sale” and “Reparations!” were checked by the police murder of Carlos Giuliani among the demonstrators in Genoa, Italy, and by the withdrawal of the United States from the UN conference on racism convened in Durban, South Africa. A week later hijacked airplanes were flown into the twin towers of the World Trade Center and the

14. Garrett Hardin, “The Tragedy of the Commons,” *Science* 162 (1968): 1243–48.

15. Wangari Maathai, *The Green Belt Movement: Sharing the Approach and the Experience* (New York Lantern Books, 2004), 20–21.

Pentagon. President Bush then announced the endless “war on terror,” which he compared to the Second World War, though in summarizing its goals (the four freedoms) he failed to mention freedom from want and freedom from fear.

With the assault on Mesopotamia in 2003 came the imposition of neoliberalism—free trade, unrestricted profiteering, and the infamous Order no. 39 privatizing the public enterprises of Iraq. Parallel to this infamy were the losses of liberties derived from Magna Carta’s forgotten chapter 39: habeas corpus has suffered particularly, trial by jury has suffered attack, the prohibition against torture wilts, due process of law is lost in Guantánamo.

President Bush is not the only one who has forgotten his history lessons. We British historians have not done our job. Both neoconservative historians as well as feminists, critical legal theorists, social and economic historians have been derelict, ignoring Magna Carta and thus laying the groundwork of forgetting. As for the commoning provisions in the Charters of Liberties, they have been ignored as out-of-date feudal relics. The argument of this book says their time has come.

Neoliberalism is an economic doctrine of globalization and privatization that depends on police regimes of security and privatization. It came into being as Margaret Thatcher and Ronald Reagan came to power, in 1979 and 1980. Accompanying the privatization and marketeering of neoliberalism was its historically inseparable sidekick, neoconservatism, which provided the police and the military. Postmodernism is an aesthetic and cultural style characterized by irony, eclecticism, high speeds, epistemological subjectivity (hence its compatibility with “identity politics”), and the refusal to accept a unity in history. Excluded from both the economic policies of neoliberalism and the cultural

politics of postmodernism were the actual planetary shifts of the 1990s—the planetary migrations, the new enclosures, the feminization of poverty, the development of precarious labor, and neoslavery. Margaret Thatcher had said “there is no alternative.” Magna Carta seemed nothing more than an archaic element in an obsolete “grand narrative.” In 1999 it seemed that postmodernism and neoliberalism reached a turning point in Seattle, where diverse movements challenged the “intellectual property” discussions of the World Trade Organization.

This was the context of the Stansky report, named after the chair of the committee that drafted the “Report on the State and Future of British Studies in North America.” The report was issued in 1999 and its recommendations and its omissions bear the marks of neoliberalism and postmodernism. On the one hand, it is a guild document defending British history as an old but disappearing part of the American university curriculum. On the other hand, it must explain the fashionable anglotude of the Anglo-American relationship. After all, English glamour dusts the high seats of power with its charms and fairy crystals: a president who was knighted at Buckingham Palace, another president an Oxford student and surrounded by Rhodes scholars, an American republic that adores an English princess, and two leaders who really resemble running dogs of imperialism, pit bull and poodle. “We need to demonstrate that the history of Britain is not merely an ‘island story,’ but indeed a world story,” the report continues. “British history used to flourish because it was consistent with what a lot of undergraduates and/or their parents wanted from a college education, a familiarity with the Western tradition but also helping their child succeed in later life. The

decline of those particular values has hurt the popularity of British studies.”¹⁶

The concept here of “Western tradition” is unthought out and carries crusading overtones that are sinister or stupid.¹⁷ As for “particular values,” these are completely unmentioned. The birthplace of democracy? The home of liberty? The rule of law? The free press? Habeas corpus? Trial by jury? Religious toleration? The commonwealth? Yes, we have known these as the politician’s sham, and when we heard them we have suspected guff, humbug, or “bourgeois rights,” but that is not reason to discard them. Let us look again. While the decline of habeas corpus, the cooperative values of the commons, the erosion of trial by jury *may have* hurt the popularity of British studies, they have *certainly* hurt the people of the planet.

There have been several moments when these “particular values” have had to be particularized, such as during the 1790s when the American Bill of Rights was drawn, or the Putney debates during the English Revolution, another such time of particularizing, or in 1940 when England stood alone against Nazi imperialism. Certainly 1215 was also a time when such values were particularized. Had we been in the habit of particularizing

16. See www.nacbs.org/report.html. See also Antoinette Burton, “When Was Britain? Nostalgia for the Nation at the End of the ‘American Century,’” *Journal of Modern History* 75 (June 2003). The journals in England of social history, *History Workshop* or *Past and Present*, have published little on the Charters of Liberties.

17. Silvia Federici, ed., *Enduring Western Civilization: The Construction of the Concept of Western Civilization and Its “Others”* (Westport: Praeger, 1995).

these values we would not be detaining people without trial, starving them to make them talk, invigilating their expressions of worship, “abusing” them in torture chambers, or looking for “our” oil under “their” soil by bombing the daylight out of them.

The reason given for the decline is this. The collapse of the Soviet Union and the apparent defeat of Communism in 1990 pulled the rug of relevancy out from under all disciplines that had depended for their rhetorical thrust on proving or disproving Marxist paradigms. Marx was a British social historian whose study of the length of the working day in Britain and Ireland, whose analysis of the *division of labor*, whose account of the mechanization of work, whose studies of the recomposition of the proletariat, and whose understanding of expropriation from the commons form the basis of the analysis of capitalism. These provide five gateways to the continuing relevance of his ideas. They open on to themes such as the charter’s call for “widow’s estovers” or the charter’s provision for subsistence in the commons.¹⁸

The failure to preserve the memory of Magna Carta’s liberties became clear to me in an unexpected way in the case of Maher Arar, a Canadian software engineer and father of two, who on returning from holiday via a U.S. airport was detained in September 2002 by U.S. authorities who shackled, chained, and blindfolded him, placed him in a cell with no bed but with permanent lighting, and prevented him from contacting family or lawyer before secretly “rendering” him to Syria where he was imprisoned for twelve months in a cell measuring three feet by

18. Maria Mies and Veronika Bennholdt-Thomsen, *The Subsistence Perspective: Beyond the Globalised Economy*, trans. Patrick Camiller, Marie Mies and Gerd Wieh (New York: Zed Books, 1999).

six feet by seven and repeatedly beaten by a length of shredded electrical cable. His was the first civil suit against the practice of “extraordinary rendition.” In 2005 the U.S. government defended the practice by asserting the privilege of “state secrets.” The senior trial lawyer for the government was known to me as a child thirty-four years earlier when I worked with her parents in hopeful causes such as the reform of prisons in the aftermath of the massacre at Attica, such as bringing the troops home from war in Vietnam, or the cause of democracy in the coal miners’ union of eastern Kentucky.

Although we in the prison movement, the peace movement, and the workers’ movement struggled against racial oppression and class exploitation, we never did so based on Magna Carta. Nor did we pass on knowledge of the 1679 Habeas Corpus Act whose full title, “An Act for the better securing the liberty of the subject, and for the prevention of imprisonments beyond the seas,” applies directly to the shameful practices known euphemistically as “extraordinary rendition.” Nor were we familiar with America’s magna carta, the 1776 Declaration of Independence, which enumerates twenty-seven reasons for declaring independence from England, one of which castigates King George III for permitting legislation to be passed “for transporting us beyond the seas to be tried for pretended offences.” We did not pass on this knowledge, as we did not have it ourselves, hence the apple fell far from the tree. Nevertheless, it is immoral to leave such errors against Maher Arar unrefuted.

Three champions from both sides of the Atlantic have carried the standard of Magna Carta into the lists of the powerful. The first is Ian Macdonald, QC, who in December 2004 resigned from the U.K.’s Special Immigration Appeals Commission. “You

lock people up indefinitely, and that's such a dangerous inroad into part of the cultural tradition of the UK. It goes back to Magna Carta."¹⁹ The *cultural* tradition of the Charters of Liberties have been perverted, as I show in chapters nine and ten.

The second champion spoke up in England's Parliament, which on 16 December 2004 ruled that Prime Minister Blair's detention of terrorism suspects without trial under the Anti-terrorism, Crime and Security Act of 2001 (the English equivalent to the U.S. Patriot Act), was incompatible with the human rights stated in the European Convention on Human Rights, and thus illegal.²⁰ The detained suspects were freed. In the House of Lords Lord Hoffman explained that this was the most important case Parliament had faced in years. "It calls into question the very existence of an ancient liberty of which this country has until now been very proud: freedom from arbitrary arrest and detention." He concluded, "the real threat to the life of the nation . . . comes not from terrorism but from laws such as these." In his argument we hear echoes of Col. Rainborough at a turning point in the English Revolution in October 1647—"I should doubt whether he was an Englishman or no, that should doubt of these things"—who continued wondering whether the poorest he or she had a life to live as the greatest he or she and whether consent was a condition of government, and if not, whether obedience to government was binding. The social contract has been violated.

The third champion of Magna Carta is Michael Ratner, president of the Center for Constitutional Rights (CCR), which initi-

19. "QC for Detainees Quits over Terror Law," *The Guardian*, 20 December 2004.

20. *Parliamentary Debates*, Lords, 5th ser., vol. 56 (2004).

ated the litigation since 2001 against the draconian actions of the U.S. government. The CCR took the Guantánamo cases that challenged indefinite detentions, torture, and disappearances, or renditions. The CCR obtained victory in the Supreme Court in June 2004 in *Rasul v. Bush*, in which Justice Stevens, writing for the majority of the Court, stated: “Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land (*Shaughnessy v. United States*, 1953).” By coincidence, at the time of this court decision I was in Runnymede inspecting the lovely field (only a bus ride from Heathrow Airport), where I found a peculiar distortion in the meaning of Magna Carta (I discuss it in chapter 9). On a little granite plinth in a star-studded columned rotunda were carved the words FREEDOM UNDER LAW. Ratner again, “We must continue fighting for core values, for human rights and for *authority under law*. This is about Magna Carta.”²¹

Ratner said that when he joined the CCR in 1972, he looked at law as an agent for social change, and that to defend “basic constitutional law and very basic, fundamental human rights” as he was doing thirty-four years later has been “a big shift.” As Macdonald remarked in the *Guardian* interview, “If anyone had told me 20 years ago that fighting for the rights in Magna Carta or the rule of law would be seen as revolutionary behavior, I would have laughed.” The big shift can lead back to the

21. Michael Ratner, “From Magna Carta to Abu Ghraib: Detention, Summary Trial, Disappearances and Torture in America,” the Clara Boudin Lecture, City College of New York, spring 2005.

beginning, because the Charters of Liberties sought to preserve social and economic rights. Likewise, the revolutionary behavior that Macdonald referred to also belongs to Magna Carta, which was the result of rebellion and civil war. Not only have apples fallen far from the tree, the orchard has been infiltrated by multiple pests.

Both Macdonald and Ratner had their legal baptism in the struggle of people of color to participate equally in British and American society without police brutality. In the case of Macdonald the issue was immigration from the anglophone Caribbean; in the case of Ratner it concerned the civil rights movement. The history of Magna Carta is intertwined with the struggle against slavery, and in the history of the Western Hemisphere the question of slavery is inseparable from the continent of Africa, as I show in chapter six. Magna Carta has been essential to the black freedom struggle.

Most of the appellants to the House of Lords case where Lord Hoffman waxed eloquent about the English nation were non-nationals from North Africa. His colleague Lord Bingham continued, “Habeas corpus protection is often expressed as limited to ‘British subjects.’ Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic ‘no’ to the question.” He then cited Lord Mansfield’s decision in the Somerset case (1772) to establish the principle that “every person within the jurisdiction enjoys equal protection of our laws.” We see this in a curious way in English heraldry. St. George, the patron saint of England, was from Palestine. His legendary slaying of the dragon was said to have taken place in Libya. The English flag, the Union Jack, is based on the red cross of St. George. In 1222

St. George's Day was set as 23 April. The symbols of the English nation go back to Magna Carta and North Africa.²²

Does history advance? It may, but we know it also goes backward. The age of the law enhances its importance, but the antiquity of a tradition suggests that it is out of date. The appeal of the modern pulls against the veneration of the old. We tend to think that ideas, like law or religion, depend on the mode of production of a given society; we are not used to considering them as invariables in the midst of technological changes and massive material production. We need a philosophy of history. Neither neoliberalism nor postmodernism can provide it, as they are so attached to the new with its attendant forgetting.

The American sociologist C. Wright Mills advised making “trans-historical constructions.” He continued, “Examine in detail little facts and their relations, and big unique events as well. But do not be fanatic: relate all such work, continuously and closely, to the level of historical reality. Do not assume that somebody else will do this for you, sometime, somewhere. Take as your task the defining of this reality; formulate your problems in its terms; on its level try to solve these problems and thus resolve the issues and the troubles they incorporate.”²³ What is the “level of historical reality” if not the suppressed praxis of the commons in its manifold particularities, despite a millennium of privatization, enclosure, and utilitarianism?

22. Hippolyte Delehaye, *The Legends of the Saints*, trans. V. M. Crawford (New York: Longmans, Green, 1907), 190, 212.

23. C. Wright Mills, *The Sociological Imagination* (New York: Oxford University Press, 1959).

One aim of this book is to put the commons back on the agenda of the political constitution. As an economic issue, the commons seems pie-in-the-sky, but scholarly scrutiny shows that on the contrary it is down-to-earth. Another aim is addressed to the world's commoners to say that we must begin to think constitutionally, as already is the case in Venezuela, Bolivia, and Mexico. Magna Carta is radical, near the root of the constitution, yet the root of Magna Carta presupposes the commons. In October 2006 Maher Arar accepted the Letelier-Moffitt Human Rights Award from the Institute of Policy Studies, concluding that what keeps him going is "the hope that one day our planet Earth will be free of tyranny, torture, and injustice."