LESSONS FROM *MAZIBUKO*: PERSISTENT INEQUALITY AND THE COMMONS

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1 Introduction

This essay will explore the idea that in the wake of the Constitutional Court's decision in *Mazibuko v City of Johannesburg*,[1] activists who are committed to dismantling persistent racial and class inequality should weigh carefully the costs and benefits of using rights-based litigation as a strategy to advance their interests. In putting forward that general idea, I want to make two central points. First, it appears that after *Mazibuko,* the benefits of rights-based litigation for activists may well be quite small. This is because the Constitutional Court has embraced a neoliberal interest in cost recovery from the poor, and has declared cost recovery programs constitutional even when they infringe on socio-economic rights. In light of the potential costs of engaging in rights litigation, I argue that the left should rely far less on rights-based litigation as an avenue of struggle.

Second, I argue that we should shift our relevant framework from "rights" to focus even more fully on "the commons." Here, I argue that the key social networks that mediate social life — our neighborhoods, social connections and even our networks of family wealth — should be understood as part of the commons. Describing these networks as the commons highlights several ideas that rights talk can obscure. Thinking of these networks as the commons emphasises the way in which we are connected (or can become connected) to each other in common pursuits and common values, and the way in which these networks constitute the foundation for participating in political, economic and social life. A 'commons' style approach also demands that people should have open and neutral access to these networks, and that the best of them should not be reserved for one small group of people on the basis of race and class.

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1 *Mazibuko & Others v City of Johannesburg & Others* [2009] ZACC 28; 2010 3 BCLR 239 (CC); 2010 4 SA 1 (CC).

The facts in *Mazibuko* involved both material networks of service infrastructure and the social networks — neighbourhoods and communities — through which government provided such infrastructure. The Court's opinion focused on the issue of whether installing pre-paid, 'pay as you go' water meters in the Phiri community constituted a violation of the constitutional right to water and unfair discrimination on the basis of race. As the Court described it, the programme had been introduced to recover costs from providing water to a community that historically had not paid its bills, although the Court said relatively little about why that might have been. Accepting this ostensibly race-neutral purpose, the Court found that the city's action was 'reasonable' and that the city had not engaged in unfair discrimination.

The plaintiffs had challenged, among other things, the way in which the pre-paid meter automatically cut off water supply once the money on a card was gone and the free basic water supply exhausted. Against a right to water challenge, the Court found that pre-paid meters were reasonable as a way of recovering costs from a community from which bill collection had historically proved difficult, and reasonable because the price of water was cheaper for those with pre-paid meters than those who enjoyed credit meters.[2]

In addition, against an equality clause challenge, the Court found that pre-paid meters were not unfair discrimination against the black, historically poor Phiri community. Indeed, the Court held, compared to the inequality that apartheid had visited upon Phiri residents, pre-paid meters were an improvement. Not only were rates cheaper than regular meters but, in addition, an automatic cut-off of water would mean that residents would not go into debt or be subject to collection actions.[3]

This article argues that, in the wake of *Mazibuko*, activists who are committed to dismantling persistent racial and class inequality should weigh carefully the costs and benefits of using rights-based litigation as a strategy to advance their interests.[4] The decision in

2 *Mazibuko* (n 1 above) paras 141-142.

3 As above.

4 It bears noting here that the project of dismantling persistent inequality in South Africa has not necessarily been couched as dismantling persistent *racial* inequality, but rather has more often been couched in class terms. Those groups that do think about inequality in explicitly racial terms — Black Management Forum, Blackwash, etc — have not engaged in rights litigation to speak of. Those groups that frame inequality primarily in class terms — including the Anti-Privatisation Forum — have experimented with rights-based litigation, but have not understood the struggle to be about achieving racial inequality. Moreover, such groups have conceptualised rights litigation as part of the terrain on which political struggle gets fought. See e-mail communication with Dale McKinley, 31 December 2010 (on file with author). My thanks to Tshepo Madlingozi for pointing this out.

Mazibuko seems to indicate that the benefits of rights-based litigation for activists are likely to be quite unreliable and limited; namely, the Constitutional Court has now embraced cost recovery from the poor as consistent with the Constitution, and has adopted a neo-liberal baseline from which to measure the reasonableness of government action that infringes on socio-economic rights. As a result, rights-based litigation will likely be of limited use in dismantling persistent race and class inequality.

In light of the limited benefits of rights-based litigation, and its potential costs, this essay argues in favour of an even more decisive shift from rights-based legal remedies to a sustained political conversation about the commons. I argue that for legal scholars, the commons might be a far more effective theoretical and strategic framework around which to push for dismantling persistent inequalities of race and class. The commons is a framework that emphasises common interests and networks of relationship that connect wealthy whites and poor blacks in South Africa and in the United States. The commons reinforces the notion that people collaboratively create neighbourhoods, cities and countries, often for reasons other than market motivation, and that no group should have unfairly-privileged access to the best that these common spaces have to offer.

In particular, this article explores the example of the transition town to illustrate what it concretely might mean to politically organise around the idea of the commons. Transition towns are a recently emerging form of commons political organisation, in which towns organise in a decentralised way to negotiate green approaches to climate change and fossil fuel dependence. Transition towns rely on townspeople to negotiate voluntary agreements to reduce their carbon footprint and oil consumption. In this paper, I investigate whether transition towns could be organised around a commitment to dismantle persistent inequality, and sketch a rough blueprint for developing a transition town committed to dismantling persistent inequality.

In sum, I want to advance the following three central arguments in this article:

- After the Constitutional Court's decision in *Mazibuko*, legal rights-based litigation appears much less likely to be of great use in affirmatively dismantling persistent inequality, and relatively less useful as a tool to open up political space for challenging persistent inequalities of race and class.
- Shifting more to a focus on the commons, and on an expanded definition of the commons, might be a more theoretically useful way to affirmatively address the problem of persistent inequality.

- Organising transition towns around a commitment to dismantling inequality might constitute a concrete example of what it means to focus on the commons.

In part 2 of this article, I develop the critique of rights-based litigation in the wake of *Mazibuko*. In part 3, I argue that scholars and activists should shift even more decisively to the framework of 'the commons' for projects designed to dismantle persistent class and race inequality. In part 4, I explore the possibility of organising transition towns around dismantling inequality, as an example of what it might mean to shift to the commons. In part 5, I take up significant theoretical and political obstacles that render any shift to the commons potentially problematic.

2 A critique of rights-based litigation in the wake of *Mazibuko*

This project is situated in an ongoing debate about how to deal with persistent structural inequalities of race and class. Legal scholars and some activists on the left have put great faith in legal rights-based approaches, and in particular in socio-economic rights-based litigation, as a useful means to address race and class subordination. On the other side of the aisle, more conservative scholars (mostly those from the United States) have suggested that over time, the market eventually will close these long-running racial gaps. In this section, I argue that rights-based litigation likely cannot be relied on to produce significant results on the inequality front. In the wake of *Mazibuko*, rights-based litigation has now become too closely allied with precisely those neo-liberal visions of the market that make the market unlikely to dismantle inequality.

Before proceeding to the critique of rights-based litigation, readers should take careful note of the modesty of this critique. This essay will not argue that rights-based litigation cannot in theory provide an opportunity to remedy persistent structural inequality. Rather, like legal scholar Duncan Kennedy, I will argue that we should not hold our breaths that it will happen, nor should activists invest much energy in rights-based litigation as a result. To the extent rights-based litigation appeared potentially to be useful as a strategy to dismantle persistent inequality, I suggest that after the Court's decision in *Mazibuko*, that appears much less likely to happen as an *empirical* matter.

Likewise, it is important to clarify the scope of this critique. My argument is levelled primarily at rights-based litigation, and not at rights as the aspirational language of political mobilisation or as the equally aspirational framework for political analysis of resistance to

state action. I am sympathetic to the view that rights talk as a framework for resistance can serve well as the aspirational language around which resistance movements are organised. I am also very sympathetic to the notion that rights-based litigation can be mobilised strategically, in a defensive posture or for purposes of raising additional political visibility for an issue.

At the same time, this article suggests that activists should be realistic about the limited scope of benefits that rights-based litigation can likely achieve after *Mazibuko*, and should take into account the significant costs of pursuing a rights-based strategy to achieve visibility and organisational energy. This critique focuses on the limited and unreliable benefits from litigation, and points up potential costs as well.

Let us proceed directly to the critique, then. In an earlier work, I have suggested that in both the United States and South Africa, rights-based litigation could be used tactically as one weapon in an arsenal of strategies to dismantle persistent inequality, requiring the government to step in to dismantle inequality. In the intervening years, I have lost faith in this tactical usefulness of rights. And, after *Mazibuko*, my faith in rights' usefulness has disappeared almost entirely. In my view, rights-based litigation may now be quite unlikely to pay dividends in advancing the cause of dismantling persistent race and class inequality.

Of course, in the United States, rights-based litigation, targeted at addressing persistent structural inequality, never was all that promising a strategy, certainly not after the Supreme Court's decision in *San Antonio v Rodriguez*.[5] In *Rodriguez*, the US Supreme Court assessed the constitutionality of a Texas school financing system that derived its revenue from local property taxes. Despite the fact that such a system created significant racial and wealth disparities in the quality of education, the Court declined to find that the federal Constitution provided any right to education, and rejected the argument that the equal protection required equal advantages where wealth was involved.[6] Although litigation under state constitutions has put forward some argument for a right to education on both equity and now adequacy grounds, much of this litigation has dragged on for years, and few, if any, states show real progress in improving education for low-income children of colour.[7] Even the most

5 411 US 1 (1973).
6 *Rodriguez* (n 3 above) 24.
7 For an excellent summary on state litigation, see R Reich 'Equality and adequacy in the state's provision of education: Mapping the conceptual landscale' unpublished working paper, 2006. Reich documents that some states have seen an improvement in expenditures per student, in those states where the highest court has ordered the legislature to equalise spending.

optimistic commentators on rights litigation acknowledge that existing funding inequalities will remain.[8]

In contrast, rights-based litigation in South Africa had scored some significant victories shortly after the transition from apartheid. In particular, in *Minister of Health and Others v Treatment Action Campaign and Others*, the Constitutional Court used the constitutional right to health care to order the South African government to roll out a medication programme that prevented transmission of HIV from mother to child.[9]

A number of other legal rights cases also gave reason to hope about rights-based litigation as a remedy for structural inequality. The most notable, *City Council of Pretoria v Walker*, rejected an equality clause challenge to the differential charging of lower utility rates to historically black areas.[10] In addition, several eviction cases required government to meaningfully engage with people whom it was going to evict, suggesting that rights discourse could help support the demand for adequate housing.[11] In the same vein, in *Government of the Republic of South Africa and Others v Grootboom and Others*, the Court also ordered government to create an emergency programme to provide immediate housing for those who are homeless.[12]

However, after the Court's decision in *Mazibuko*, rights-based litigation seems relatively much less promising as an avenue of social change to redress persistent racial and class inequality.[13] In *Mazibuko*, the Court addressed the constitutionality of a water delivery scheme that used 'pay-as-you-go', pre-paid meters to charge customers for water usage in a black township, but used credit meters for predominantly white municipalities and neighbourhoods. Despite the significant problems of access created by the meter, the Constitutional Court held that the pre-paid meter system did not violate the Constitution's affirmative right to water, and that the Court would defer to government on the appropriate amount of free water to provide to indigent water users.

Most importantly, in its decision, the Court rejected (some would say again) the idea that affirmative socio-economic rights created

8 JE Ryan & M Heise 'The political economy of school choice' (2002) 111 *Yale Law Journal* 2043 2062.

9 *Minister of Health & Others v Treatment Action Campaign & Others* (2002) CCT8/02; 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC).

10 1998 3 BCLR 257 (CC).

11 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v the City of Johannesburg & Others* 2008 3 SA 208 (CC); *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 3 SA 454 (CC).

12 *Government of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169.

13 *Mazibuko* (n 1 above).

some minimum core of obligation that government owed citizens, and emphasised the need to defer to government decision making in assessing the rights of access for those who could not afford water. Prior to the decision, there had been some reason to think that the Court might be willing to define a minimum core of obligation to justify a more searching review of state actions that infringed on socio-economic rights. In *Treatment Action Campaign (TAC)*, the Constitutional Court had emphasised that some level of scrutiny of government decision making was intrinsically necessary as part of judicial review:

> Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.[14]

But whatever the Court's willingness to scrutinise government had been in *TAC* appears (at least for the moment) to have disappeared in *Mazibuko*. In the latter case, the Court seemed to recant or reinterpret the earlier *TAC* language as relatively limited to extending pre-existing government policy, ostensibly because the government had already committed to rolling the drugs out for the entire population. Finding the notion of defining a minimum core of obligation to be too intrusive, the Court retreated behind principles of reasonableness and progressive realisability to a more deferential stance, and refrained from giving substantive content to affirmative socio-economic rights.

> [I]t is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.[15]

Beyond rejecting the idea of 'minimum core', the decision in *Mazibuko* illustrates a more pressing problem. In particular, the Court's decision approved as constitutionally permissible those neo-liberal programmes for cost recovery that are directed at the poor,

14 *Treatment Action Campaign* (n 9 above) para 99.
15 *Mazibuko* (n 1 above) para 64.

even those that unduly burden a person's right to access to water. Without much discussion at all, the Court found it constitutional to ration access to water based on the ability to pay, even for the country's poorest black residents. In so doing, the Court took as its implicit baseline of reasonability those apartheid inequalities of race and class that accompany, and are deepened by, neo-liberal programmes of cost recovery that target the poor. In effect, the Court in *Mazibuko* found these inequalities constitutionally permissible, even though cost recovery from the poor serves to reinforce the legacy of apartheid.

This embrace of the neo-liberal baseline appears in both parts of the Court's decision, with regard to both the free water policy and the installation of pre-paid meters. With regard to the free water policy, for example, the Court found the city's programme to be reasonable because cost recovery justified imprecise calculations — in the Court and the city's view, it would be too difficult (in other words, expensive) to calculate free basic water allowance amounts per person, rather than per household, because calculating per person amounts was administratively difficult for more transient poor communities.[16]

With regard to the pre-paid meter system, the Court accepted the city's assertion that credit meter payment systems for low-income families would cost too much in uncollected revenue, compared to a pre-paid meter that would permit cost recovery.[17] Likewise, the Court found the programme reasonable because it provided for the first time to residents a certain amount (6kL) of free water monthly allowance and then charged people a subsidised tariff rate for water after that.[18]

Notably, the Court found pre-paid meters reasonable despite the fact that, under the old deemed consumption system, Phiri residents received free and abundant access to water, largely because they did not pay their bills. The plaintiffs had argued that, compared to this system, the pre-paid meter imposed stringent limits on the plaintiffs' access to water. Rejecting the plaintiffs' argument, the Court found that it was not legitimate to characterise as retrogressive free water for which residents did not pay when compared to a system of rationing on ability to pay — one assumes that is because the idea of residents gaining access to the water they needed by simply not paying was not an option the Court felt it could approve.[19] Nowhere did the Court inquire whether Phiri residents' non-payment was

16 *Mazibuko* (n 1 above) para 45.
17 *Mazibuko* (n 1 above) paras 129 & 139.
18 *Mazibuko* (n 1 above) para 136.
19 *Mazibuko* (n 1 above) para 139.

connected to their ability to pay or the legacies of apartheid. In making its ruling, however, the Court privileged the city's interest in cost recovery over and above Phiri residents' interest in sufficient access to water, thereby stripping out much of the potential force of an affirmative constitutional right to water.

Because the Court found existing racial and class disparities to be part of the existing baseline, the Court's decision about what was reasonable seemed rational and appropriately moderate. Because the Court accepted those disparities as a long-standing part of the South African racial landscape, the Court could not approve the idea that poor black residents could take water without paying because they could not afford to pay. Perhaps most remarkably, in at least one part of the decision, the Court appeared to use apartheid configurations as the baseline from which to measure whether the pre-paid meter system, which was rolled out only in Soweto, constituted unfair discrimination. To justify its finding that the pre-paid meter and free water policy were not unfair, the Court cited the fact that poor residents were actually being charged less for water than they had been under the old apartheid policy.[20] In addition, in a deeply paternalist move, the Court argued that the inability to prevent the cut-off of water was an advantage to poor black residents, because automatic cut-off prevented residents from getting into debt.[21] With such a view of benefits, and with apartheid inequalities as a baseline reference point from which to measure, it is no wonder that ordinary neo-liberal inequalities appeared reasonable to the Court.

The Court's use of this neo-liberal baseline supports two versions of critique, one more radical than the other. In the weaker version, the Court can be faulted for approving a version of cost recovery that is too harsh. One could imagine that the Court, drawing from the more fundamental notions of equality and dignity, could have insisted that the city delay adopting pre-paid meters until they could improve their free basic water allowance calculations to accurately reflect the size of households or to calculate on a per-person basis. Alternatively, the Court might have insisted on a more redistributive pricing curve that exacted higher increases in cost for the higher-volume, wealthier users rather than on low-end, low-volume residential users.[22]

In the stronger version of the critique, the Court can be faulted for embracing in any way those cost recovery programmes that condition full and adequate access to water for the poor on the ability

20 *Mazibuko* (n 1 above) paras 152-153.
21 *Mazibuko* (n 1 above) para 154.
22 P Bond 'The economics of water resources allocation' in J Lehr (ed) *The encyclopedia of water* (2005) 215-218 (comparing the current curve of rising block tariffs from Johannesburg with a more progressive curve that imposes higher increases on high-volume users).

to pay. Aggressive cost recovery from the country's poorest will always be antithetical to the task of dismantling persistent race and class inequality. Against the backdrop of apartheid's stratification of race and class, the Court could have ruled that the city should refrain from aggressive cost recovery targeted towards the country's poorest via pre-paid meters.

Much of this stronger critique rests on the limitations of the Constitution's rights provisions. In particular, most affirmative socio-economic rights contain provisions that require only that the government 'reasonably' provide access, and then only 'progressively' and 'within available resources'.[23] As many others have recognised, this reasonableness provision, which substitutes for conversations about the minimum core of such rights, has opened the door for economic privilege to assert its power. Of course, these limitations have weakened legal rights' scope of protection considerably, particularly as the South African government continues to struggle with resource allocation and the slowness of economic transformation.[24]

But the far more important, and original, point to be made here is that courts now appear to be assessing what is reasonable, progressive or available against a neo-liberal baseline. In both the United States and South Africa, dramatic disparities of race and class — in housing, health care, wealth and education, to name a few — are uncontroversial and long-standing configurations of the socio-economic landscape. If *Mazibuko* is any indication, courts now appear to be willing to use a neoliberal baseline that measures what is reasonable against the backdrop of a system that accepts such inequalities as the order of the day. Likewise, the courts measure reasonability against the background assumption that cost recovery from the country's poor black residents is legitimate, and that disparities produced by such a programme do not violate equality or equal protection clauses. Small wonder then that the courts find segregated education and structural disparities in water access to be constitutionally valid. In the wake of *Mazibuko*, rights-based claims may now be much less reliable as vehicles for reducing persistent inequality.

So much for the uncertain benefits from rights-based litigation. What about the costs? What is the downside for engaging in rights-based legal claims on the chance that a court might reach a pro-rights

23 Sec 27, which provides for a right to water, includes the following phrase: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'

24 See D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or what are socio-economic rights good for?' in H Botha *et al* (eds) *Rights and democracy in a transformative constitution* (2003).

result? Anecdotal accounts of litigation in the *Mazibuko* case suggest that rights-based litigation might carry a significant cost — the potential to tie the hands of activists who organise around resisting government neo-liberal programmes of cost recovery that perpetuate racial inequality. In the case of water, the social movements pressing the case on behalf of Phiri residents had deployed litigation only as one strategy in an arsenal of strategies that had commenced with activities to reconnect water and electricity for residents who had no access. Many activists continued with these reconnection activities to bypass the offending pre-paid meters, and reconnection activities spiked after the High Court's decision finding the pre-paid meters unconstitutional.

In the run-up to the litigation over access to water in *Mazibuko*, at least one activist reported that lawyers had advised the client, the Anti-Privatisation Forum, to cease their reconnection activity, for fear of appearing before the courts with 'unclean hands'.[25] It is very important to note here that the lawyers adamantly dispute this report and deny giving such advice. They do acknowledge that they told APF members that lawyers could not professionally advise them to continue with reconnections, because professional obligations to remain within the constraints of the law prohibited them from giving such advice.[26]

But even the factual dispute about such advice itself raises an important point. To engage in rights-based litigation potentially risks hobbling the organisational energy that fuels social movements demanding, and not petitioning, redistribution. Rights-based litigation is a distinctly legal activity that can potentially constrain its participants (or at least the lawyers) to remain within the confines of the law. A lawyer advising political movement clients must decide how to handle a potential conflict between her client's interests in engaging in resistance activities — like reconnections — that violate the law, on the one hand, and her need to comply with her professional obligations, on the other. Clients must decide whether to risk appearing with so-called unclean hands before a court, as they ask the court to enlist the coercive power of law on their behalf with one hand, and simultaneously potentially to break the law with the other. This tension, intrinsic to rights discourse, has the potential to de-radicalise political resistance against persistent inequality.

It is important to recognise again that legal rights claims are not all downside. Rights claims offer many potential benefits, particularly in a defensive posture. As I myself had pointed out ten years ago,

25 Interview with APF activists, June 2010.
26 Correspondence with Jackie Dugard, February 2011 (on file with author).

rights-based litigation offers the possibility of enlisting coercive state power from the courts to counter coercive state power. Indeed, Phiri residents only turned to a legal rights challenge after community efforts at resistance had been crushed by the state. Activists had been legally banned from coming within 50 meters of pre-paid meter construction, and the city had enforced this order with the help of a private security company to monitor construction. In September 2003, 14 residents and activists had been charged with public violence and property damage for handing out flyers. As part of a co-ordinated defensive effort to defend activists from state harassment, movement leaders turned to rights litigation as a last resort, in order to enlist the power of the state in an offensive manoeuvre to combat state repression.[27]

But as the Constitutional Court's opinion demonstrates, rights appear to offer at best an unreliable means of checking state power with state power. Indeed, because the discourse of reasonableness is a discourse highly deferential to the state, and because the Court has ruled that rights are theoretically consistent with neo-liberal programmes of cost recovery, rights litigation is now even less likely to offer a reliable avenue to secure access to water or other socio-economic rights. At best, rights litigation is a roll of the dice, and at worst, counterproductive. This paper seeks to point out the limited promise of a litigation gamble, and to highlight the potential costs of engaging in such litigation.

3 Shifting to the commons

The foregoing section used the *Mazibuko* case to investigate the limits of legal rights discourse in dismantling persistent race and class inequality. So if not legal rights claims, where should progressive legal scholars focus their energy? This essay suggests that activists should shift from rights-based litigation to focus even more fully than they already do on politically constructing a concept of the commons. In particular, two ideas from the commons seem especially useful in thinking about persistent class and race inequality. First, the commons contemplates that the political concept of common interests — of shared connections and collective well-being among a group or community — should drive the project of dismantling persistent race and class inequality. Importantly, constructing a common interest is a political project of solidarity, one that has taken a real beating in the last decades, thanks to the forces of neo-

27 J Dugard 'Civic action and legal mobilisation: The Phiri water meters case' in J Handmaker & R Berkhout (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (forthcoming) 71-99. See also n 54 below and accompanying text.

liberalism and structural consolidation. This essay suggests renewed focus on that project.

Second, with the idea of the commons comes the notion that, because the commons forms the foundation for shared participation in community life, no one group should have special access to the best parts of the commons. For resources that are jointly created outside the market, particularly for those that are foundational to participate in a community, no one group should have a persistent monopoly over the best opportunities and resources. This idea of fair commons access motivates a more militant and active concept of citizenship, and poses a more decisive challenge to neo-liberal arrangements.

Before discussing each idea in turn, a general word or two about the commons might be helpful. In every day parlance, the commons has referred to shared ownership and enjoyment of natural resources — for example, the air or the ocean. Hardt explains:

> On the one hand, the commons refers to the earth and all of its ecosystems, including the atmosphere, the oceans and rivers, and the forests, as well as all the forms of life that interact with them. The commons, on the other hand, also refers to the products of human labour and creativity that we share, such as ideas, knowledges, images, codes, affects, social relationships, and the like.[28]

Beyond natural resources, more recent scholarship has argued that the stuff of intellectual property — patents, designs, computer code, and information more generally — should be considered part of the commons as well. This group of scholars suggests that, because information is jointly created in a decentralised way, and often for non-market reasons, the commons is a more useful approach than the market for management.[29]

The notion of common interest, as the idea that lies at the heart of the commons, is potentially the most useful of concepts when thinking about persistent structural inequality. More specifically, the commons implies that communities can negotiate to find — to discover or to construct — a common interest that unites the players and induces them to co-operate.[30] Of course, the notion of community itself, as the relevant collectivity in which a common

28 M Hardt 'Politics of the common' Contribution to the Reimagining Society Project hosted by Z Communications, Boston, 6 July 2009.

29 E von Hippel 'Norms-based intellectual property systems: The case of French chefs' (2009) 19 *Organisation Science* 187-201; Y Benkler *The wealth of networks: How social production transforms markets and freedom* (2008).

30 See M de Angelis 'The tragedy of the capitalist commons' http://www.turbulence.org.uk/turbulence-5/capitalist-commons (accessed 4 February 2011); E Ostrom *Governing the commons*: *The evolution of institutions for collective action* (1990).

interest is forged, is itself a highly contingent concept, emerging from political contest and other emergent processes. So too it is with the common interest, which inevitably is also the product of political struggle rather than some pre-existing thing that needs only to be uncovered.

Ostrom's Nobel Prize-winning work on the commons makes clear both that common interests lie at the centre of 'the commons' and, more importantly, that through political contest, players with diverse interests can find ways to co-operate on a common interest. Ostrom's work focuses on a set of self-organised collectives — the youngest of which is a century old — that successfully have managed to devise a set of rules, despite conflicting interests, about how to sustainably manage a common resource. Ostrom's case studies include a wide range of examples, from fisheries management in Turkey to forest management in Sweden and water management in Los Angeles.

Ostrom targets for study the kinds of first-order collective action problems that often plague 'common-pool resources'. These include the problem of appropriation — how much does each user get to appropriate? They also include provision problems — how will the resource be created and maintained? Ostrom also tackles the second-order institutional problems. For example, who will supply the rules for managing the resource? How will users make credible commitment to those rules; and how will users mutually monitor and enforce against rule violations?

In illustrating a wide range of potential solutions to these collective action problems, Ostrom notes that there is no one-size-fits-all model, and that different models will lead to different conclusions. For example, Ostrom describes the lottery system that fisher folk in Turkey have designed to solve sustainability problems in Turkey's fishing waters. The system is unique to the problems faced in that particular area by those particular users.[31]

At the same time, Ostrom demonstrates that the long-enduring communities that she studies share some basic design features. In these groups

> [i]ndividuals repeatedly communicate and interact with one another in a localised physical setting. Thus it is possible that they can learn whom to trust, what effects their actions will have on each other and on the CPR [Common Pool Resource], and how to organise themselves to gain benefits and avoid harm. When individuals have lived in such situations for a substantial time and have developed shared norms and patterns of

[31] Ostrom (n 30 above) 183.

> reciprocity, they possess social capital with which they can build institutional arrangements for resolving CPR dilemmas.[32]

What interest might a community negotiate as its common ground in dismantling persistent inequality? No pre-set answer will suffice here. Much will depend on the hard political struggles over the definition of community, the identity of stakeholders and the subject of discussion. Residents of Johannesburg, or of Southern Johannesburg, might have agreed that public health was a common interest, given the connection between water and cholera. On access to education, Texans or residents of San Antonio might have come to find common ground on the need for long-term political order, a more engaged and vibrant citizenry, a stronger sense of well-being and community.

A body of academic literature supports the argument that higher levels of inequality are correllated to diminished co-operation. Communities that see high levels of inequality are also likely to see less social co-operation, political co-operation and economic co-operation. In this era of social, political and economic restructuring, co-operation is now more essential than ever. Stability, security, democracy, peace, community wellbeing all are goals that depend critically on co-operation.

Critics have pointed the finger at Ostrom's work, arguing that she presents a de-radicalised version of the commons that is consistent with capitalism. To be sure, her work presents informal commons that in many instances operate quite comfortably within neo-liberal frameworks of global capitalism. But it is precisely this political struggle over what constitutes common interest that will determine, as De Angelis notes, the scope of the challenge that the commons will pose to neo-liberalism. That is, the level of radical challenge to neo-liberalism versus domestication cannot be determined in advance; the politics underlying the push for the commons will determine its radical character:

> There are thus two possibilities. Either: Social movements will face up to the challenge and re-found the commons on values of social justice in spite of, and beyond, these capitalist hierarchies. Or: Capital will seize the historical moment to use them to initiate a new round of accumulation.[33]

The push for the commons in the context of persistent inequality faces another problem. Coming up with a common interest in connection with the environment is relatively simple when compared with persistent racial inequality. In Ostrom's Ananya fisheries

[32] Ostrom (n 30 above).
[33] De Angelis (n 30 above).

example, fisher folk were all quite aware, even before they sat down to negotiate, that they shared a common interest in harvesting fish without destroying their future supply. Convincing people that they share a common interest in dismantling racial inequality is a much tougher proposition, for two reasons. First, the process requires players to stake out a position on the difficult question of class-based inequalities. At the outset, stakeholders might all agree that equalising school expenditures benefits all because it provides an educated labour force for capitalist markets. But that position legitimises, and maybe even reinforces, existing class inequalities, and for radical theorists, class inequalities lie at the heart of racial inequalities.

Second, and relatedly, stakeholders must acknowledge the importance of common interests other than economic interest, but must also acknowledge the important role that economic interest plays in perpetuating racial inequality. Indeed, the desire not to sacrifice in the short-term white economic privilege — the monopoly hold on capital and on good jobs, high property values and good schools, when it comes to neighbourhoods, for example — might constitute the primary obstacle to agreeing across class lines on a common interest. And of course, the problem of racial difference might be uniquely difficult, as is discussed more in depth in part 5.

The preceding discussion has raised more questions than it has answered on the subject of common interest. Indeed, negotiating agreement about the common interest necessarily will be the site of significant political struggle. But such is the advantage of a commons-based approach over a rights-based approach: Stakeholders must engage in the difficult political conversations about what kind of community they want to create.[34] This point is worth repeating. The strength of a commons-based framework is the space it makes for creatively fighting about common ground.

Beyond the idea of common interest, the commons offers a second idea that is centrally important in thinking about persistent inequality: Self-reinforcing networks that serve as the very foundation for participating in community life ought not be monopolised, and ought to be protected as the commons. Accordingly no one group should have special access to those networks.

Carol Rose has written about an early nineteenth century category of property which she has called 'inherently public property', a category in which a legal interest vested in an 'unorganised public', outside the direct management of the state or private owners in the

34 See De Angelis (n 30 above).

market.[35] Such property, which typically included waterways, roadways and trading grounds, among other types of property, was governed by 'custom' or informal, unofficial practice.[36] Rose argues that the creation of such inherently public property rested on two major features. First, it had to be potentially capable of monopolisation. Second, the public's claim or use had to be superior to that of the private owner.[37]

When did nineteenth century courts think that the public's use was superior to a private owner's use? Rose points out that courts consistently chose as superior those public uses that had a self-reinforcing capacity to expand wealth, or to expand human social interaction for 'the members of an otherwise atomised society'.[38] So, for example, courts ruled that the use of a venue for the customary community dance was superior to the use of the property for the private owner because the former use had a self-reinforcing capacity to increase its value.

Putting the argument in network terms, the more likely the first attendees were to attend the dance at the traditional venue, the more likely other participants would attend. Importantly, declaring the property public reduced the possibility of underinvestment — if no one wanted to be the first person on the dance floor in a place other than the customary venue, dance traditions would die away. Likewise, property used for commerce — the trading square and roadways, for example — was considered inherently public property because it facilitated the network interaction of people in commerce, with exponential returns to increasing participation in trading networks.[39]

Put differently, property was more useful to the public when it served to help create the self-reinforcing networks of participation that are necessary for to collective social life. Roads, waterways and trading venues were necessary for people to network to participate in the economy. Community venues for the annual town dance were necessary for networks to create social solidarity and cultural meaning through ritual and custom. The self-reinforcing nature of these networks — the way in which the presence of early traders or dancers would induce the participation of more traders or dancers —

35 C Rose 'The comedy of the commons: Custom, commerce and inherently public property' (1986) 53 *University of Chicago Law Review* 711 721.
36 Rose (n 35 above) 742.
37 Rose (n 35 above) 774.
38 Rose (n 35 above) 721. Rose traces part of the definition to courts' concern for private holdout in connection with roadways, waterways and community recreational spaces, like the maypole field. However, Rose notes that the holdout danger was not by itself sufficient to explain 'inherently public property'; Rose (n 35 above) 760-761.
39 Rose (n 35 above) 770-772.

meant that public use of the property would inevitably have a higher value than private use.[40]

Importantly, in Rose's view, the public value of such property rested on the inability to identify with specificity any group likely to use the property. Were a court able to identify with particularity the users of a *cul-de-sac*, or a particular trading group, or one particular social group of dancers, such groups could negotiate with the private owner on the private market with some fair assessment of their use value. For nineteenth century courts, what gave the property its higher value in public use was its role in facilitating the interaction of an indefinable group of people.[41]

On similar lines of argument, Yochai Benkler has argued in favour of a commons-based approach to regulating information. Much like Rose, Benkler points out that information is a self-reinforcing resource because current know-how and artistic creation builds on pre-existing information accumulated from previous generations. And, like Rose, Benkler argues that people need information as a foundational resource to even begin to participate in a market economy.[42] Accordingly, Benkler argues that it is both more efficient and more just to make information freely available as part of the commons.[43]

What do self-reinforcing foundational networks have to do with dismantling persistent inequality? I want to argue that the key foundational networks that permit people to participate in collective activity — our neighbourhoods, our informal social networks, and even our family networks of social and economic wealth — can be understood as 'inherently public property', to be governed by the informal custom of an 'unorganised public' outside the reach of the state or the market.

In a forthcoming book, I have traced persistent inequality to the self-reinforcing nature of these key foundational networks.[44] I have argued in particular that structural inequality in the United States persists because whites monopolised the best of these networks during the Jim Crow and slavery eras, and because monopolisation of these networks has now become self-reinforcing over time. Wealthy white neighbourhoods remain wealthy because children are able to attend well-financed schools. Financial assistance from family networks helps the next generation to buy a house and attend college,

40 Rose (n 35 above).
41 Rose (n 35 above) 764.
42 Benkler (n 29 above) 307.
43 Benkler (n 29 above).
44 D Roithmayr *Them that's got shall get: Why racial inequality persists* (forthcoming, NYU Press).

two of the most important activities in which adults can participate in order to accumulate wealth. Neighbourhood networks, and the wealth of network members, determine whether current and future generations of children are able to attend well-financed public schools. Informal social referral and mentoring networks shape who will be well-salaried and fully-employed, on the one hand, or under- or unemployed, on the other.

As I have documented, these networks are deeply stratified along lines of race and class. In both the United States and South Africa, owing to outright exclusion and early occupational segregation in both countries' history, access to these networks and to the resources that come with them continues to be defined by race and class. In both countries, historically and currently, living in a rural area, a black township or neighbourhood means poor neighbours and the inability to attend a well-financed public school. In Johannesburg, as in the rest of South Africa, living in the Phiri community has meant not having access to sufficient clean water on a credit meter that will not automatically shut off when families are struggling financially to pay the bill.

Likewise, in the United States public schools, being part of white social networks has brought higher paying jobs — when white male shop teachers see themselves in their white male students and bring them along in informal networks of mentoring and job referral assistance. Because black and Latino shop students are not part of those networks, they must look for jobs through the formal work-study listings.[45]

Along with the community dance venue and the town bazaar, these social networks look like good candidates for inherently public property. As my previous work argues, the networks are capable of being — and in fact have been — monopolised, or the best of them have been, at any rate. More precisely, in the United States, during Jim Crow and even earlier during slavery, whites monopolised the best neighbourhoods, social networks, workplaces and networks of family wealth on the basis of race. Those monopolies have now become self-reinforcing over time by way of positive feedback loops. Wealthy white family networks pass down the kind of assistance that enables the next generation to accumulate even more wealth.[46] White social networks distribute well-paid employment with an opportunity of advancement, which enables others in the network, and the next generation, to connect to the same type of jobs.[47]

45 D Royster *Race and the invisible hand: How white networks exclude black men from blue-collar jobs* (2003).
46 D Conley *Being black, living in the red: race and social policy in America* (1999).
47 Roithmayr (n 44 above).

The same is true in South Africa, though the divides are different — rural versus urban divides are racially and economically stratified, owing to the legal history of Bantustans. Feedback loops owe more to broad geographical divisions rather than neighbourhood divisions in the city. A growing black middle class and black elite blur the lines a bit more as well. At the same time, disadvantage is reliably passed down for those born into townships or rural areas far from economic empowerment.

The self-reinforcing nature of these feedback loops makes the neighbourhood or regional networks more valuable as inherently public property. More precisely, the networks exhibit increasing returns in the same way that trading networks and community dance venues do. Each person who joins the network — the family, the neighbourhood, the social network — makes the network more valuable for subsequent members. Like trading networks, the social connection network is particularly enhanced if it contains network members with abundant resources who are particularly well connected — think Facebook or Linked In. Like community dances, bigger is better when it comes to family wealth; extended family networks are more capable of distributing financial and emotional support than are small family networks. These increasing returns are part of what make public network use more valuable than private.

Beyond scale, qualitative features of these networks matter as well, for purposes of superior public value. So for the town square and the community dance venue, it very much matters *which* square or venue people use, because the customary place serves as the focal point around which people gather. Although town squares or dance venues could be replicated elsewhere, the customarily central square or venue is what will draw the early network members. So too does it matter to which community or which family or which workplace one belongs. Custom here also dictates which networks will be the preferred networks, although for reasons having less to do with focal point generally, and more to do with focal point for particular kinds of members.

Of course, important differences exist between trading networks and community dances, on the one hand, and these 'social transaction' networks on the other. In the former kinds of networks, scale likely is more important in thinking about public value than the strength of network ties between members. In contrast, in social transaction networks like communities, neighbourhoods and families, the ability of the network to distribute resources may depend in part on the distribution of strong and weak ties, and these might vary between the networks — family networks will depend far more heavily

on strong ties, for example, than communities or neighbourhoods.[48] Likewise, and for related reasons, crowding or congestion might be more of an issue for some kinds of social transaction networks. Past a certain size, families are less likely to have the kind of strong ties on which family support depends, and the same might be true for communities and social networks.

But the self-reinforcing value that comes from strength of ties and the optimal size of networks is more a function of culture than anything else. These kinds of transactional networks are created in some large part for non-market, non-economic reasons. People give help to family members, give to their churches and refer jobs to their friends for reasons that include not just potential economic benefit but for reasons having to do with collective identity and a sense of social affiliation. As we will discuss in part 4, both the importance of scale and the distribution of strong or weak ties are more a function of cultural meaning than economic necessity. And transition towns will be built on the argument that those cultural norms might be amenable to change.

4 The commons in action: Transition towns

What would it mean to understand and describe these foundational networks as part of the commons? At the very outset, a commons-based understanding moves away from thinking about a person's membership in a family or community or social network as a private entitlement or birth right, inherited by virtue of parentage or racial affiliation. As part of the commons, these networks are less the private creations mediated by developers and estate tax lawyers, and more collective resources that are jointly created via shared collaboration and co-operation. Describing these networks as the commons emphasises the idea that people participate in them for mostly non-market reasons, and that the act of participating in such networks is infused with cultural meaning.

Using the idea of the commons also says something about appropriate modes of governance. Among the left, and perhaps among some sectors of the right as well, the commons has become a sort of third way, neither socialist state nor private market.[49] In the latter half of the twentieth century, contending camps — at least in academia — had lined up behind either *laissez faire* market competition, on the one hand, or comprehensive state regulation to

48 N Lin 'Building a network theory of social capital' (1999) 22 *Connections* 28 31 (strong ties more important); M Granovetter *Getting a job: A study of contacts and careers* (1995) (weak ties more important).

49 A Ozgun 'A common word' (2010) 22 *Rethinking Marxism* 374 377.

contend with market failure, on the other. At the end of the century, many came to understand that market failure was far more common than previously understood, particularly with regard to informational asymmetries and uncertainty. For those who believed in government regulation, they in turn came to understand that governments are neither sufficiently informed nor sufficiently free from capture by the powerful — or accountable to those without power — to effectively correct market failures.[50]

In the wake of this discontent with both the market and the state, social capital — on the right — and the commons — on the left — came to prominence at the end of the last century and the beginning of this one. Both of these ideas focus on the ability of the public, outside the direct reach of the state or the market, to create informal institutions that solve social problems.

Those to the left of centre are attracted to the commons because it focuses on trust, generosity and collective organising as a way of solving problems. Those who are fans of laissez faire are also — perhaps somewhat reluctant — fans of social capital because they are in favour of using communities and other informal institutions — anything but the government — to supply things like public goods or effective regulation of common-pool resources.[51]

In academia, discussions about the commons and social capital originated in Bourdieu's work,[52] and now have famously taken form in Ellickson's ranchers in Shasta County (who negotiated rules of trespass and property loss informally without law),[53] Putnam's bowling leagues (which provide opportunities for social trust and bonding)[54] and Platteau and Seki's fishing co-operatives in Toyama Bay (which informally share income and information as a way of combating highly variable fish catches).[55] In the US, George Bush's thousand points of light (voluntary organisations addressing poverty) and Hillary Clinton's child-raising village (providing collective norms with which to socialise a child) come from essentially the same idea.[56]

Transition towns are a newcomer to the commons/social capital scene, but are built on many of the same principles. Australian

50 S Bowles & H Gintis 'Social capital and community governance' submitted to *Economic Journal* symposium, December 2000.
51 Bowles & Gintis (n 51 above).
52 P Bourdieu 'The forms of capital' in JG Richardson (ed) *Handbook of theory and research for the sociology of education* (1985) 241-258.
53 RC Ellickson *Order without law: How neighbours settle disputes* (1991).
54 R Putnam *Bowling alone: The collapse and revival of American community* (2000).
55 JP Platteau & E Seki *Community arrangements to overcome market failures: Pooling groups in Japanese fisheries* (2001).
56 Bowles & Gintis (n 51 above).

ecologists in the 1970s developed the concept of permaculture to describe the shift from an agricultural system that moved toward depletion (forest, field, barren earth) to a system that replenished itself naturally. Quickly, practitioners adapted the concept to apply to resource sustainability.[57]

United Kingdom scholar Rob Hopkins, a permaculture professor, came up with the idea of transition towns, and worked together with his students on a pilot project to wean the small town of Kinsale, Ireland, from its dependency on fossil fuels. More specifically, the Kinsale Town Council pledged a commitment to address the common interest of townspeople in reducing carbon emissions and reducing dependence on oil consumption.[58]

After some early but limited success in Kinsale, Hopkins moved to Totnes in England, a town of about 8 500 people, to begin the first official transition town.[59] In keeping with principles of permaculture, Hopkins spent his first year in the town observing informal practices and raising consciousness and awareness via film screenings and unmoderated town hall discussions, using 'Open Space' technology. Six months after the official launch, volunteers set up working groups to focus on a variety of topics, ranging from energy, to economics, to the arts.[60]

These groups then set about developing visible and practical manifestations of the commitment to reduce dependency on fossil fuels. Most centrally, the groups have worked together to develop an 'Energy Descent Action Plan', a blueprint of steps designed to reduce reliance on oil and reduce the town's carbon footprint. The Energy Descent Action Plan focuses on the overall goal of the transition project:

> By shifting our mind-set, we can actually recognise the coming post-cheap oil era as an opportunity rather than a threat, and design the future low carbon age to be thriving, resilient and abundant.[61]

One of the most visible manifestations of the plan is the Totnes pound, an independent currency that encourages participation and increasing value in the local economy, as a way of reducing imported

57 E Hamer 'Case study: Creating transition towns' http://www.theecologist.org (accessed 27 November 2007).
58 As above.
59 Sadly, part of what motivated Hopkins to move was that someone intentionally set fire to his personal new-built cob house, three months before completion. Harner (n 58 above).
60 Hamer (n 58 above).
61 'Who we are and what we do' Transition Totnes website Transitionnetwork.org (accessed 7 February 2011).

goods and the energy expended in their transportation.[62] Other projects include (i) persuading restaurants to carry local food on the menu; (ii) bulk purchases of solar energy equipment for local homes; (iii) building an online farmer's market; (iv) persuading local retailers to switch to low energy lighting; (v) helping businesses switch to renewable energy providers; and (vi) organising a business waste exchange, where businesses use each other's waste as inputs into their commercial processes.[63]

The 12-step blueprint[64] describes a long-term action plan, stretching out over at least ten years, and includes building bridges with local government to adopt longer-term structural projects. The most important feature of the blueprint, however, is that it is experimental and decentralised. The idea is to 'unleash the creative genius' of the community, in devising projects both big and small to reduce fossil fuel dependence. Working groups are asked to come up with their own ideas, and no central co-ordinating body approves or disapproves of the plans. Each working group is given responsibility for its own projects, but groups share information and know-how in implementation.[65]

The preliminary results from Totnes are impressive. According to a 2010 assessment of 35 transition households in Totnes, participants have observed the following savings so far for those households:

- total carbon savings per annum: 38,9 tons;
- total financial savings per annum: £19,236;
- average carbon savings per household per annum: 1,2 tons;
- average financial savings per household per annum: £601.

Projection — by the time all 35 groups or 278 households have completed the programme by the end of round 2 in March 2011:

- estimated total carbon savings per annum: 338 tons;
- estimated total financial savings per annum: £167,109;[66]

62 Ten thousand one-pound notes have been printed and circulated, after a trial run with 300 notes. TT website (n 62 above).
63 TT Website (n 62 above).
64 TT Website (n 62 above).
65 TT Website (n 62 above).
66 F Ward 'Transition together evaluation' http://transitionculture.org/2010/07/30/first-results-from-transition-together-evaluation/ (accessed 8 February 2011). For purposes of comparison, in the United States, in 2003, the average household produced 12,4 tons of carbon dioxide from its household operations and approximately 11,7 tons from its automotive uses. Energy Information Association Report (2003 data) http://www.eia.doe.gov/kids/energyfacts/uses/residence.html (accessed 11 October 2010).

Transition towns have now begun to spread like wildfire. Hundreds of communities, mostly in the United States, the United Kingdom, Canada, Australia, New Zealand, Italy, Chile and Scotland, have begun their own energy descent action planning. These communities have taken on small and large-range projects, like purchasing community land trusts for conservation purposes, acquiring and redeveloping key land and buildings with green technology, and co-ordinating car sharing and public transport projects. Most are independently funded via innovative techniques like 'crowd funding', an online fund-raising technique. One, in Scotland, is actually funded by government.[67]

Relatively little empirical research is available to document the broader success of transition towns. Scholars have conducted a survey of transition initiatives in the United Kingdom, with some interesting results. Roughly 9 per cent of transition towns are actually parts of a town or city, and 28 per cent cover a larger town or city; the rest cover rural villages and small towns. The vast majority of transition initiatives, 90 per cent, get set up by individual citizens, and 20 per cent incorporate pre-existing community groups and citizens' movements. Most groups partner with local government, businesses, charities and social enterprises. The majority of towns are still operating early in the 12-step process, with about 90 per cent having completed the first two steps, and 75 per cent completing steps three through five.[68]

Most transition town actual accomplishments thus far have focused on awareness raising and community engagement (68,5 per cent). A significant portion has undertaken food and gardening activities (39,7 per cent), waste activities (12,3 per cent) and energy activities (11,0 per cent).[69] Transition town 'timelines' have targeted a reduction of 15 per cent of a town's energy consumption two years

67 2009 Transition Network Conference Write-Ups http://transitionculture.org/2009/07/06/transition-network-conference-2009-film-and-writeups/ (accessed 8 February 2011).

68 The 12 steps include (1) setting up a steering group with a plan for its demise; (2) awareness raising; (3) identifying and liaising with community groups; (4) The Great Unleashing, a launch event; (5) forming working groups; (6) conducting open space meetings; (7) developing practical manifestations of the project; (8) retraining participants in important skills; (9) building bridges with local government; (10) honouring the elders; (11) letting the project go from here to where it wants to go; and (12) creating an Energy Descent Action Plan with all stakeholders. 'A case study of Transition Towns' http://www.theecologist.org/how_to_make_a_difference/climate_change_and_energy/360237/case_study_creating_transition_towns.html (accessed 9 February 2011).

69 G Seyfang & A Hazeltine 'Growing grassroots innovations: Exploring the role of community-based social movements for sustainable energy transitions' unpublished working paper, 2010.

in; for towns that begin in 2009, those goals will not be measured until 2011.[70]

How useful is this idea for racial disparity? As a practical example of focusing on commons-based approaches, could we harness the energy of transition towns towards the goal of dismantling persistent inequality? The transition town offers several features that might be particularly well suited to dismantling persistent inequality. First, scholars have noted that the transition town positions people in ways that comport more with their own vision of themselves and their agency. Giving participants the ability to generate their own projects to carry them forward, the transition town creates a version of people who are neither the 'passive dupes beholden to social structures', nor the 'free and sovereign agents' making choices in the market but, rather, creative people who inherit and engage in a set of social practices but who can change those practices even as they reproduce them.[71] As other commentators have described it, transition towns position people as 'subjects of change' and not just as objects of change.[72]

Second, the collective nature of the projects that participants undertake makes transition towns potentially quite radical. In the context of the environment, transition towns have not just asked participants to switch to a new brand of refrigerator; participants have considered — on their own — whether they need refrigerators at all.[73] This feature might be particularly useful in an anti-racist transition town, which would potentially ask participants to rethink the way they distribute assistance via families, social connections and communities. The challenge of dismantling bundles of practices,[74] rather than changing one feature of one practice, pays off for transition towns in both the environmental movement and the movement to dismantle inequality.

Decentralisation also appears to be key in spreading the norm changes generated by the movement. Explaining why they were eager to join transition towns, research subjects reported that they particularly valued the fact that the movement was decentralised with no real hierarchy, and that they had been asked to creatively

70 As above.
71 G Seyfang *et al* 'Understanding the politics and practice of civil society and citizenship in the UK's energy transition' unpublished working paper, 12 February 2010.
72 A Kenis & E Mathijs 'The role of citizenship in transitions to sustainability: The emergence of transition towns in Flanders, Belgium' (2009) European Conference on Sustainability Transitions: Dynamics and Governance of Transitions, June 2009.
73 Kenis & Mathijs (n 73 above).
74 Kenis & Mathijs (n 73 above) 8.

come up with their own projects around an affirmative vision of reduced carbon emissions and reduced oil reliance.[75]

These features could work particularly well in a transition town committed to dismantling persistent inequality. In keeping with the principle of unleashing community creativity, this essay will not provide any sort of script for a transition town to adopt, beyond the general principles already discussed. But what sort of things might a transition town propose to further the goal of dismantling persistent inequality? Here are some possibilities which appear quite reformist in scope and US-centric besides, but are merely meant as examples rather than as a prescriptive programme:

- generating children's trust funds, targeted to low-income children of colour, to given them the benefits of family networks of wealth;
- organising water-sharing networks to transfer excess water from high-end, high-volume users to low-volume, low-income families of colour;
- creating online social networks targeting people of colour, to pass along information, mentoring advice and news about employment in particular sectors;
- persuading urban developers to include low-income units in multi-family developments, and commit to goals for mixed-race, mixed-income developments;
- recruiting people in an urban community to sign restrictive covenants that would require them to give preference to brokers and listing services that target prospective buyers from communities of colour;
- creating partnerships for public schools in which parents provide job-training classes, mentoring networks, child care, and in which teachers and administrators share know-how and resources;
- developing community land trusts that buy land on which to develop low-income housing, to sell (and buy back) housing for low-income families, who will pay only for the price of the house, and not the land.

5 Some cautionary notes and a conclusion

This essay articulates three provocative propositions, any one of which is on its own quite contestable. First, the essay suggests that rights claims have not made sufficient headway in dismantling persistent racial inequality because they do not make sufficient room to negotiate common interests. Second, the essay advocates that legal scholars abandon rights discourse in favour of adopting more commons-based approaches. And third, the essay offers the commons-based approach of the transition town, a concept

75 Kenis & Mathijs (n 73 above) 5.

developed originally for progressive environmental purposes but potentially retrofitted for purposes of dismantling racial inequality.

Although any one of these claims is subject to significant questions, the last claim appears potentially the most easily dismissed. Are transition towns on the question of oil consumption and carbon emission translatable to the context of dismantling persistent racial inequality? The social capital scholars themselves raise significant doubt. Among a number of scholars, Putnam most famously has documented that racial differences can often diminish people's ability to develop the relationships of trust and collaborative spirit that characterise social capital or commons-based approaches.[76]

In general, Putnam's research confirmed the findings of a number of other studies — that racial difference and trust are negatively correllated. But Putnam's data appeared in particular to indicate that people who live in a racially diverse area trusted people of another race less, *and* were also less trusting of people of their own race.[77] Putnam interpreted his data to mean that diversity caused people to hunker down and to become more socially isolated.[78] Putnam's research suggests that transition towns might do much less work in dismantling persistent inequality than for environmental progress precisely because racial difference reduces the social capital on which transition towns are built.

As distressing as the research is, Putnam's work also contains the seeds of potential resolution to this dilemma. Putnam points out that the relatively well-documented phenomenon whereby racial difference lowers social connection is a short run phenomenon and, in the long run, as members of groups come together under an overarching common identity, both identity construction and levels of social trust can change. Putnam and other scholars argue that, over time, deliberate policies that create a 'new more capacious sense of "we" can ameliorate and even reverse the loss in trust that racial difference creates'.[79]

76 R Putnam '*E pluribus unum*: Diversity and community in the twenty-first century' (2007) 30 *Scandinavian Political Studies* 137 149.

77 Putnam (n 77 above) 142.

78 Putnam (n 77 above) 149.

79 Putnam (n 77 above) 162-164. Research by Tajfel and Turner confirms that creating a common can ameliorate the effect of in-group and out-group bias and lack of trust. In the Robber's Cave experiment, boys who had been assigned randomly to one camp or another displayed both out-group and in-group bias. When researchers asked the boys to come together to solve a common problem, the effects of group bias diminished considerably. H Tajfel & JC Turner 'The social identity theory of intergroup behaviour' in S Worchel & WG Austin (eds) *Psychology of intergroup relations* (1986).

It is precisely here that the concept of 'transition town' has both its greatest challenge and its greatest promise. Persuading town residents to come together under the label of transition town may prove a much greater undertaking for those residents who live in racially-diverse areas. But for those participants who come together under the umbrella identity of 'transition town', both the identity itself *and* the collaborative work demanded of a transition town blueprint might well serve to create the social capital on which commons-based approaches rely.

Beyond the thorny questions about social capital, this essay must also recognise the potential false step of putting too much stock in community activism, and failing to recognise the way in which power will come to play an important role in transition towns, if not at the outset, then when privileged interests perceive a challenge. Bakker warns:

> [A]ppeals to the commons run the risk of romanticising community control. Much activism in favour of collective, community-based forms of water supply management tends to romanticise communities as coherent, relatively equitable social structures, despite the fact that inequitable power relations and resource allocation exist within communities.[80]

Finally, as noted earlier, commons-based approaches are always at risk for being recaptured, by either the market or the state. Under threat from the market, if commons-based projects do not work to infuse larger-scale norms, values and practices into daily life and public consciousness, then the 'neo-iberal baseline' may well re-emerge to recommodify commons processes.

For example, one of the most influential micro-entrepreneur advocates, Hernando de Soto, has created a vision of 'the commons' that relies upon micro-loans, collateralised with the land, shacks, livestock and other goods informally owned by poor people.[81] This vision of the commons, which is quite reformist in scope, should be contrasted with the local efforts of transition towns to fundamentally redirect inherited patterns of extraction, production, distribution, financing, consumption and disposal. So too might transition towns that target persistent inequality ask their participants to fundamentally rethink the way in which we form our family, neighbourhood, social affiliation and workplace networks.

[80] K Bakker The commons versus the commodity: Alter-globalisation, anti-privatisation and the human right to water in the global south' (2007) 39 *Antipode* 430 447.

[81] T Besley & M Ghatak 'The DeSoto effect' unpublished working paper, London School of Economics, 2009.

Likewise, transition towns risk being recaptured by the state. A transition town overly caught up in the machinery of the state could easily transition away from the radically-decentralised form of civil society and back towards a form that focuses primarily on lobbying the organs of government to accomplish what informal collective action cannot. Although transition towns are perhaps best envisioned as complements to the state and to the market, they should not be confused with either. The damage to a commons of social trust — in the form of transition towns that 'go bad,' for example — should not be underestimated. But by the same token, the potential revolutionary energy of informal collective action towards social change should not be underestimated either.

In summary, *Mazibuko* might well have signalled the beginning of the end of whatever promise legal rights might have held for dismantling race and class inequality. This essay argues that both as an empirical and theoretical matter, legal rights have not been, and likely never really could be, all that reliable as a source of remedy, certainly not in the way that we tend to envision legal rights — investing them with some sort of magic pixie dust or seeing them as a bulwark against injustice.

Likewise, the commons is not an always-reliable remedy either. As noted earlier, political struggle will determine whether a community embraces the more radical version of the commons as a distinct challenge to neo-liberal modes of governance, or instead adopts a domesticated vision of the commons, of the sort that Ostrom describes. This essay suggests that, at least for the moment, legal scholars should abandon legal rights and put more energy into the avenue of political struggle consistent with a 'commonist' vision of what unites communities around things like access to water, education, health care, employment, land, political participation, and others. Ultimately, constructing those arguments — about peace, democracy, security, health, and community connection and well-being — is a task to which legal scholars would do well to contribute.