The Cultural Production of Intellectual Property Rights

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By

Sean K. Johnson Andrews
Master of Arts
George Mason University, 2002
Bachelor of Arts
Southwestern University, 1999

Director: Paul Smith, Professor
Cultural Studies

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George Mason University
Fairfax, VA
DEDICATION

This is dedicated to CONAIE, the Sarayacu, the people of the Intag valley, and the Pirates. Thanks for helping me see what’s at stake.
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ABSTRACT

THE CULTURAL PRODUCTION OF INTELLECTUAL PROPERTY RIGHTS

Sean K. Johnson Andrews, PhD
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Dissertation Director: Paul Smith

The argument of this dissertation is that the debate over intellectual property rights (IPR) exposes the underlying reified culture of property that pervades western capitalist societies. This culture rests on the Natural Law ideology of Locke and his defense of the liberal state. In large part the participants in the debate around IPR have presumed that the stakes are only over the way this reified culture is extended to “intangible” products. I contend that it is truly over a longstanding process of commodification, primitive accumulation, and the division of labor into mental and manual capacities which are all different dimensions of this “reified culture of property.” These are the indispensable characteristics of the “purely economic” state that is necessary to produce subjects adhering to the classic ideal of Liberal culture. IPR appears a conjunctural concern, in relation to digitization and globalization, but these are just catalysts which produce points of conflict over a more fundamental theory of value and property. Therefore the expansion of the scope and scale of IPR is less about IPR than about the continued health of global capitalism and the reified culture of property itself.
INTRODUCTION: The Cultural Production of Intellectual Property Rights: Policy as Culture in the Global Political Economy

The effects of the U.S. preference to consider radio, TV, and other communications media as nothing but business enterprises, a view being taken up in Europe and Latin America, should provoke us to reexamine questions of property among these media, be they state- or privately-owned.¹

This dissertation is not about intellectual property rights. It concerns the debate over intellectual property rights (IPR) and what that debate reveals about the reified culture of property that pervades Western capitalist societies. The debate about IPR is centered on the way digitization and globalization have changed the way the properties in question are produced and distributed, and their owners remunerated; but the rupture created by these global, digital processes opens up broader questions of value and the liberal defense of law and the state. This is especially visible in relation to the imposition of this reified culture of property into other cultures through the policies leading to what is understood as globalization. I argue that the opening created by globalization and digitization and evidenced by the debate over IPR allows us to reevaluate this broader culture surrounding property and to contemplate allowing for alternatives to emerge. To engage in this evaluation, however, we must develop a conceptualization that helps us to more deeply understand culture. From here we can evaluate the specific relation

¹Néstor García Canclini, Consumers and Citizens: Globalization and Multicultural Conflicts (Minneapolis: University of Minnesota Press, 2001), 9.
between property and the state in the Anglo-American culture—as well as the way culture itself can be a part of the reimagining of this relationship. It allows us to see that the conflict over intellectual property rights should really be seen as a conflict over property rights in general.

To reiterate: looking at the debate over IPR, I argue that what it shows is a potentially terminal crisis around the concept of property rights that is most visible through the lens of the cultural. For it is only by assuming property rights (and intellectual property rights) as they are currently configured as pre-political, as not cultural, that their expansion in scope and extension around the globe can be seen as “natural.” The extension of property rights in both the tangible and intangible to other cultures through globalization, alongside the more frequently discussed emergence of what Henry Jenkins calls the “convergence culture” of new media, precipitates a crisis in the current configuration.¹ The first case, in the projection of IPR onto other countries through treaties and institutions like the World Trade Organization (WTO) shows the narrow cultural relevance and specific cultural history of the general concept of property and the political institution which protects it—namely the liberal state; in the second case, the exciting discovery of the participatory, social production of value around so-called intellectual property recalls the observation, made by Marx, that all value is produced socially. I ultimately argue that it is in this temporal and spatial opening, facilitated by the uneven distribution and development of globalization and digitization, that we can see the already vibrant alternatives to the current configuration. Thus this dissertation is not about IPR, but about what the debate about IPR tells us about property, value, and power in the early 21st century.

One of the most important revelations of this analysis is what I’m calling the culture of property. By a culture of property I mean a culture whose social relations are ever more deeply commodified; where the ultimate goal is to subject all social interaction (not just those of

commerce) to the market system’s understanding of the social process of valorization, geared as it is towards accumulation according to privately held properties; where the primary role of the state is held to be the protection of that process according to the ownership and distribution patterns already existing; where the owners of property are presumed to have created the value protected by the state; where the state protection of this property is held to be natural and/or scientifically necessary thus beyond democratic reorientation; and, finally, where this formal legal environment helps to determine a culture such that individuals respond to the functional discipline of the market as if it were a force of nature rather than a historically contingent social relation.

Regarding this culture of property, I make three related points in this dissertation. One, mentioned above, is the most fundamental: we must begin with a coherent conceptualization of the cultural and its relationship with politics and the state. In chapter one I develop the concept of cultural efficacy in order to consider the role of law and the state in shaping and imposing models of culture. In contrast to recent trajectories in the field of Cultural Studies, I argue that there needs to be a renewed interest in policy—not as it relates to culture as in cultural policy studies—but policy and Law itself as a kind of culture. I argue as well as giving new respect for questions of the law and the state in relation to culture. The latter forms some of the strongest channels through which Raymond Williams’ enigmatic “culture as a process” is forced.

The second point is more related to the dominant understanding of property, which I argue must assume that the most fundamental struggles over property and law have already been settled. This an extension of the above point about policy—the law—as a kind of culture. This is most evident when laws governing a particular community or a specific set of practices are more broadly applied. There is a subpoint here about the distinction between formal and functional power in relation to the law: it basically notes that formal guarantees are not the extent of power; as Poulantzas says, power extends far beyond the state. On the other hand, the informal means of
exerting functional control are also not separate from the state. These each exist in a dialectic that, again, is wrapped up in the political use of culture.

Adherents to this culture of property must assume, in Marx’s terms, a previous round of primitive accumulation and the direct disciplinary force of the state in order to presume a natural order of *homo economicus*. This is another way of saying that the staunchest defenders of this reified culture of property rely on the cultural efficacy of their own presumptions in order to project this model of society as a universal set of norms with such unquestioned political stability and legitimacy it is unnecessary to have the state. Or, from another direction, they deny the political function of the state and the law in crafting—both historically and presently—a social order and population that more closely resembles the pure model its proponents argue is a natural state of affairs. Central to this model is the Lockean understanding of Natural Law: and central to Locke’s model is the concept of value and its relation to property, the division of labor, and the state.

The debate over Intellectual Property Rights potentially undermines this culture of property because the metaphorical extension of property rights to these immaterial objects illuminates the inadequacy (and malleability) of this central concept of value. The debate about intellectual property is largely over the way value is produced and distributed relative to the legal owners. But many of the same observations apply to the valorization of tangible forms of productive property. The third point, therefore, is that the conjunctural struggle over imposing intellectual property rights on a global level should be seen less in terms of the history of copyrights, patents, and trademarks—which is the context in which most scholars put it—but in relation to the history of property rights. While this seems to be the least theoretical of the points above, it turns out to be quite elaborate. The bulk of the dissertation is spent looking at the Lockean understanding of value in relation to both property and IPR and the way the debate over IPR can be extended to what seem to be settled understandings of property rights and the state.
The three main points of the project, therefore, are: first, we need to have an understanding of cultural efficacy which incorporates the state; second, that law and the state are mutually constituted with and through culture; and third, that, in the case of IPR, the reified understanding property that organizes Western notions of law and the state in relation to culture and value is more important than the debate about IPR alone. This culture, I argue, is potentially undermined by the expansion of this understanding onto new objects and into new territories. As mentioned above, my entry point into this topic is more through the debate over intellectual property rights than through engaging in a close study of the specific articulations of those rights themselves. I understand the positions within this debate as being the product of a conjunctural set of circumstances—meaning they are unique to our contemporary moment—but which are inflected by a more fundamental cultural tension at the heart of capitalism and modernity.

As IPR currently stands, laws which prescribe intellectual property rights have been expanded in both scope and scale on the domestic (US) and international levels. Within the US a sampling of this expansion includes: the criminalization of circumventing Digital Rights Management (DRM) in The Digital Millennium Copyright Act (DMCA) of 1996; the extension of copyright terms by an additional 20 years (through the Copyright Term Extension Act of 1998); and the PRO-IP Act of 2007, which increases civil and criminal penalties for copyright and trademark penalties and creates a cabinet level position for the national and international enforcement of IPR. Most of these increase only the scope of the protection—for instance the length of time the IPR is protected, the move to making piracy or DRM circumvention a criminal (as opposed to merely civil) offence, and the increased resources in executive and judicial institutions for their enforcement.

At the international level, however, this increased scope is applied at a greater scale. The TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights) riders were made essential in the reincarnation of the GATT (i.e. the WTO) in order to supplement the treaties and
rules administered by UN’s WIPO (World Intellectual Property Organization). The latter were seen as too soft on developing countries, kowtowing to their needs and lacking clear enforcement mechanisms. TRIPS was intended, in no small part, to give countries like the US (and their multinational corporations and investors operating abroad) some clout in forcing these increased rules onto other countries. TRIPS is connected to the WTO’s “dispute resolution” mechanisms which allow for legal trade sanctions (among other enforcement procedures) to be made in retaliation for failure to protect IPR.

Each of these represents a move to more forcefully protect Intellectual Property Rights. I call maximalist the above legislation, the interest groups that support it, and its corresponding ideological position within the larger debate. The term maximalist in relation to IPR in this dissertation should be understood as a position advocating the protection of Intellectual Property rights in as stringent and forceful a manner, increasing in both scope and scale, as property rights in the “tangible.” Although this maximalist position in the debate over IPR is an ideological position, supported by various legal and economic theories explored throughout this project, it is also peopled by a well defined interest group. Like the condition known as globalization, maximalist protection of intellectual property was brought about through policies written and implemented by a handful of powerful actors. Peter Drahos and John Braithwaite interviewed a senior US trade representative in 1994 who claimed that “probably less than 50 people were responsible for TRIPS.” Key players in the US pharmaceutical, computer chip, and media content industries were given key positions in the advisory committees setting US trade agenda in the Uruguay Round; they then partnered with European and Japanese conglomerates to draft the

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“intellectual property principles that became the blueprint for TRIPS.” These lobbyists support the maximalist position because it helps to maintain or expand their business model and it will aid them in retaining the value they possess in terms of IPR assets.

However, as Drahos and Braithwaite point out, these interest groups—and especially the Pfizer corporation—also enlisted the “analytical backing and justification” of think tanks like the Heritage Foundation, the American Enterprise Institute, and the Hoover Institute by funding conferences, funding specific projects, and making direct financial contributions. Whatever the results of these contributions, these think tanks and the other foundations that fund them generally support a maximalist view of protecting IPR.

This maximalist view is usually held alongside a commitment to what are held to be classical liberal principles of private ownership, free markets, and limited state regulation. Taken together, I refer to these as the reified culture of property. Although the early chapters of this dissertation will look to the Lockean origins of this position, the contemporary resurgence of this position is due to a mid-twentieth century movement of a coalition of economists and legal scholars to reform US law according to their understanding of liberalism. This movement, like the maximalist position, was inspired by a set of conjunctural circumstances: the transformation of US law and the economy during and after the New Deal. Seeing the New Deal as an affront to the natural laws governing the relationship of state and economy, this insurgent group of lawyers, economists and political scientists set out to reorient the US state towards the principles of classical liberalism.

In this dissertation I will speak about this movement as the Law and Economics movement. While the stated mission of this interdisciplinary enterprise is simply to bring economics and the law into conversation, the conversation is limited to using what people outside

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5 Ibid.
6 Ibid., 70.
the movement would identify as libertarian, Austrian, classical liberal, or, following Milton Friedman, “neoliberal” understandings of economics. This means seeing the state’s role as limited to the protection of property of all kinds. Thus, like the liberal capitalist view of property rights, maximalists are both an interest group and an ideological position. The advocates for maximalist IPR should be seen as a subgroup of larger ideological movement.

They are for increasing the control they can have over this property by using tools like Digital Right Management, and employing criminal law to force the emergent practices of piracy and counterfeiting back into obscurity and social ostracism. This dialectic of reforming cultures around the world—of their norms and practices—through laws and coercion, is matched by attempts to materially control what Lawrence Lessig calls “the technology to capture and spread tokens of culture” by increasing the exclusivity of its use and distribution through DRM, digital signatures on commodities produced in global commodity chains, among others. By making it harder to transfer and copy—and making it legal to make it harder to transfer and copy—the maximalists goal is to transform the ideological position that IPR is property into a natural principle of modern culture. In other words, they hope to reify it, making it an obstacle to be navigated rather than a culturally constituted juridical fiction to be negotiated.

In principle I am ambivalent to this maximalist position on the isolated topic of IPR. While I don’t agree with it in the least, it is not because I see IPR as being unique. On the one hand, the more complete privatization of US popular culture is one of the most important processes of the twentieth century. As chapter four explores in depth, the Cultural Studies

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tradition was at least partially founded to challenge and understand the implications of the commodification of popular culture. This commodification has itself been increasing in scale and scope since the beginnings of industrial capitalism. Therefore it is not surprising that, having saturated our “lifeworld” with these privately owned commodities for the past half century or so, the erstwhile owners of said properties have returned to claim their pound of our collective consciousness.

On the other hand, if we look at the principles of liberalism as they have operated throughout the history of Western capitalism regarding productive property in relation to the state, I would argue that it makes perfect sense that maximalists are asking for protection from the states of the world for the valuable property they now own, even if that property is “cultural.” Liberalism is founded on the principle of using the state to protect the socially created value embodied in private property, particularly property in the means of production. This principle has come to the fore in western culture in the era of neo-liberal retrenchment (aided by the Law and Economics movement mentioned above); in the policies advancing what we now understand as globalization, this principle was explicitly emphasized above all others. Undermining the cultural efficacy of this more fundamental principle of liberal property rights—and understanding its history, the priorities it gives to the state, and its limiting and coercive conception of value—is the most powerful means of challenging the expansion of IPR.

Unfortunately a majority of the scholars criticizing this maximalist position—the scholars who form the opposite position within the narrow debate over IPR that is the object of this study—are also confined by this reified culture of property, and the challenge they concoct amounts to splitting hairs. Most balanced critics of the maximalist position are primarily interested with “the issues that stem from assuming a metaphorical relationship between property and
intellectual property.” They say this is because intellectual property is intertwined with what they call “culture.” Among others, issues of free speech (which relies on the free use of the public domain) and economic development (which is supposed to be different in the “information economy”) mandate against this. Further, the expansion of digitization means that more aspects of the social and natural world can be understood as “information” and, therefore, “property.” This requires what they call a “balanced” view: within the debate over IPR, I will call the position these mainstream critics take in relation to maximalist IPR the position of for “balanced IPR.” I explore these arguments, but the principle I intend to question first is the principle from which they begin: that the reified culture of property rights is beyond question.

In part, this leads to seeing the globalization of liberalism—and, therefore, of the reified culture of property—as beyond question. Thus Drahos and Braithwaite lament that “[intellectual property rights] raise levels of private monopolistic power to dangerous heights, at a time when states, which have been weakened by the forces of globalization, have less capacity to protect their citizens from the consequences of the exercise of this power.” They are correct, but, again, I contest the characterization of “the forces of globalization” as if they were distinct from the spread of privatization through specific liberal-oriented policies. In this regime, the state is not inherently weakened; it is just forced to limit its use of coercion to the protection of property.

As I said, I see the positions of this debate as being motivated by particular circumstances, but reflective of a more fundamental debate over this reified culture of property. The conjunctural circumstances in which this debate takes place are most clearly evident to the average

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9 Drahos and Braithwaite, *Information Feudalism*, 3. (Emphasis added.)
Most participants in this debate presume that its impetus stems from the processes unleashed by the political and technological projects of globalization and digitization. The distributed production of global commodity chains and peer-to-peer networks reveals, i.e. helps to make visible, on the one hand, the social production of value and, on the other, the arbitrary nature of the legal fiction of property.

On the one hand, this conjuncture creates an enormous possibility for the reorganization of various kinds of production and distribution arrangements. Especially through the increased possibility of individual production and distribution of media, the so-called “culture industries” of commodified movies, music and publishing are being forced to reorganize. The protection of these industries through IPR would reduce the need to reorganize. As expressed by industry leaders like the RIAA’s Hillary Rosen, this increased protection is necessary because it will undermine the ease of piracy facilitated by digital distribution. But the equally vigilant move to use trademark law to protect copyrighted articles shows that they are just as fearful that a completely independent production and distribution system—using tools like YouTube—would make piracy unnecessary because consumers were simply more interested in the work of other consumers. At the current moment it seems to be inevitable that the pirates will force this reorganization and that every Web 2.0 interface they lock down with IPR controls will be replaced by one that is more open; in the current cultural climate these industries seem overwhelmed by difficulties inherent in trying to balance the freedom of speech they are supposed to encourage and the authoritarian use of technology and the law that would be required to tamp down on pirates.

In relation to digital technology, the maximalist position currently suffers from a lack of legitimacy and a dearth of strong technological locks in relation to music and movie piracy on a global scale. However, if this ideology in relation gains a foothold; if the technology is developed to even more carefully police the digital environment; if countries make ISPs more responsible for
policing their networks or the network itself becomes two tiered to the benefit of incumbents; if any or all of the above occur, it is likely that the apparent inevitability of this now visible process of valorization will turn out to be as ethereal as the previous myths of the democratic essence of communication technology. This point has been made by many communication, legal, and political scholars—and drives much of the criticism of the maximalist position.

I am interested in this argument, but more so in what it reveals about the social process of valorization that is essential to almost all productive property. While there are obviously material differences motivating the distinction between these forms of production and more tangible production processes, there is continuity to the enclosure of both. The foregoing example focused on copyright piracy; trademarks are of similar concern. Balanced IPR legal scholar Yochai Benkler draws attention to the recent US law restricting the dilution of trademarks.\textsuperscript{10} He argues that this law demonstrates how material transformations are driving the further enclosure of our cultural commons. Traditional trademark law protected trademarks from infringement, meaning companies making similar products couldn’t use similar names, logos or other identifying symbols because it would confuse the customer. This was not for the benefit of the company, but for the customer, who needed to have faith that products that looked the same were made by the same company. The anti-dilution law changed this because it saw trademarks, in Benkler’s words, as communicating “cultural” rather than “commercial” meanings.

The law restricting dilution expanded this protection to encompass any product that had a mark, logo, etc. that was similar to the trademark owner’s regardless of whether there could be any confusion, particularly in the case of well known brands. He says this is due to the fact that “brands have become the product itself, rather than a marker for the product:” “The product sold in these cases is not a better shoe or shirt—the product sold is the brand. And the brand is

\textsuperscript{10} The law in question was the Federal Trademark Dilution Act of 1995.
associated with a cultural and social meaning that is developed purposefully by the owner of the
brand so that people will want to buy it.” The capitalization of seemingly immaterial social and
cultural meaning, however, is not just a randomly generated necessity: it was the product of a
material transformation in the global economy.

These material transformations, often understood in terms of globalization, are interwoven
with concerns over IPR. A 1987 GAO report often cited as an early landmark in US anxiety over
international IPR makes the counterfeit of US trademarked products as a primary concern.

The recent increase in concern over inadequate protection of U.S. Intellectual property
rights is associated largely with the economic development of several newly industrialized
countries. Many businesses in these countries have attained the capability for mass
production and distribution but lack name brand recognition and find it difficult to
compete with established products. Therefore, they often resort to reproducing products
already well known in the world marketplace.12

The report warns against counterfeiting as a strategy used by foreign corporations to leapfrog into a
higher income bracket. To consider this a strategy as such—often called “moving up the value
chain”—is contingent on seeing the US and US corporations at the top of a value chain, where
the “ideas” are produced.

Certainly it is possible that there were legitimate threats from foreign firms. However,
Robert Brenner, who sees this leapfrogging as a primary cause of the falling profitability of US
firms on a global scale, situates this concern in the early 1970s.13 The strategy at the time was
initiated by Western corporations aiming to employ cheaper, less organized labor through global

Yale University Press, 2006), 448.
12 United States General Accounting Office, "International Trade: Strengthening Worldwide Protection of Intellectual
sourcing. The early trade initiatives of the 1970s and 1980s—primarily concerned with the sourcing of US apparel and computer technology—were also instrumental in the early articulation of what later became the blueprint for global IPR. Drahos and Braithwaite cite the Caribbean Basin Initiative during the Reagan years as including one of the first tarries in the IPR war; Ellen Israel Rosen says the same trade regime transformed the import/export ratios between the Caribbean countries and the US, and eventually Mexico and the US, particularly in relation to apparel goods.\textsuperscript{14} The trade regime gave preference to what Jane Collins calls “branded marketers.”\textsuperscript{15} Unlike traditional branded clothing manufacturers, who might own a factory somewhere, these firms focus on the “high value added” work of developing brand identity—work that becomes extremely profitable when the products to which the brand is attached are produced at increasingly lower wages, through contracts to foreign firms who assume all the risk of purchasing brick and mortar factories and dealing with the complications of human laborers. To paraphrase Benkler, the trade regime gave preference to companies who thought of themselves as only selling a brand.

The same firms concerned with trademark dilution in the US are concerned with both trademark dilution and trademark infringement abroad. I would contend that Benkler’s observation about the material changes in the way brands are considered is rooted—more or as much—in this global contingencies; that the value of the brand is produced in a longer cultural process of meaning making is analogous to the way the branded products are produced through a global chain of production. In both cases, sitting at the top of the hierarchy of value is the brand owner. Protecting this immaterial value is a key policy priority, but the profitable exploitation of this mark is ultimately based on very material realities.


On the other hand, the processes of digitization and innovations in science and technology (for instance the ability to capture the essence of a living organism in a sequence of DNA) create the possibility that intrinsically different aspects of nature and human culture can all be classified under the single moniker of “Information.” So software programs (copyright), corn seed varieties (patents), and the visual signifier of the Coca-Cola Company (trademark) are all protected under the same kind of rubric. Legal scholar James Boyle calls this a “homologization of forms of information” which is justified (in the dominant discourse) because of “their liquidity, in the monetary sense of easy conversion from one form to another.”  

In other words, because they can all be captured digitally, they can be considered essentially identical as “information.” Homologizing these varied objects under the heading of “information” or “intellectual property” means that “ideas originally applied to one ‘information area’ seem to apply to another, first in metaphor and then in technological reality. The same problems arise in area after area and, increasingly, solutions are borrowed too.” In other words, as May says above, the problem is the expansion of the scope of this metaphorical homologization between information and tangible property to include more and more elements of social and cultural life.

This creates potential problems, particularly when properties in “cultural heritage” (e.g. traditional medicines, clothing patterns, or dances), genes, or business processes are thrown into the mix of objects/objectifications being discussed. How these are defined? Who protects them? Who is the legitimate owner of property in a traditional practice going back hundreds of years or a piece of the human genome millions of years in the making? While these might seem to be acts of obtuse navel-gazing, when it comes to assigning these rights, there is clearly much at stake. Boyle and others have done a keen job of evaluating the implications of these changes.

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17 Ibid.
Both of these changes are consequences of conjunctural transformations, but they reveal contradictions in the way we understand the production of all forms of value. While balanced IPR critics try to limit their observations to an analytical distinction between material and immaterial property, the Maximalist advocates recognize the continuity between the production of value in both tangible and intangible property and demand the liberal state protect all these forms of value as property of the legal owners. I argue therefore, that proponents of the balanced position are challenging the continuum of property from the wrong direction. Instead of trying to stem the downstream torrents of privatization, it is better to begin closer to the source: at the more fundamental culture of property and the liberal state that protects it. The conflict that Boyle and others see between the amazing potential of globalization and digitization and the maximalist attempt to channel this potential according to the dictates of the reified culture of property is not a conjunctural phenomenon: it is a recurring tension in capitalist modernity.

In short, the conflict over intellectual property rights is between: those who see modernity as an ongoing process that requires balance, democratic participation, and rational inquiry, which allows for the universal improvement of the human condition in all its particularity; and those who see the improvement not in terms of the improvement of humanity, but “the improvement of property, the ethic—and indeed the science—of profit, the commitment to increasing the productivity of labor, the production of exchange value, and the practice of enclosure and dispossession.” The latter is most clearly articulated in the principles of classical liberalism and its tension with the other face of modernity, the more democratic energy, is recognized as a problem by critics of IPR. However, the more fundamental culture of property is so deeply engrained as a cultural dominant at the heart of the liberal resurgence of global capitalism that it often inspires critics of the maximalist position to see more liberalism as the only answer to too much property.

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In spite of this basic similarity between the maximalist position and their critics, many of the latter have also developed powerful arguments about the way value is produced in IPR that are strikingly similar to criticisms made of property in general a century and a half ago. For instance the peer-to-peer (p2p) process of social valorization that balanced IPR scholars like Lawrence Lessig and Yochai Benkler champion are crucial evidence in their case against the maximalist position: they just seem unaware of how these arguments could be easily as applied to material production. Because they presume the division between mental and manual labor as natural, they are unable to see the continuity of this social valorization—and its expropriation by what could be argued are invalid owners—throughout the production process. This is all the more true when the properties in question are deemed to be key components of the productive economy, as they are in the so-called Information Society. By making visible the social process of valorization they help to undermine the softest, yet most important pillars of this reified culture of property: value. These critics, therefore, form both a paltry opposition to the maximalist position and the other key foil for the arguments of this dissertation.

In addition to these two very public, very present positions, I implicate a third position. The third position in the debate over IPR within this dissertation is the intersection of this debate with the field of Cultural Studies. The debate between the above positions of the maximalists and their critics converges on parallel, but interconnected fields of politics, economics and culture. That culture forms one of the key fields of debate should make Cultural Studies a primary authority in discussing the way the law and the economy affect and interact with culture. However, the field itself is mostly adrift in relation to conceptualizing culture in relation to economics, law, and the state. Indicative of this is Ted Strifhas and Kimbrew McLeod’s observation in their introduction to a special issue of *Cultural Studies* on IPR,

As comparative outsiders to the legal sphere, however, cultural studies practitioners find themselves at a relative disadvantage with respect to being heard by those who purport to
direct (create, review, enact, contest) legal discourse. Whatever wiring connects cultural studies and the law often barely seems to close the circuit. Cultural studies may burn brightly with cultural capital, but its legal capital often seems to yield only a dull flicker. In response to what they see as primarily a credibility gap they don’t advocate understanding the law better or engaging in deep conversations about the role of the law in relation to culture—and vice versa. Instead they advocate “performative utterances” and “culture jamming” to undermine the authority of the law and, “other forms of critical praxis that engage the legal but that cannot be reduced to it.” In the process of making these recommendations, they happen upon a crucial distinction, one which I outline in much detail in relation to the framework developed in chapter one in terms of formal and functional power. They say that “any theory of law must account for its interaction with something that is not law or with that which exceeds it. Better yet, any strategy for contesting the law should proceed through more than just legal channels, lest we inadvertently reinforce the legal realm’s claims to power, authority, and exclusivity in the process.” However this is the limit of their discussion of the law and the state in relation to culture. This is not appropriate for a discipline initiated to engage these questions.

Therefore, in the interest of the primary critique of the reified culture of property at the heart of this dissertation I’ve attempted to devise a framework to conceptualize culture. In turn, as the phrase “reified culture of property” indicates, I have privileged this concept of culture as a lens through which I am refracting the both the juridical concepts of property and intellectual property and the subjects of law, economics and political theory. Thus, while the cultural is the principle ground of this inquiry, it intersects with aspects of society normally considered by the disciplines of political science, economics and legal studies. In part, exploring the cultural in relation to these

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20 Ibid.: 131.
other disciplinary discourses is necessary because the practitioners of these disciplines adopt the concept of “the cultural” in their own exploration of property and intellectual property rights, often without any reflection on where or how they have derived their definition. Likewise, they explore aspects of a given social formation as “natural” when cultural studies scholars would consider them the product of particular historical and social struggles: this is especially the case with the Natural Law discourse about property rights, the law, and the state which often inform discussions of intellectual property rights.

The need to specify the cultural in relation to these disciplines and the need to look at these disciplines largely stems from the same general problem: reification. In so far as Cultural Studies has a single purpose it is in historicizing the processes, contextualizing the products, and problematizing the politics of reification. By reification I mean the epistemological fallacy whereby processes and relations between people are perceived as natural, ahistorical, thingly obstacles to be navigated, rather than social constructs to be negotiated or altered. Divisions in the field of Cultural Studies contest the primary methods and theories best equipped to execute this task but when the field is positioned in relation to the larger field of power and politics, most everyone can agree that undermining the force of reification is an essential preliminary step. In short, the foil of Cultural Studies within the discussion of this project signals a failure and an opportunity. While I see it as an inadequacy of the field to engage in the discussion of political economy and law in relation to property and IPR in a coherent way, I also see the potential to employ the insights of cultural studies to this discussion—provided that it is done with rigor.

Thus far I have charted the space in which this project takes place. I began with a description of the ascendant legal and geopolitical circumstances of TRIPS and the DMCA as well as the more general atmosphere of ascendant liberalism. Then I outlined what I see as the primary positions of the debate —the present tension between the Maximalist position and their critics along with the potential position of Cultural Studies within this debate. I situated these in terms of
what I see as conjunctural circumstances (globalization and digitization) and a more fundamental cultural reflex—what I have termed a reified culture of property. Throughout this I have reiterated what my understanding of these circumstances has led me to see as the primary goal of the project—undermining the reification of this culture of property. As mentioned above, I see value as one of the pivots through which the debate about IPR turns into a debate about property in general. I will now briefly outline how I see this, illustrating it through two anecdotes taken from areas of the world where this culture of property is yet to be reified. Following this, I will provide a brief outline of the chapters.

Un-Locke-ing Culture: Labor, Value, and the State

In her article “Copyright as Myth,” Jessica Litman discusses “the problem of unintentional or inadvertent infringement” of previously published works. Contrasting the mandates of copyright law (which would require permissions from all sources of inspiration) with that of the creative process of authorship, she declares that “all authorship is fertilized by the work of prior authors.”

The work of the creative individual that intellectual property rights are supposed to sanctify with ownership is inevitably the product of a variety of other socially produced inputs. As this dissertation will argue this is as true with other forms of productive property. It is also true of the individual most often cited as inspiring the philosophical justification for property rights in general: John Locke. Locke’s defense of private property and the liberal state is infused with the ideas of a myriad of sources that he synthesizes from what Raymond Williams might call an emergent “structure of feeling” in seventeenth-century thought. Chief amongst these, as chapter two of this project elaborates, was the ideology of “improvement” central to the natural science

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movement that included Sir Francis Bacon. However, Locke is usually cited as the originator of the idea of the labor justification of property—a curious fact since he never admitted to writing the tract from which it is taken (The Second Treatise on Government). Thus while I follow a convention in the literature of property rights in attributing authorship of this idea to Locke, it should be understood that, when I refer to Locke, I am referring to a wider cultural formation of which he is the most oft cited representative.

The centrality of Locke to arguments about property is well established—so much so that some might find it tedious to whip this dead horse. However, as I outline more in future chapters, there is renewed interest in his defense of property precisely because of the conjunctural struggle over IPR and property rights in general as a result of globalization and digitization. I argue that this is due to the centrality of the concept of value within his Treatise. Locke’s defense of property is really a defense of the fundamental culture of property that is under threat and that maximalist IPR—which relies on Lockean assumptions about ownership, value, and its protection by the state—is meant to rescue. Likewise, balanced critics of the maximalist position reproach the maximalists for their overreach in applying Locke’s defense of property to intellectual property. Both, in other words, see Locke as germinal to the debate about IPR; I argue that this harmony of their views is due to the fact that the debate about IPR is really a debate about the basic culture of property in Anglo-American society. Since this culture of property is the primary focus of this project, it is hardly a tangent to review Locke’s Treatise and the circumstances of its articulation.

Chapter two provides a comprehensive overview of Locke and the cultural and social circumstances of his Treatise. Other chapters meditate further on the implications of his thought for the Natural Law justification of property rights, the social process of valorization, and the liberal state. For the moment, I will just give a brief statement summarizing what I will mean when referring to a Lockean understanding of property and the state. Following this, I’ll give a
coup de examples of how globalization is working to undermine the concept of value that is at the heart of this understanding. I will then end with a short overview of the chapters.

Locke bases his defense of the liberal state on what he calls a “natural law.” His articulation of this law is in response to an opposing argument made by Robert Filmer who says that, if God gave everyone the land in common, then the only way for private property to exist is for a God appointed “patriarch” (or monarch) to legitimate those rights. In other words, Filmer argued that a democratic government would begin with property held in common, only parcelling it out by popular mandate: private property necessitated a God-appointed monarch.

Since Locke was arguing for a parliamentary monarchy, famously dividing it into separate branches, the prospect of a return to absolutism was unacceptable. Yet he felt that property must be privately held. On this count, Locke also had to argue against the religiously oriented popular movements which had sprung up during the English Civil War who argued that, in so far as there was a Natural Law, it was that “God is no respecter of persons.” This was taken, in its most extreme versions, to mean that there should be both political and economic democracy: that all people should have the vote and that there should be a reversal of the enclosures of the previous century—and maybe even a dismantling of the property system.

In writing his treatise, Locke had to position his argument for property and for a secular, parliamentary democracy in such a way as would justify both, but which would place a bolster against the possibility of economic democracy. His solution was to make one contingent on the other: government could be democratic, but only in so far as it supported property. This was because rights to property were given by a natural law, which preceded the state: instead, private ownership of property flowed from the individual labor of appropriation. To paraphrase, even though God might have given everyone the world in common, there was obviously a natural law which said that, once someone had “improved” a piece of land through their labor, they could claim exclusive ownership of it. On this basis, Locke said that there could be a democratic
government provided that government protected this natural law: in so far as the government failed to protect private property, that government was illegitimate.

The role of value in this argument pivots on the curious idea of the labor of “improvement” that lies behind Locke’s claim. While he was interested in matters of politics, Locke was more driven to lay down a new economic model. As mentioned above, he was inspired by the Baconian idea of improvement that had justified much of the enclosures and the transformation of swamps and other spaces of the English countryside into more efficient farmland. His secondary goal in the *Treatise* was to advocate for more efficient farms and a more frugal gentry running them. The labor of improvement in this theory, therefore, referred not to the laborers themselves, many of whom increasingly had no land of their own: instead, the natural law of the appropriation extended from the laborers one employed back to the owner of the property. In short, the justification of private property still held if the labor of improvement and appropriation was done by the owner’s servants or tenants rather than themselves. Since the more efficient farms he advocated required a good number of these laborers, paid in wages, the economic dimension of this value creation was increasingly hypothetical. By this, I mean that few of the labors of appropriation were done by the people claiming ownership in the improved property. Instead, the value that was produced—the improvement of the land through the labor of appropriation—was not of the individual laborer but instead took place through a much wider process.

This wider process of social valorization is the problem that Marx hoped to point out. After all, if the economic argument for improvement necessitated enclosure of the commons, dispossession of the cottagers, and the collective use of their labor in capitalist farms, it hardly followed that this justified a government which protected the individual property owner on the basis of “Natural Law.” However, as the maximalist defense of IPR today, Marx noted that the defenders of the reified culture of property in his own time
Like to present every attack on the capitalist form of appropriation as an attack on the other kind of property, the property that has been worked for, indeed an attack on all property. [. . . ] The general legal conception, from Locke to Ricardo, is therefore that of petty-bourgeois property, while the relations of production they actually describe belong to the capitalist mode of production. [. . . ]

1) economically they oppose private property resting on labour, and show the advantages of the expropriation of the mass [of workers] and the capitalist mode of production;  

2) but ideologically and legally the ideology of private property resting on labour is transferred without further ado to property resting on the expropriation of the direct producer.

By illuminating the extended process of reproduction—that is ignored by both the economic and political defenses of Lockean property—Marx hoped to undermine this culture of property more generally. He hoped to undermine the system wherein “this fixation of social activity, this consolidation of what we ourselves produce into an objective power above us, growing out of our control, thwarting our expectations, bringing to naught our calculation.”

Marx was looking at the industrial form of capitalism, but many of the presumptions about this culture remain. The power of capital in relation to labor and the assumption that laborers are less important to the production of value is central to the contemporary capitalist order. As balanced copyright critic and legal scholar James Boyle points out, “intellectual property and its conceptual neighbors may bear the same relationship to the information society as the wage-labor nexus did to the industrial manufacturing society of the 1900s.” Boyle says that relationship of IPR to the idea of the information society has been under analyzed; this may have been the case before his path-breaking work. But now the need is to analyze the analogy he raises between the basic structure of capital and property in both ages—and how we should therefore understand the push to

instantiate the maximalist position in the present day. In both times, the legal structure was presumed to allow all the benefits of the economy of scale to flow to owners concentrated at the top; this is presumed to be because of the fact of private property and the incentive it provides.

Yet the ideology justifying this circumstance is still based on the notion of the individual entrepreneur. After the fact, this entrepreneur/owner, like the owner of a large farm in Locke’s time, is taken, legally, to be the producer of all the value contained in a property; the only possible state in this liberal ideology is therefore one that protects this individual property, even in what are socially produced values. Liberalism thus makes the law protecting property, which is supposed to be based in some way on a democratic agreement, an apolitical fact of life. As the conceptual framework lays out in detail in chapter one, instead of a mutual constitution between law and culture, law becomes a reified structure: it reifies the cultural process that could reform the law and make it fit the transformed social relation.

In terms of so called “real” property, this reified culture remains. But the struggle over IPR is helping to throw it into greater relief. As critic Lawrence Lessig maintains in his book *Free Culture*,

> We live in a world that celebrates ‘property.’ I am one of those celebrants. I believe in the value of property in general, and I also believe in the value of that weird form of property that lawyers call ‘intellectual property.’ A large, diverse society cannot survive without property; a large, diverse, and modern society cannot flourish without intellectual property.

But almost as soon as he says this, he undermines his own argument, saying, “But it takes just a second’s reflection to realize that there is plenty of value out there that “property” doesn’t capture.
I don’t mean ‘money can’t buy you love,’ but rather, value is plainly part of a process of production.”  

The realization by critics of maximalist IPR of this extended process of production is one of the primary challenges to the Lockean understanding of value within the culture of property. Although Lessig and others place a limit to the way digitization and globalization make this more visible, this dissertation argues that if we take seriously the notion of the social production of value, we should see that social production of value as relatively widespread, far beyond just these recently commodified objects. The notion that there is “value out there that ‘property’ doesn’t capture” is something one could argue about most of the value that markets claim to both measure and distribute. But to move in this direction would require a much more fundamental critique of the culture which assumes private property as a founding concept. As we will see in the case of digitization and globalization, this is the case even when it is obvious that the gains in efficiency are not due to the owner, but to the extended process of valorization he is able to hook into.

Critics of IPR are most attuned to this process of valorization in relation to digitization or what Henry Jenkins calls *Convergence Culture*. In his most recent book, *Remix*, Lessig builds upon Jenkins’ “participatory culture.” In relation to the cross platform, multimedia environment inhabited by so-called “digital natives” of the early 21st century, Jenkins says that we should begin to think differently about how media—and meaning and value—are produced and consumed: “Rather than talking about media producers and consumers as occupying separate roles, we might now see them as participants who interact with each other according to a new set of rules that none of us fully understands.”25 The rules that are in place currently are being slowly undermined therefore, and the reified culture of property becomes suspect. It is this new set of rules that Lessig

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and others hope to help craft—but only in relation to IPR. In any case, showing this extended process of valorization helps to undermine the legitimacy of this reified culture of property.

The Lockean understanding of property is central to the natural law claims made by maximalist proponents of IPR protection; it has also been reactivated by the natural law presumptions of the Law and Economics movement. Therefore it is essential to this project to consider its origins and the potential ways that it is undermined in terms of its articulation of the political to the economic around the concept of value. Chapter four will pick up again on the way that digitization has helped to undermine in some part the reified culture of property. Often less commented, however, is the way that the expanded process of production through the international division of labor has a similar effect—and, in actuality, has more at stake in the projection of Intellectual Property Rights on a global scale. Keeping in mind that the TRIPS agreement represents the projection of this Anglo-American understanding of property and natural law onto other countries, I present two anecdotes that will demonstrate the way globalization has a potentially similar effect in undermining this culture of property. As promised, following this, I will present a short summary of this argument so far and an overview of the chapters that will elaborate this argument further.

In the spring of 2007, the Ecuadorian authority (The Ecuadorian Intellectual Property Institute, or IEPI) set up to enforce World Intellectual Property Organization (WIPO) and newly minted TRIPS (Trade Related Aspects of Intellectual Properties) riders to the WTO rules made a very public threat to the media retailers operating in the southern port city of Guayaquil: start selling legally imported merchandise or be shut down. They targeted 15 merchants operating near the Malecon 2000, a tourist oriented commercial center built through public/private partnerships on the banks of the Guaya River in an effort to increase the profile of the city. In the coverage of the threatened crackdown, IEPI officials said they had found 42 such merchants in the Malecon
and nearby Bahia shopping centers: no explanation was given as to why less than half were being asked to change their wares. The merchants themselves denounced the policy, declaring their “right to work” and, off the record, insinuating that, far from being an attempt to bring Ecuador’s anti-piracy efforts on par with their neighbors in Columbia and Brazil, this was really just a power grab by the single, unnamed importer with the authority to supply them with legal CDs and DVDs.²⁶

Since that declaration in April 2007, there have been few other efforts of so public a nature by the IEPI to crack down on pirated CDs and movies. On a visit to Guayaquil a few months later, it was easy to walk a few blocks up from the Malecon 2000 and find several shops openly selling pirate copies of the intellectual property owned by corporate conglomerates headquartered in the United States. The latest Harry Potter movie, for instance, was readily available in one shop though it had only been in theatres a few weeks in the States. Still, a Spanish dubbed version of the film was playing at the Malecon, several sold out viewings of the film attesting to the fact that this business wasn’t exactly hurting sales—despite the fact that it was a regular print of the movie painfully stretched onto a convex IMAX screen. On the other hand, these shops, hawking mostly pirated copies of these media products were the only place they could be bought. If there was, indeed, a legitimate importer, they had yet to open up a shop here. These informal distributors, though not licensed by the studios in question, were doing the work of spreading Anglo-American media culture as efficiently as the pirate TV broadcasters in the 1960s that Herbert Schiller denounced as tools of the American Empire.²⁷ To be fair, however,

they were spreading it alongside a large number of other, regional or local artists, many of whom are likely only available in the US through similar informal networks.  

A few hundred miles to the southeast, Bolivian apparel workers are also engaged in labor, primarily in “small, family owned and operated workshops” operating in private homes, independently and part of loose networks which are “not registered with the government.” “Some may perform contract work for larger, legitimate firms,” but “some of the workshops produce counterfeit apparel products, which are sold in the local market shops or transported to Bolivian towns near the Argentinean and Brazilian borders.” Although all of these workshops operate outside of state regulation, the same TRIPS rules that Ecuador is trying to enforce would apply to these distributed workshops of clothing manufacturers: trademarks are part of the same international bargains as copyrights. Ecuador has its share of trademark counterfeiters as well: the town of Pelileo is actually legendary for its counterfeit denim products.

Notable in each case is the fact that the local laborers claim ownership—or a right of some kind—to the work that they do. This is explicitly in response to efforts to curb these practices because they don’t conform to the particular articulation of property rights in the Lockean vein.

As mentioned above, though the latter is supposedly based on the labor of the direct producer, it is actually a defense of the capitalist oriented expropriation of the direct producer. In any case, the labor of the actual producer is ignored by the ideological and juridical defense of private property.

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28 It is also worth noting that they had a larger variety of media options, including mini-CDs with mp3 versions of the songs, larger compilation mp3 CDs of what would be called “pirated” music evidently created by local artists—complete with original cover art—and data DVDs with several movies encoded on one disc. Regardless of what mp3 or avi. Advocates might say, these are media of inferior digital quality. And, contrary to conclusions one might draw from iTunes’ market share, selling them at the regular retail price of a US market CD or DVD would be jilting the consumer.


30 “In Pelileo there are around 400 enterprises engaged in the tailoring jeans. This activity started in the early 1970s when an entrepreneur started sub-contracting out to households. Rapid expansion of tailoring activities took place during the 1980s. While Pelileo has specialized in jeans tailoring, other communities in Tungurahua have focused on shoe-making, knit-wear and shirt-making. In total some 3,000 people are employed in one capacity or another by the jeans economy. A few firms are large (about 15 out of the 400 in Pelileo, employing around 70 people each), but most are household based, with an average of no more than 5 members. Most of the household-based enterprises operate in a subcontracting relationship with larger firms.” Peter Lanjouw, “Poverty in Rural Ecuador,” in *Ecuador Poverty Report, A World Bank Country Study* (Washington, DC: World Bank Publications, 1996), 157.
The expanded production of trademarked garments in the global commodity chain blurs the line between tangible and intangible property. It also raises the question of whose labor produces more value in the final product—and thus whose property rights in either tangible or intangible commodities should be defended by international law.

A report on Bolivia, from scholars writing for the *Journal of Fashion Marketing and Management*, touches on the dimension of labor that would likely apply equally to the formal and informal producers in Ecuador and throughout the developing world. Barbara J Frazier, Mozhdeh Bruss, Lynn Johnson attempting to portray the skills of this labor pool that would make them “attractive to foreign apparel firms because they would need to invest less in training,” relay the following assessment, based on observations and interviews with the producers themselves:

The president of an apparel manufacturer association explained with considerable pride that Bolivian apparel workers are masters at duplicating brand-name products. He explained that many apparel manufacturers in his trade association are able to disassemble a pair of famous brand jeans, make a pattern from its pieces, and then duplicate the item flawlessly—right down to the trademark label. There were many examples of this skill in the local markets, where vendors offered counterfeit clothing with popular trademark labels for $6–$10. Although trademark owners would probably not be impressed by this practice, the comment illustrates the skill that apparel workers have, and the pride that they take in their craft. Bolivians also take pride in the quality of their alpaca and llama wools. There is a rich culture of artisan handwork using these fibers to produce hand-knitted garments that have found their way to upscale markets in the US and Europe.\(^3\)

The singular difference between licit and illicit producers is in the consecration given by a license from the trademark owner to some other producer up the supply chain. The careful reverse

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\(^3\) Frazier, Bruss, and Johnson, "Barriers to Bolivian Participation in the Global Apparel Industry," 441.
engineering mentioned above is not necessary in the case of, for instance, counterfeit Oscar de la Renta jackets sold in the square in La Paz: the same producer made them on a subcontract from a contract from the official company. Once the contract ran out, the small manufacturer simply purchased some fake labels from a Chinese supplier, and the otherwise identical jackets were sent to the local square rather than to the contractor, the company, and the North American retailer who would otherwise sell the jacket. In other words, the purpose of trademark—to ensure that you are getting the authorized quality of product—is still being fulfilled; it just isn’t authorized by the branded marketer that is the legal owner of the “mark.”

The quality of the labor involved in these products is not lost on the consumers—nor is its local origin. Dr. Nina Laurie contends that to call them merely replicas or counterfeit doesn’t capture either the value that is created through the labor or the exchange value as perceived by consumers. Also speaking about Bolivian counterfeiters, she says,

In fact, they are not replicas at all but originals designed for the local market but with a designer label included because otherwise they would not sell. [. . . .] “The quality of the fakes has improved so much that they are proud of their products as being better than the originals [. . . .] An example is Tunari/Wrangler jeans, made in Bolivia. They are made by a Bolivian cooperative in the shadow of the Tunari Mountain so people know they are getting local quality, not badly produced fakes.

It doesn’t hurt, on the other hand, that the counterfeit products sell for less 10% of the cost of a brand original. The trademark, in this case, serves as an ambivalent signifier of some cultural value: part created by the local producers, part created by the designers of the branded

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32 This is based on an anecdote related to the author by two Bolivian citizens, speaking off the record.
33 The term “branded marketer” is taken from Collins, Threads: Gender, Labor, and Power in the Global Apparel Industry. In this she distinguishes them from “branded manufacturers” in that the latter actually own some aspect of their production process whereas the former concentrate on “high value added” labor, such as “research, design, sales, marketing, and financial services [. . . .] while farming out riskier and lower-return tasks such as manufacturing itself” (44).
manufacturer, part created in the larger social context where the brand circulates to indicate both. It is attached, however, to a product that can be used: whatever the value of the trademark, its being attached to a shoddy piece of clothing would make a mere kitsch object, particularly in a culture where consumption proceeds first of all from need. In other words, the labor of these producers is creating most of the value of the product: its relation to the brand is ambivalent, even if international law claims it is not. For instance, this distinction is lost on INTERPOL, who launched Operation Jupiter III from October 1 to December 31, 2007 to crack down on pirates of all kinds, arresting and deporting Bolivian workers (amongst others) who had moved to Argentina to work in larger counterfeiting operations. Though this operation didn’t target Ecuador, over 50% of the goods it confiscated were CDs, DVD, or other media products.

These short anecdotes help to point up several of the key themes and questions that animate this dissertation. As I’ve already discussed above, the central topic of both the anecdotes and this larger project is the reason behind the process through which Anglo-American, capitalist-oriented understandings of Intellectual Property Rights are being imposed on other countries. Here I mean ‘reason’ in two ways. On the one side, there is the cultural production of the idea of intellectual property rights, which is the product of a certain rationality developed through the history of Western/Northern political and economic cultures. For instance, INTERPOL reported that its action was praised by David Hirschmann, President and CEO of the US Chamber of Commerce's Global Intellectual Property Center who said, “By working together, the business community and INTERPOL are striking severe blows against criminal counterfeitters and pirates, while protecting the innovators, workers and consumers who rely on legitimate and safe products and technologies.” From within his maximalist inflection of northern/western culture we can assume that what he calls the “business community” is not the network of households in Bolivia;

the “innovators” are not the apparel workers in these networks; the “workers” are not the media merchants in Guayaquil; and the “consumers” are not the shoppers who would prefer the local, cheap, well-made fakes to the overpriced products consecrated by the corporate owner.

Hirschmann’s definition of all of these hinges on the distinction he assumes between “criminal” and “legitimate.” This ultimately comes back to a Lockean understanding of value, private property, and the state. As noted above, this understanding necessitates a powerful state with complete, unrivaled sovereignty over its territory and the capability to functionally execute law on a national basis. This structure of law is then given a specific content through a class-oriented definition of property justifying ownership over formerly common resources based on a class-oriented understanding of how value is produced and distributed. The presumed agreement on these points is the result of hundreds of years of struggle, over law, theories of the law, and their relation to local cultural practices: to paraphrase Henri Bergson, it takes centuries of culture to produce a statement like Hirschmann’s. The production of this fundamental culture is the first type of reason behind this imposition.

The second reason is more conjunctural, but it is related to the reification of the former reason. The reasoning above creates a view of the world, an international division of labor, in which the US and the West are at the pinnacle of a contemporary hierarchy of producers that corresponds to their being the pinnacle of development: they are now post-industrial. The “creative industry” work done in these countries has a higher ratio of “value added.” Therefore the (primarily) first-world workers engaged in this labor—and the companies who employ them—should receive a greater proportion of the profits. From the perspective which sees this Lockean reasoning as natural, as reasonable, increasing the scope and scale of intellectual property rights

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36 The original quote is “It takes centuries of culture to produce a utilitarian such as John Stuart Mill.” It is the epigraph of the introduction to Pierre Bourdieu, *The Social Structures of the Economy* (Cambridge, UK; Malden, MA: Polity, 2005).
domestically and globally is doubly reasonable. By this I mean “reason” more directly: why is this being done? As Samuel Oddi, an international law scholar points out, until the TRIPS regime, the rule of intellectual property was basically that “foreigners be treated like nationals,” but each state was free to establish its own rules. With TRIPS at the international level this is no longer the case. The Digital Millennium Copyright Act points to the domestic version of this within the US. The argument of this dissertation is that these policy instruments are necessary because the current conjuncture has unsettled what were assumed to be natural laws. So-called globalization and the widespread availability of digital technology, networked on a global scale, have undermined the functional monopoly of capital owners in post-industrial economies: their focus is on intellectual property rights, but the full extent of the legitimation crisis is much worse. It is a crisis in the fundamental rationality of the North/Western culture of property.

The owners of this economic property have largely brought this crisis on themselves, with the help of willing agents around the world. In practice, what we understand as globalization is often the rather mundane process of globally sourcing the production of commodities in countries and communities with the right mix of docile workers and muscular discipline. Increasingly, as Oxfam and other organizations have charted, the distributed production of globalization has been arranged by branded manufacturers or marketers, but also by retailers, like Wal-Mart, who rely on their monopsony position as a single powerful buyer to contract goods from local manufacturers at a given price. Contractors then subcontract that work, placing the oversight of the work—and thus the responsibility for exploitation or poor labor conditions—far from responsibility of the Arkansas boardrooms that empower them. The “flexible” production structure these corporations have created—with help from the US trade representative and the World Trade

Organization—atomizes production, reduces the force of labor rights, and makes informal production the rule rather than the exception. The grey market practices this arrangement necessitates have the inadvertent effect of empowering local producers to take matters into their own hands. While the family-run Bolivian workshops laboring at exploitative piece rates may not produce directly for Wal-Mart or for branded marketers like GAP or Liz Claiborne, this production structure indirectly creates a situation where these corporations’ only power over these producers is related to the legitimate control of their intellectual property and monopsony controlled access to US consumers.  

Likewise, US and European media conglomerates such as the companies combined under monikers like The News Corporation, The Disney Corporation and AOL/Time-Warner have worked for decades to establish global saturation of media markets, sometimes, as mentioned above, with the help of the military or diplomatic corp, in the interest of spreading the deep cultural logic that was assumed to be integral to their media products. In the past two decades, this has started to pay off, with international markets becoming increased sources of profits. Their hegemonic position, however, was mostly based on their dominance in the capital-intensive infrastructure of analog broadcast media. The introduction of digital technology was supposed to help spread these products wider, with even larger profit margins. But reducing the cost of doing business has also eliminated their monopoly on distribution, making their accumulated libraries of content—past and present—the greatest source of their potential revenue. These, however, are only capitalized as value in so far as they are legally protected and the laws enforced.

40 I will discuss this “deep cultural logic” in terms of Cultural Imperialism in the last chapter.
42 On the savings that were supposed to come from digital distribution, cf. Toby Miller et al., Global Hollywood 2 (London: British Film Institute, 2005), ch.5.
This uneven, unreliable set of social production relations was foretold in Daniel Bell’s “venture in social forecasting” as to what The Coming of Post-Industrial Society would look like. In that text he said, “Increasingly, the United States is becoming a rentier society, in which a substantial and increasing proportion of the balance of trade consists of the return on investments abroad by American corporations, rather than exports.” It is a very odd sort of rentier society, however, as he recognized in his foreword to the 1976 edition. Its rents are increasingly based on supposedly exclusive control over knowledge, “yet knowledge, even when it is sold, remains also with the producer.” On the other hand, knowledge and the goods created using knowledge—are collective goods. Bell, presaging contemporary advocates of the “Creative Economy” like Shalini Venturelli, concludes that, “knowledge, not labor is a social product, and that Marx’s analysis of the social character of production applies more fully to knowledge than to the production of goods.” This dissertation takes Bell’s “rentier” classification seriously, but turns his comment on knowledge and labor back onto itself: the discoveries we are making about the social production of knowledge help to revitalize arguments made by Marx about labor, value, culture and, ultimately, property.

Critics of the expansion of intellectual property rights within the US, UK, Canada, and Australia rightly point out the multitude of contradictions in current intellectual property rights policies. Among the most prominent scholars are Lawrence Lessig, Rosemary Coombe, Yochai Benkler, Siva Vaidhyanathan, and Peter Drahos. They point out that, enforcement on a global scale is nearly impossible: there too many small vendors in Ecuador, family producers in Bolivia and Torrent users around the world for the minimal police force to track down and prosecute all

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44 Ibid., xiv.
45 Shalini Venturelli, “From the Information Economy to the Creative Economy: Moving Culture to the Center of International Public Policy,” (Washington, DC: Center for Arts and Culture, 2003).
of them. If it could be done, however, they point to the impact this would have on culture. Here they mean “culture” in the narrowest possible sense: the free exchange of information and ideas and the archive of previously exchanged content that we build upon. Both of these—the limited reach of the coercive forces of the law and the mercurial exchange and mutual elaboration of meaning through media content—are important elements of the crisis, but they get nowhere near its fundamentals. To do this, we must talk about culture—and think about property and value—in a deeper way. This means understanding the mutual constitution of law and culture—and the fundamental crisis created when they no longer link up in a relation of efficacy. This is the primary goal of chapter one.

These circuits of valorization are made more visible by the “Participatory Culture” in relation to media convergence and digitalization and the process of distributed production of economic globalization. Just as value is produced through some extended process of valorization in the digital sense, the extended process—and myriad of positions—in the production of globalized commodities more generally also undermines the culture of property, showing it to be the product of a narrow, insular worldview of a particular society. These together undermine the culture of property in general. And it is this crisis that calls for the imposition of Intellectual property rights on a global scale. On the one hand, as Marx said, long ago, “Whenever, through the development of industry and commerce, new forms of intercourse have been evolved (e.g. insurance companies, etc.), the law has always been compelled to admit them among the modes of acquiring property.” This is true today with the supposed arrival of the post-industrial, information economy. On the other hand, the process of extending these rights inevitably reveals the political nature of the rights to property and the naked force required to implement one allocation of value over another. In reference to the rights of both labor and capital to the value

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produced through the process of production, Marx reveals how different positions within that process will view their just proportion of the final product differently. Capital insists it should be able to use the commodity of labor as it sees fit; but “the peculiar nature of the commodity,” i.e. that it is the product of a living human, producing in common with others, gives it rights as well—each right canceling the other out: “an antinomy” “of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides.” When the cultural efficacy of law breaks down, when the visible antinomy of these rights undermines the Lockean ideology, the law—and the police—are used as a blunt instrument is the last resort. Many scholars of Intellectual Property are keen to the extended circuits of valorization in the “digital natives” of the first world; few connect these with their counterparts in distributed production on a global scale. Yet it is only by understanding these together, as dual contagions to the culture of property, that we can see the problem—and consider the possible solutions. My project is an attempt to do this. I will now give a brief overview of the chapters.

Outline of Chapters

The conflict over intellectual property is best seen as a conflict over property rights in general. In both cases, the legitimation of the juridical culture of property is underpinned by a specific understanding of the proper political economy of ownership and valorization. As argued above, this culture of property is undermined by two changes: digitization and globalization. Contemporary critics of intellectual property rights are unable to properly situate this because they readily accept the ideological essentials of the reified culture of property, even as they are able to reverently describe the expanded process of valorization they see in the creative process for the

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goods protected by this legal regime. On the one hand, seeing the expanded process of valorization through Peer to Peer, “remix” and “Convergence” culture has exposed the way value is produced more generally to a wider investigation. On the other hand, IP is necessary to preserve the dominance of certain property holders in the domestic sphere as well as the United States/Western Europe’s place in the international division of labor. Trying to secure these through various treaties has resulted in exposing it to the differences in culture throughout the world.

This dissertation is an attempt to outline this culture of property in some specificity. In chapter one, I develop a framework for understanding cultural efficacy which will more thoroughly evaluate the questions involved in presenting a “cultural inside.” I argue that there needs to be a renewed interest in questions of class, property and capitalism as well as a new respect for questions of the law and the state in relation to culture. The latter form some of the strongest channels through which the enigmatic “culture as a process” is forced. Until the reification of the latter is questioned and critiqued, cultural studies can’t effectively claim to be a project of global importance or scope; instead, it will remain a narrow kaleidoscope which merely finds ways to describe the apparently chaotic interplay of cultural elements on the ground level rather than ever being able to note the effective closures that determine this process.

Chapter two is an extended history of four processes: the consolidation of the nation state, the construction of law in relation to culture; the Lockean definition of property in terms of Natural Law in contrast to other competing ideas about the relationship between property, value and the state; and the process of primitive accumulation that allowed this definition to appear both legitimate and effective. As this introduction has argued, the history of property itself is more fundamental to the expansion of intellectual property rights than the history of intellectual property rights themselves. However, there is a parallel development in both that coincides with a more fundamental cultural construct. Coeval with property rights and intellectual property rights
is the birth of the modern nation state. The unitary law of the sovereign nation state is initially legitimated by the religious patriarchy common to most of the feudal cultures of Western Europe. In the context of England, its earlier separation from the Roman Catholic Empire unsettles this hierarchy of legitimation. Copyright first emerges as a way of controlling the competing religious ideas that might threaten this central authority.

In the brief moment of English absolutism, the expanding authority of the central state is used to force capitalist social relations based on private property onto an unwilling population. The revolution that overturns the feudal hierarchy results briefly in a resistance to this imposition; in short order the unitary rule of law that is supposedly necessary to restrain the limited authority of the central government also restrains the restive population and governs them based on the cultural articulation of “natural law.” Copyright, again, joins with other restrictions on movement and freedom to reduce the resistance to this imposition. The late Lockean justification of the federal authority in the defense of property rights thus follows a century of primitive accumulation. The erasure of this history serves as a common component of the liberal defense of property, as does the pattern of primitive accumulation which precedes it.

Chapter three follows the argument of chapter two with a discussion of the specific content (i.e. culture) of that law in the England and the US. It describes a more recent struggle over the idea of natural rights to property and the reaction of the Law and Economics movement to the results of this struggle, i.e. the welfare state and legal justification of the New Deal. The Law and Economics movement informs both the current legal hegemony in the United States and Lawrence Lessig’s critique of intellectual property rights. This chapter argues that the central premise of this movement is faulty because it takes as natural what is actually political and cultural in the legal institution of private property rights and neoclassical economic relations. Though a logical failing, this also undermines its legitimacy because it fails to account for how that legitimacy is secured. In other words, it takes for granted the cultural efficacy of the system of private
property, deriving it from nature instead of a specific articulation of the utilitarian economics and formal power of the state—both of which are overtly criticized from within the movement for attempting to reshape culture according to positive rights.

If the previous chapter looked at the political/legal defense of a certain economic model, this Chapter Four continues by exploring the obverse: the economic arguments in defense of a certain political/legal model. It argues that there is a disconnect between neoclassical indexes of value (e.g. price) and the social process of valorization from which they are abstracted. Although critics of IPR are able to see the latter in regards to “creative” work, their observations would apply to the products of most other kinds of labor. The chapter outlines the way some concepts from Marx—commodification, primitive accumulation, and the division of labor—help to describe, on the one hand, the inadequacy of this index, and, on the other hand, the historical, social, and material process whereby it came to appear descriptive in the US context. It develops more fully the concept of “cultural efficacy” to denote the process whereby top-down programs and products gain bottom-up legitimacy. It argues that the implementation of IPR in its current form is indeed a form of unjust appropriation, but this is not limited to property of the intangible: it is intrinsic to the system critics of this program otherwise defend.

On this ground, we can return to the site from which this section began: the site of the limited reification of the culture of property in general, and the culture of intellectual property in particular. This, in the end, is what Schiller and others meant by cultural imperialism: the attempt to completely transfer the cultural framework of capitalism throughout the developing world, resulting in the global rule of capitalist social relations and the international protection of private property rights, capital investment, and “shareholder value.” But only by recognizing this as a cultural formation, only by working from a coherent, complete conceptualization of culture, with the animating and attenuating dialectics outlined above, can this complete system, idealized in
theory and coercive in practice, be critically engaged—nor the resistance to its imposition fully comprehended.

It is problematic to uncritically celebrate the actors of informal spaces like the pirate media merchants in Ecuador or producers of counterfeit clothing in Bolivia. In both cases, it is likely that they remain enmeshed in systems of unequal power and wealth. The paradox between liberalism and democracy remains salient at this level and, in part, it is the uneven development of these processes that create the conflicts that will stall the smooth imposition of a global legal environment that serves capital and property alone. Locally conceived alternatives, emerging in indigenous communities and what Ankie Hoogvelt terms the “post-development” countries of Latin America, are able to witness the limits of the liberal culture of property and rethink the contours of this model in their own context. This resistance, termed irrational or autocratic, also opens a contradictory space of counterhegemonic struggle. The lesson of this for cultural studies is less that these areas will produce an alternative model to be applied from the top down elsewhere, but that the more deliberative, collaborative understanding of culture—and value and, therefore, property—that emerges from these struggles can inform our criticism of the dominant culture of the hegemonic core. In other words, the lessons to draw from the space where this culture of property is yet to become reified can be helpful in understanding the limits that current critics of intellectual property alone set on the prospects for social change. On the other hand, the fact of uneven development should alert us to the continued expropriation of the periphery for the benefit of the core—and show that the simple suturing of the intellectual property regime along national lines for the benefit of core, post-industrial economies, is unethical, unsustainable or both.
CHAPTER 1: Culture, the State, and (Intellectual) Property Rights

These changes are extrinsic to political forms which, once established, persist of their own momentum. The new public which is generated remains long inchoate, unorganized, because it cannot use inherited political agencies. The latter, if elaborate and well institutionalized, obstruct the organization of the new public. They prevent the development of new forms of the state which might grow up rapidly were social life more fluid, less precipitated into set political and legal molds. To form itself, the public has to break existing political forms. This is hard because these forms are themselves the regular means of instituting change. The public which generated political forms is passing away, but the power and lust of possession remains in the hands of the officers and agencies which the dying public instituted. This is why the change of the form of states is so often effected only by revolution. [. . .] By its very nature, a state is ever something to be scrutinized, investigated, searched for. Almost as soon as its form is stabilized, it needs to be re-made.

As the introduction argued, the purpose of this project is to look at the culture of property that is revealed by the debate over intellectual property. I discussed this debate in terms of three positions. Two of these positions—the maximalist and the balanced position—limit their dispute to the question of intellectual property, proponents of the balanced position often going to great lengths to prove they uphold the culture of property in general. In both positions, the concept of culture figures centrally, yet remains unrefined as a concept. The third position I mention in the

Cultural Studies, is mostly engaged in a frenetic attempt at providing an overview of the issues that arise in this shifting sense of culture in relation to the merely conjunctural changes of digitization and globalization. All three positions take a special interest in the concept of culture, but none of them, in their current articulations, have a coherent conceptualization of culture. I see this lack of a conceptualization of culture as a problem of special importance and special relevance to this project.

On the one hand, this project is a Cultural Studies dissertation. Cultural Studies should have a coherent conceptualization simply because it claims to study culture. However, with a few exceptions, the contemporary arguments made from within this tradition seem as unclear as ever about what they mean when they talk about culture. Most unclear in this position is the relationship of law, economics, and the state to culture. I diagnose Cultural Studies’ lack of clarity and coherence on the social forces of law, economics, and the state as the combination two factors. One is a holdover from previous debates within the field (over the idea, for instance, of the determination of the superstructure by the base) which I discuss in terms of Stuart Hall’s two paradigms. The other is an intellectual energy borne of the current conjuncture, trying to catalog and navigate the “vitality” of current changes wrought by digitization and globalization. I find this erratic approach to the concept of culture in relation to the state unacceptable. I feel it blinds cultural studies to important aspects of its object of inquiry and it is necessary to correct this lacuna in the field. The current project is undertaken from within this field; therefore I see it as crucial to be able to speak about this coherently.

However, while I see the conceptualization of culture as a disciplinary necessity, it is not simply out of this necessity that I feel compelled to construct this framework for understanding culture. This disciplinary necessity is the first reason the conceptualization of culture is a problem of special importance and special relevance to this project. It is matched by a more important motivating factor related to the topic of the project itself. Namely, the battle over IPR (and
property rights in general) is being fought on the grounds of something called “culture.” It makes sense that Cultural Studies be able to bring a certain level of expertise to this debate. This requires a coherent conceptualization.

To reiterate, in addition to the disciplinary concern, the necessity of elaborating a concept of culture in this chapter stems from the stakes of the debate over IPR that is the topic of this project. The stakes of this debate are largely over how we understand the relation between culture, value, and the state. The maximalist and balanced copyright positions—largely populated by legal scholars, political theorists, and economists—make assertions about culture in relation to law. They also make assertions about culture in general, how it works, how we use it, and, in particular, what our approach should be to constructing the legal institutions that will regulate it. They make these assertions from within a certain understanding of the role of the law in relation to culture. Cultural Studies should be able to step back from this debate and speak coherently about what culture is and what its relationship could and should be to law and the state. It should be able to execute this analysis in relation to this debate and many others. This has not been done well enough in my opinion and so I must begin this project by doing so.

First, however, I will establish the role that “culture” as a concept plays in the debate about IPR. I am especially interested in the role it plays in the balanced copyright position. Culture, in this position, is characterized as an endlessly dynamic process. It is less clear, however, what the status of this dynamic was in the previous era—that is, before digitization and globalization—and what the role of the formal structures law and functional pressures of economics were before being upset by the internet and other new media technologies. I argue that taking this into account throws into relief the claims of what Lessig refers to as “our tradition of free culture.”

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50 Lessig, Free Culture.
I will then compare this briefly with what I see as the Cultural Studies position, as it exists, in relation to the conceptualization of culture. This position is very similar to the balanced position in its characterization of culture, with the exception that it is less explicit about the role law and the state play in this relationship. The result is that this position often denies any real role of the law, the state, or the economy per se. The lack of a real understanding of structure leaves the discipline no way of talking about what I’m calling “cultural efficacy.” Indicative of this is Nick Couldry’s recent attempt at outlining the method of Cultural Studies, Inside Culture, which unfortunately doesn’t provide much of a framework for thinking about a cultural “inside.”

In both positions there is some erasure of the role that the state and the law play in shaping culture—either hypothetically in the Cultural Studies position or historically in that of balanced copyright. In contrast to these two positions, I offer a dialectical understanding of culture proposed by Adorno as an entry point to the discussion about the role of law and the state in relation to culture. Following this, I provide a conceptualization that attempts to take into account both Adorno’s more dialectical view and the more closed culture of property that I feel both of the above positions are unable to evaluate. The upshot to this exercise is to see that the process of culture is in some ways determined by a reified culture of property at the level of law and the state.

To see the state as a determining level is not just a theoretical possibility, but an assumption intrinsic to the Western model of the state. This model has both a form and content. The form is that, in terms of its formal legal power, it has potentially complete control over all the practices and norms within its sovereign territory. The content appears variegated and diverse, but beneath this apparently open process is a closure. This closure is effected by the application of a model. This model of the state is based on an assertion of “natural law” and, consequentially, a denial of the cultural assumptions implicit to both its functioning and its political legitimacy. Therefore, in order to understand this model as a model, we have to be able to conceptualize its
cultural assumptions as cultural. Over time, this model has become the reified culture of property
that is central to my project. While this model remains impurely applied by the standards of the
maximalist position, in so far as it exists, it has been forced on a significant portion of the
population through a long series of struggles. Its continued application in other social formations
yields similar struggles. This chapter, therefore, prepares the way for seeing the law and the state
can be used to impose a model of culture on a certain society. This sets the stage for the next
chapter, which looks at the concrete process of instantiating the Lockean understanding of value,
property and the state on the population of Early Modern England and Ireland.

As I argued in the introduction, the figure of Locke and his discussion of value provide
the pivot between property and intellectual property. Critics of maximalist IPR unintentionally
articulate the first level of this correlation in their conceptualization of “culture.” Culture for
them, like labor for Locke, is a dynamic energy that inevitably helps to propel civilization further.
However, unlike Locke, they don’t recognize the inherent limits placed on the dynamism of
culture within the reified culture of property they inhabit.

To demonstrate this claim, I will now look at their conceptualization of culture.
Following this I will compare it to what I argue is the dominant conceptualization of culture
within the discipline of cultural studies. This builds up to the main section of the chapter,
wherein I elaborate a conceptualization of culture that helps repair what I see as a lacunae in both.

With the push for stronger rights in the broad category of intellectual property, critics
have advanced a variety of arguments contesting their morality and viability. In their rebuke of
the maximalist position, the concept of “Culture” figures centrally. Works such as Rosemary
Coombe’s *The Cultural Life of Intellectual Properties* and Lawrence Lessig’s *Free Culture*—as well as
the latter’s open source copyright organization, Creative Commons—use the term culture to
describe a process that they see as creating a certain set of products (which, incidentally, are also
called “culture”). Though Lessig isn’t overtly influenced by Cultural Studies scholarship, he and Coombe consider this process as relying on a social process of production analogous to those articulated in poststructuralist considerations of authorship, audience studies understandings of the co-production of meaning, and early Cultural Studies ethnographies on subcultural appropriations and resistant readings. The conclusion of these disciplinary inquiries into the process of producing and consuming cultural objects seemingly settled the debates about the political or economic determination of the cultural by showing the contingent, creative, collective process of elaborating and appropriating meaning from mass cultural products. Although more theoretical figures like Derrida or Foucault figure into these understandings, critics of IPR often refer to more pragmatic scholars like Hal Foster (Coombe) and Henry Jenkins (Lessig), both of whom discuss creative appropriation and the collective process of meaning making by popular audiences.

Inspired by these insights and the visible processes of meaning making they see around them, Coombe, Lessig and others dealing with the issue of IPR from the balanced position, implicitly see the status quo of cultural exchange as a space of rich, participatory cultural expression which, for various, unexamined reasons, finds most of its raw materials in the realm of mass or popular culture. The latter, by coincidence of history, are also the cultural products that are most likely to be locked down by the tightening of Intellectual Property Rights—copyright, trademarks, patents, and publicity rights of celebrities. By limiting the use of these products/raw materials of culture via onerous legal frameworks and exclusive rights, the social process of their valorization is denied and the future process of this supposedly vibrant cultural production is threatened. Since these same cultural processes are what pass for the free and open discourse of the public sphere, limiting them via IPR is usually posited as having some political effects, limiting freedom of speech alongside the consequences for creativity in general.

This framing of “culture as a process” in which people are continually active is analogous to a dominant narrative that has emerged in Cultural Studies in the past two decades. The narrative posits the production of meaning at the level of the self and the formation of the identity as the primary ethnographic orientations for scholarship. Largely in reaction to what were seen as overly deterministic, Structuralist arguments about the culture, the field has become increasingly focused on seeing culture in terms of the mercurial interactions of individuals and the variegated experience of identity and the self. Nick Couldry, for instance, surveys possible methodologies for understanding culture and settles on using Elspeth Probyn’s *Sexing the Self* to help him in “thinking the social through the self.” Schol...
as a “noun,” instead focusing on culture as “activities of expressive struggle rather than symbolic context, involving conflictual signifying practices rather than integrated systems of meaning.”

Likewise, Lessig, in his *The Future Of Ideas*, uses fellow IPR critic Yochai Benkler to consider the different levels at which communication can be controlled by forms of corporate monopoly rights—at the level of the infrastructure, the code, or the content. This discussion inevitably forces him to consider the corporate ownership of the pipes through which the dominant commodities of US culture have been distributed for the past 70 or so years. Despite the ever increasing centralization of the media industry, he still characterizes the development of the mass media in the US as only questionably monopolized, focusing instead on the few instances of openness that have worked within these (determining?) limits, such as common carrier laws US telephone companies were forced to accept. In criticizing maximalist IPR laws, he laments them as “a radical shift away from our tradition of free culture” speculating that it is “yet another example of a political system captured by a few powerful interests.” Yet Lessig doesn’t seem all that animated by the previous forms of control enacted in the interest of mass media corporations. Instead, in his latest book, *Remix* he describes the twentieth century as “a time of happy competition” amongst media technologies. The only change, it seems, is that there are now new technologies allowing consumers to take a more active role in this process.

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55 These laws were originally put in place as anti-trust protections to make it possible for there to be some competition in the telephone communications industry. This has been an unintended benefit in the early years of the internet because it allowed for more ISPs—and more competition amongst them. Lessig and others involved in the media reform on internet issues (such as the Electronic Frontier Foundation) have been quite upset at legislation the major phone and cable companies are lobbying for which would prevent a similar kind of situation from emerging in the era of cable deployed broadband. This is in addition to their lobbying for preventing communities from providing free wireless broadband. Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, 1st ed. (New York: Vintage, 2001).

56 Lessig, *Free Culture*, 12.

From the perspective of these critics, even on the narrow subject of what they call culture, most other aspects of the US communication and legal infrastructure are acceptable: the push for intellectual Property Rights just represents a step too far—to the level of content. Critics of IPR deride this corporate attempt to control these materials, particularly with the advent of new technologies of production and distribution that make possible more anarchistic forms of organization, such as the open source software movement. In reality, of course, the latter are only exceptions to the general rule of corporate controlled media. It is not a coincidence that six companies now own much of what passes as popular culture in the US. We cannot assume that a mere change in technology will alter this landscape but for a brief moment. Internet and new digital technologies, as Vincent Mosco points out in his book *The Digital Sublime*, are just as subject to monopolization as all the previous new technologies meant to spread freedom, democracy, and so on.\(^58\)

Benkler and Lessig amongst others are hoping to prevent this foreclosure of the possibilities they see as inherent in these technologies. Benkler says that the change from what he calls the “*industrial information economy*” to the “*networked information economy*” is alone responsible for transforming the “material conditions of information and cultural production and distribution.”\(^59\) This has, in turn, changed how we think about those portions (alone) of the economy and the way we organize the state.

There is a contradiction at the heart of this understanding of culture and what digitization has done. On the one hand, Benkler and Lessig point to technology as the primary motor of undermining this order; yet in speaking about culture as *essentially* a process, there is no sense of what culture was doing before the new media. Benkler proposes a shift from “consumers to


users” in communication law which will take into account the fact that the properties of media content are made increasingly malleable through desktop technologies and networked distribution. Therefore the people who used to be seen as only consumers can now be seen as “users” of culture. 60

This is similar to my own position, with several very important exceptions. First, in making technology alone the only breaking point, they act as if this process of social interaction with the media is a new occurrence that is completely the result of technology. The most important contribution actually existing Cultural Studies can make to this conversation as it is currently articulated is to point out that this process has been taking place throughout what Benkler calls the “industrial informational economy.” Dick Hebdige’s discussions of appropriation and bricolage amongst oppositional English subcultures and Henry Jenkins’s identification of “textual poachers” are but two examples of this kind of work.61

I will return to a discussion of this CS work more completely in chapter four, but for now it is important to note that their analysis illustrates that what Lessig and Benkler understand as culture as a process has, indeed, been taking place; but it was taking place in circumstances of monopoly control over almost every level of the communications infrastructure. Clearly I believe a change in technology is helping to make this process more visible, but I don’t believe that this is because of a feature inherent in the technology. More importantly, I don’t think that the earlier communication forms were as inherently undemocratic as Lessig presumes. It may be true that there were “inherent” or even “natural” limitations to analog technology—copies were inferior and the technologies for making them were rare and expensive. As Lessig points out, IPR was instrumental in helping protect this model from the kind of consumer—or “user”—insurgency

Lessig or Benkler see as increasingly possible, but “it wasn’t really the law that mattered most in stopping [consumer level] piracy. It was the economics of making a copy in the world of analog technology.” In this regard, Lessig argues, “digital technology changed this ‘nature.’”

Yet, as chapter 4 below explores in more detail, there was nothing inherent or natural about consumption of culture as a commodity to begin with—and certainly nothing natural about a culture dominated by the consumption of commodified media. This model was not inherent, for instance, in broadcast technologies like the radio, which Barnouw, Robert McChesney and many others point out were originally quite open in their potential. In his history of the deployment of radio, Barnouw paints a striking portrait of the amateur radio networks that sprung up in such numbers that they were causing interference amongst one another. This chaotic model was eventually overthrown by the government sanctioned monopoly of exclusive licenses given to private, commercial radio networks. The functional control over these networks by large corporations was secured by the state not only through IPR, but also through direct subsidies and restricted access to the airwaves. In other words, it was politics not nature that limited this culture.

As chapter four examines more closely, this cultural model of commodity consumption was not limited to media commodities. This leads to the other key distinction that I make: I think that the visibility of the social process of valorization should help us reconsider the broader culture of property. In contrast Benkler sees new possibilities for “nonmarket production” and “decentralization” emerging from the way digitization makes visible the social process of valorization, but he is clearly limiting this to some band of economic production he defines as “informational.” For most critics of IPR, the notion of culture as a process becomes instrumental to challenging the argument that the corporate owner of the media commodity is the

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62 Lessig, Remix, 38. Lessig is obviously unfamiliar with the British campaign against “home taping.”
64 Benkler, "Freedom in the Commons,”
only party responsible for the value created around this intellectual property within a given society. When Coombe—who is more aware, earlier on, of Cultural Studies work on audiences and subcultures—considers the value created around a trademark by consumers, she touches on the social process of value production in general. It is true that marketing firms work diligently to attempt to produce this value—and are paid much better than manual laborers for their attempts. Theoretically, they only get paid when they can prove results. But when so many marketing campaigns fall flat, it does seem like there is a factor that isn’t being accounted for in the production of this value. Coombe, for instance, relies heavily on the art critic Hal Foster’s idea of *Recoding* to consider the social production of value in intellectual property. This is a very productive line of inquiry. However, if she were to consider the homology between the social production of value using immaterial means of production and the wider production process Marx describes, it might generate even more creative tension. At the moment, the sense that property is essentially different in these two forms overshadows the similarities in the social division of labor that make both “productive.”

On the face of it, this focus on the social process of cultural production is a powerful argument. It points to one connotation of the title of this project: if there is a value to an intellectual property, it is one that is produced within this complex cultural “flow.” Though this critique usually highlights an ethical argument—how can a single owner claim a value that is produced in a social process—many critics then pitch this into a much more pragmatic argument: if the production of this value is made through a cultural process, and this cultural process itself relies on a certain kind of freedom and openness, then not only do stronger intellectual property rights represent an ethically spurious appropriation of a social process of collective labors, but they also threaten to undermine the very source of this value and to “lockdown” culture (and the

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65 Coombe, *Cultural Life of Intellectual Properties*.
process of “improvement” and accumulation) at large. This paraphrases Lessig’s argument in *Remix*, where he looks at the way the “sharing economy” made visible through digital technology can be good for the “commercial economy.” In these explanations, a distinction is always clearly drawn here between intellectual property and other kinds of private ownership: culture—which is, in this portion of the argument, a separate sphere of activity from the rest of social and economic life—is different and assigning property rights to it should only be done with the greatest of care.

On the other hand, in privileging this description, Critics like Coombe and Lessig use this very potent conception of culture without reflecting much on its origins. Culture as a concept is here moved to a continuum where the current configuration is mostly ideal and acceptably processual, but altering it threatens to shift culture into a kind of reified, corporate controlled feudalism. In some moments, there are glimpses of a more dialectical understanding of the concept of culture, but these seem mostly strategic accommodations rather than deeply theorized understandings. This narrative leaves fundamental questions about culture unanswered and, moreover, basically adopts what I will be arguing is a dominant cultural understanding which, despite the impression it gives of the object under investigation, is fairly “closed.” My purpose, and what separates me further from this balanced position, is to draw attention to the larger culture of property which informs distinctions like these; to ask why there needs to be this backstop on

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67 Lessig, *Remix*.
68 One exceptional example is James Boyle’s recent article “The Second Enclosure Movement and the Public Domain” makes certain comparisons between the enclosure movement that took place in early modern capitalism and the current press for stronger IPR. However, he basically assumes the first enclosure movement—and the social property relations that resulted—are basically acceptable, even if they weren’t fun at the time. Michael Perelman, who has written extensively on the early enclosure movement, has a very different perspective on this analogy. James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain,” *Law and Contemporary Problems* 66, no. 33 (2003); Michael Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation* (Durham, N.C.: Duke University Press, 2000); Michael Perelman, *Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity*, 1st ed. (New York: Palgrave, 2002).
the conversation about property. I ultimately argue that, there may be a process of culture—both before and after the new media—but there are some things that are unalterable.

In other words, far from being an unencumbered space for the play of difference, there remain more than a few things that are unquestionable: though it does some violence to the terms, they are analytically denotative. By this I mean that they appear to be a sort of common sense: the mutual benefits we all get from private property in general and minimal regulation in the market become hegemonic ideologies which inform the dominant culture. Likewise: “improvement” qua profit and growth as a defense of ownership; and the denial of class power. As many of the early theorists key to the early Cultural Studies tradition often pointed out, these ideologies, like ideology in general, are a powerful force which structures our ideas—either because we accept them or we are forced to negotiate them in order to make arguments in the dominant discourse—as well as the way those ideas affect our interpretation of reality.

Those paying close attention to these descriptions of this dynamic process might notice their similarity to discourses around the concept of “the market.” Even when capitalism and the free market aren’t explicitly discussed, there is significant overlap between these and many other discourses which more or less reproduce this cultural dominant. A sampling of these might include: the anarchistic understandings of radical democratic politics; a libertarianism that, though not dominant in US politics is an often unstated ideology of even the most reflective US based and/or trained intellectuals; pop-science applications of chaos theory to explain social organization; and a residual common sense of US culture that says the free marketplace of ideas

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69 True anarchism would likely found the discussion on something other than private property, but even this isn’t assured any longer.

70 The most prominent amongst these was James Gleick’s *Chaos: The Making of the New Science*. It’s worth noting, on the other hand, that one of the less popular uses of this theory has been to show that the chaos under discussion actually undermines many of the economic presuppositions of rational actors which go into believing in markets. Chief amongst the critics from this direction are Paul Ormerod. His ideas aren’t all that unique in terms of social and cultural theory, but they seem to be so in economics. James Gleick, *Chaos: Making a New Science* (New York, N.Y., U.S.A.: Viking, 1987); Paul Ormerod, *Butterfly Economics: A New General Theory of Social and Economic Behavior* (New York: Basic, 2000).
allows the cream to rise to the top, which, of course, takes this theory (and the reality of this free
marketplace) to be an objective observation and therefore assumes that, if an idea is on top, it must
have been filtered through *The Wisdom of Crowds*, consecrated by a *Critical Mass* popularity,
reaching *The Tipping Point*.

The point here is not just that the free market ideology that became
more deeply hegemonic during the Reagan and Clinton eras has filtered into the various cultural
expressions, but that the contemporary culture *qua* culture is presumed to be the product of this
process in action.

Alternatively, we can see the privilege this gives to a democratic ethos, again projected
into the past. The present focus on cultural complexity makes it seems like what we have as
culture is, in fact, the “best that has been thought and said;” but instead of it being decided upon
by crusty elites, it was previously selected by some earlier process of the demos filtering out all the
merely good and better ideas. In this conception, the idea of culture as an open-ended,
progressive, spontaneous force is seen not only as a presently achieved ideal, but is projected into
the past. Though the precise ideological articulation of this conception varies, its most potent
form is a conservative insistence that further changes in the present will actually undermine future
advances. This last point has been a mainstay of natural law proponents of property rights in
general, who are the descendents of what Mill called “those important classes in European society
to whose real or supposed interests democracy is adverse.”

Versions of this claim informed the “Gradualists” in the US civil rights movement, have
gripped, in a post-facto way, the women’s movement in the current era, and could even be said to
inform the absence of any popular reaction against the neo-liberal dismantling of the welfare state.

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These are three titles of books that have recently been published which basically argue along these lines. Philip Ball,
*Critical Mass: How One Thing Leads to Another*, 1st American ed. (New York: Farrar, Straus and Giroux, 2004); Malcolm

In effect, the belief is that the actual advances in rights or redistribution are a natural trait of the progressive nature of US culture, rather than the result of long, sometimes bloody struggles. It is a fairly contorted position made possible only by the brief dominance of a certain set of cultural politics that has effectively fed into a relatively conservative bias in terms of social action or legal reform.

This points to another possible connotation to the title of this project: that intellectual property rights are the product of a certain culture, a culture, as this dissertation argues, committed to a Lockean notion of “improvement” that emphasizes the necessity of exclusive, individual rights to all kinds of property (virtual, real and in-between) and its profitable employment. That this culture sees itself as innovative or progressive is hardly a novel observation. But this is crucially important, particularly since the ideological ground yielded to the maximalists by balanced copyright critics of Intellectual Property is precisely the ground on which the struggle should be taking place. The weakened notion of culture that has become dominant—particularly in these discussions—prevents a dialectical understanding of culture which would allow for the identification of the relatively stable culture of capitalist accumulation and its necessarily conservative notions of freedom and property. This is largely because of the insistence on the distinction between culture as a process and what Coombe calls culture as a noun—as a structural arrangement with an effective inside which determines behavior, beliefs, and policy norms.

It should be indicative of a common set of claims that the terms of the debate between maximalist and balanced copyright converge so closely on the issue of preserving culture as a process. Like their balanced copyright critics, IPR maximalists accept most of these arguments as given and argue that property rights—whether in so-called creative products or in general—are the foundation of this as a process of economic growth and social development: making these

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rights less clear will cripple this mechanism. Without incentives in property provided to producers the innovation that we understand as basic to the “progress” of this capitalist order will no longer continue.

This argument seems to have some credence based on the dominant discourse of property rights, dominant narratives of the isolated artist/inventor whose labor should be rewarded, and the supposed widespread benefits that rewarding monopoly property rights creates for the entire society: this argument is difficult to deny on logical grounds, even if it is made by corporate owners of pharmaceutical or electronics patents for products developed directly or indirectly with public funds, who subvert the disclosure laws about their inventions, thus violating their main condition for being granted the patent in the first place. In other words, in terms of the dominant western ideology about property, these arguments seem basically reasonable. They actually add another layer to the argument of culture as a process, which says that people don’t naturally engage in this process, but are only motivated by some sort of commercial return; thus taking away protections will reduce the total number of participants. While this turns the Lockean argument on its head—Locke says people naturally engage in this labor and we then naturally give them property in their improvement—it still presumes it to be reasonable.

To add an even further ethical imperative, when this line of argument is projected onto the global scale, considered in the final chapter as both culmination and undoing of this regime, intellectual property rights are presented as one of the most important tools of economic development. Thus not only is it more just to have developing countries honor the Intellectual Property Rights of multinational corporations, but it is in their country’s best interest as it will lead to domestic sources of growth. Keith Maskus, an economic advisor to the World Bank and

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74 For a good account of IPR from this perspective, cf: Perelman, *Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity*. One of the key points he makes is the extensive use of public funds for the basic science on which R&D for pharmaceuticals is based. In other words, the bulk of the enterprise is public, not the private, incentive-motivated production of patent-happy corporations.
WIPO, claims that “economic analysis [. . .] supports the view that stronger IPRs have considerable promise for expanding flows of trade in technical inputs, FDI, and licensing. These in turn could expand the direct and indirect transfer of technology to developing nations.” At the same time, he cautions that “such gains may not be uniformly available to all developing countries,” making his recommendation that IPRs be strengthened seem less than equivocal. Nevertheless, they have been strengthened through TRIPS—largely on arguments that they automatically create the necessary incentives for growth—so the die has been cast.

Hopefully this short look at the basic arguments the balanced copyright position makes about “culture” helps illustrate the role that the conceptualization of culture “as a process” holds within their discourse. Their discussion of culture draws attention to work like that of Cultural Studies scholars on audiences. While balance IPR scholars situate these processes largely in relation to the “convergence culture” of new media technology, the dynamic they illustrate in terms of the culture is clearly important. However, as they place a backstop on illustrating this dynamic—on the sanctity of private property in the tangible—they must then project this dynamic backwards. This means implicitly validating the belief that this ideal of culture is the status quo—culture in the West/North is and should be like this, free and open to change through this play of differences. And, more importantly, the status quo is the result of this ideal of culture in action and is threatened by the adulteration of closure by these new legal frameworks. But where do these legal frameworks fit in the conception of culture? What role did they play in determining or directing the previous “processes” of culture? How widespread were the practices and theories the law determined as “right” before they were projected onto the society in question? And what was the role of the process of culture in relation to helping form this law?

Cultural Studies should be able to help us navigate this argument, but it largely remains derivative of other discourses about these apparent conjunctural changes. In fact, at a moment when there is an urgent need for a coherent analysis of culture, there is a dominant belief within the field that speaking of culture in terms of a closure, of having an effective interior undermines the careful work that has been done cataloging the processes mentioned above. Thus the purpose of the discussion of Cultural Studies that follows is first of all to demonstrate the similarity between the concept of culture used in debate over IPR above and that which exists in the majority of work in this field. Cultural Studies, I argue, focuses solely on the processes of culture—a key feature, but not its totality—and not on the equally important process of enclosing the options and determining practices that are possible for that process to undertake. Cultural Studies has lost the notion of a cultural efficacy. This is especially the case in relation to the major institutions that channel our energies around private property—the law, the economy, and the state. On these, Cultural Studies is less able to break out of what has become its primary reflex: to think only of the ways which the processes of culture are able to adapt to the frameworks determining them.

In general, Cultural Studies needs to figure out a way to talk about an effective inside to culture, despite the fact that we can, retroactively see a variety of movements—a diversity or complexity of cultures—leading into the status quo. In so far as there is a cultural inside, the state seems to be a key institution in making this inside stick, despite the current tensions or struggles around certain practices. In the case of the US, the dominant ideology speaks of entrepreneurship, private property, the free market, and agentless transformation of the social fabric in a more progressive direction. This also assumes that we have come to the most progressive social fabric possible—particularly in relation to other societies. All of these are, more or less, enforced and constituted by the state (and, in the case of social transformations, are only really guaranteed when they become state policy) regardless of how anti-state these ideologies may be. The conceptualization I develop at the end of this chapter hopefully helps to clarify this relationship.
between culture and the state; for now I will illustrate the widespread notion of culture as a process which limits the discipline in developing its own conceptualization.

I have chosen Nick Couldry as an index for this illustration. This is because, while he chooses the phrase Inside Culture as the title for his book on reimagining methodology in the field, he doesn’t seem to have any way of conceptualizing what makes the interior of a culture seem effective.76 Readers may object that he is not illustrative of the entire field and, of course, may reject my reading of his method. I contend that, while he is somewhat more nuanced than my brief exposition of his argument will allow, he generally lands where I’ve placed him and his position represents a general tendency within Cultural Studies.

Part of what restricts Couldry’s position springs from one of the admirable qualities of his approach: he actually takes the time to read some of the early texts of the field. This allows him to return to a time when the purpose of Cultural Studies was more focused on illuminating what I’m calling cultural efficacy and trying to explain how a dominant ideology was able to take root, even amidst the mercurial processes of subcultural appropriation and transformation. Virtually from the beginning the energy of the field was animated by the tension between the “Structuralist” and “culturalist” paradigms.77 As the “culturalist” understanding is more interested in the “process” oriented understanding of culture, Couldry’s revision of the method is clearly meant to give more weight to that end of the spectrum. However, he positions himself as reimagining the field in relation to Raymond Williams, one of the more balanced and nuanced scholars working in the tradition—and therefore one of its least Structuralist.

Williams himself characterizes culture as “a process” in his descriptions of it in both Keywords and Marxism and Literature. However, within this process the three major categories in Williams’s theory of cultural struggle and transformation are residual, dominant, and emergent. In

76 Couldry, Inside Culture.
Sociology of Culture he also considers alternative and oppositional culture. The precise contours of these concepts is less important to this conversation—but note his admission of a cultural “dominant”—than the fact that all of these presuppose a closed system, an evolution (or regression) of culture within a certain set of historically and geographically defined social relations.

Couldry objects to this. At issue here is the notion of what constitutes this culture “as a way of life.” Is it’s penetration as uniform as Williams seems to suggest? How much does it necessitate linking culture with place? As Couldry argues,

> The strength and clarity of Williams’ vision derives in part from a closure: a closure around a particular historical ideal of community. This leaves, on the face of it, very little room for questioning more fundamentally the value of cultural ‘closure’ itself. In the transformed context of the late twentieth century, there are powerful arguments for avoiding closure.”

I see the point Couldry is making, but his criticism is based more on an ideal of what culture looks like when taken from a long view of history rather than the effective closure visible at a certain level of analysis. In short, he is using a hypothetical ideal of what culture ought look like and criticizing Williams for failing to hew to this ideal when trying to describe a culture as it is.

He then goes on to enumerate the many difficulties of applying Williams’s model to the present day; chief amongst them is that the “massive increase in inter-cultural flows of people, images, information and goods [. . . .] makes the idea of cultures separated by hermetically sealed borders impossible to sustain.” This in turn undermines “the idea that culture is necessarily tied to place.” If we presume that there is some novelty in the level of exchange and mobility supposedly essential to the process of globalization, these are valid points. Still, it is curious that there can be “inter-cultural flows” without cultures being closed on some analytical level. If there

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78 Couldry, Inside Culture, 30.
79 Ibid., 95.
is no closure, they are just cultural flows, in which case there’s nothing unique about the moment he describes other than the scale on which it operates.

In any case, while Williams is hardly advocating the idea that cultures should be hermetically sealed, his list of concepts—dominant, residual, emergent, etc.—doesn’t include an understanding of a cultural development transmitted from the “outside” of culture. Couldry is right to point this out and I’ve tried to correct this some with the dynamic of endogenous vs. exogenous culture in the conceptualization below. Couldry, on the other hand, simply abandons the project of establishing the “inside” in question.

Instead of the larger, effective, dominant culture which, one assumes, constitutes the inside of a culture, Couldry’s focus returns the individual self and his/her co-determination of the system or structure in which they were enmeshed via complex feedback loops with chaotic, unpredictable consequences. Culture became a part of this process; it was the rational agents, adjusting to facts on the ground, which were the real creators of the system that, from afar, appears stable. This characterization is influenced by his reading of Ulf Hannerz, whose book _Cultural Complexity_ has become a mainstay of recent critics in the field. In the words of Hannerz, who describes this as the “flow” of culture:

I find the flow metaphor useful—for one thing, because it captures one of the paradoxes of culture. When you see a river from afar, it may look like a blue (or green or brown) line across the landscape, something of awesome permanence. But at the same time, ‘you cannot step into the same river twice,’ for it is always moving, and only in this way does it achieve durability. The same way with culture—even as you perceive structure, it is entirely dependent on ongoing process.\(^{80}\)

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Following from this, Hannerz says culture is complex, which he insists is a “sober insistence” in place of “characterization(s) of the cultures in question in terms of some single essence.” In other words, instead of summing up culture as one thing, he says it is complex and only complex. 81

This is certainly an admirable ideal for how we could think of culture and certainly it fits well within the range of what Raymond Williams would have thought about culture at its best. But Williams was very careful to consider the inflection given to this characterization, realizing that the use of this definition itself was political. For him, the fact of this closure in the local community was enhanced by precisely the interpenetration of the more capitalist oriented culture from outside. 82 In his essay on “The Idea of a Common Culture” Williams concludes with the following:

In any society towards which we are likely to move, there will, first of all be such considerable complexity that nobody will in that sense ‘possess cultural property’ in the same way; people invariably will have different aspects of the culture, will choose that rather than this, concentrate on this and neglect that. When this is an act of choice, it is completely desirable; when it is an act of someone else’s choice as to what is made available and what is neglected, then of course one objects. But it is not only that the society will be more complex: that people will not and cannot share it in an even and uniform way. It is also that the idea of a common culture is in no sense the idea of a simply consenting, and certainly not of a merely conforming, society. One returns, once more, to the original emphasis of a common determination of meaning by all the people,

81 That he is the only person mentioned characterizing culture as any one thing—in this case, it is complex—is contradictory, but sort of beside the point: he has just finished explaining that he is interested in looking at the complexity of only “Contemporary Complex Cultures” so his characterization has an elegant circularity to it (at least, from afar.)

82 In reference to Southey, writing in the nineteenth century, Williams notes that “The word, culture, indicates here the line which was to be so extensively pursued: the setting up, in opposition to the laissez-faire society of the political economists, of an idea of active and responsible government, whose first duty was the promotion of the general health of society.” Raymond Williams, Culture and Society: 1780-1950 (New York: Columbia University Press, 1958), 25.
acting sometimes as individuals, sometimes as groups, in a process which has no particular
end, and which can never be supposed at any time to have finally realized itself, to have
become complete."

Williams points to the tension between choices we can make and choices determined by other
forces, culture as an open ended process versus culture as a process which has reached its end.
Here the idea of culture as a closure is a resource for resisting and productively channeling change
on the part of the members of a community. Only from a perspective which sees Western,
capitalist culture as natural and adequately democratic does the resistance to its contours and
determinations appear reactionary.

Theodore Adorno’s writing also presents a useful tension within the concept of culture,
largely because he sees the progressive potential and the political closure as locked in a dialectic of
process and administration, complexity and closure. On the one hand, in his more pessimistic
view of contemporary society, Adorno states that “whoever speaks of culture speaks of
administration as well.” In matters that most contemporary theorists would prefer to be fluid and
“complex,” Adorno looks to the contradiction of organizing “culture” towards particular ends:

Organizations of convenience in an antagonistic society must necessarily pursue particular
ends; they do this at the expense of the interests of other groups. Therefore obduracy and
reification necessarily result. If such organizations continue to occupy a subordinate
position within which they were totally open and honest toward their membership and its
direct desires, they would be incapable of any action. The more firmly integrated they are,
the greater is their prospect for asserting themselves in relation to others. The advantage of
totalitarian 'monolithic' nations over liberalist nations in power politics which can be
internationally observed today is also applicable to the structure of organizations with a

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smaller format. Their external effectivity is a function of their inner homogeneity, which
in turn is dependent upon the so-called totality gaining primacy over individual interests,
so that the organization is forced into independence by self-preservation: at the same time
this establishment of independence leads to alienation from its purposes and from the
people of whom it is composed. Finally – in order to be able to pursue its goals
appropriately – it enters into a contradiction with them. 84

This alienation, of course, wouldn’t apply to the “organization men” who were put in charge of
policing these definitions. They would eventually internalize the logic and see no contradiction:
since they were in charge of policing the authentic, it would be little trouble to them to be
inauthentic themselves. As Dewey’s epigraph to the present chapter argues, this is not just a
logical possibility: it is a concrete reality.

On the other hand, unlike Hannerz, in so far as Williams and Adorno thought the
complexity of culture was important, it was in the possibility that, as Adorno says elsewhere,
Culture, in the true sense, did not simply accommodate itself to human beings; but it
always simultaneously raised a protest against the petrified relations under which they
lived, thereby honoring them. Insofar as culture becomes wholly assimilated to and
integrated in those petrified relations, human beings are once more debased. 85

Although this ideal of culture is taken from another essay, it lies as a tension with the essay on
“Culture and Administration,” such that, at moments the “culture” he refers to in the article is not
the debased, petrified version of administered culture, but the “vital” protest culture that he saw as
always already possible. Thus, contrary to the representations of Adorno as a stodgy elitist, the role
of culture in this sense was not simply to exist and be valorized by some future Clement

Greenberg: it was supposed to inspire people living in those petrified relations to take action, to change those petrified relations and continue to work at making them closer to the ideal. As Williams says earlier in his essay,

In talking of a common culture, then, one was saying first that culture was the way of life of a people, as well as the vital and indispensable contributions of specially gifted and identifiable persons, and one was using the idea of the common element of the culture—its community—as a way of criticizing that divided and fragmented culture we actually have."

This was, perhaps, a tall order, but it is the reason that cultural critics were focused on culture.

Between these two modes of culture, there should run a tension: a dialectic between what is and what could be; the petrified relations of administration versus a protest against them. This might be a merely negative dialectic, with no absolute sense of what came next, but nevertheless the phantom of an ideal should at least haunt the discussion. The role of the cultural critic here was not to elaborate the ideal, but simply to help construct a method of considering the culture itself, as a whole, that undermined the process of naturalization, the process of reification that made these relations and the culture that they represented seem like a historical inevitability and in this way honored their fellow humans with the encouragement of continued development.

Before one can present a revolt against petrified conditions, one must have some sense of what those conditions consist of—and what about them could and should be changed. This requires method for identifying how cultural efficacy is constituted and specifying what components of that efficacy are the result of the kind of culture Adorno terms “administrative.” Finally, it requires a return to some admission that there is an administrative level which has some effect in creating a “closure,” an “inside,” a cohesion to cultures.

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86 Williams, *Resources of Hope: Culture, Democracy, Socialism*, 35.
Hanerrz asserts that the cohesion at a distance—the very “cultural inside” of Couldry’s study—is an illusion. There is no cohesion, only the anarchy of atomized individuals interacting. This template leads Couldry, at the extreme, to suggest the individual is the best site for the study of culture. But in the end neither he nor Hannerz is able to present a method for discerning why a culture would ever appear to be a coherent system—much less how it might function and continue to be reproduced in many of the same terms, despite all the apparent change.

In the end, I would argue, this is the main goal of Cultural Studies. Hannerz is discussing a form of reification: to ask why those vital rivers appear as sclerotic lines is to undermine their reification. Hannerz seems to be deeply philosophical in his invocation of Hericlitus’s maxim: indeed we may never step in the same river twice, but the flowing water is contained between the banks. To recognize that the apparently complex processes are also determined by the banks of that river is to reinstate the dialectic of culture. Hannerz and other contemporary scholars who invoke culture rest comfortably on their undialectical conclusion rather than attempting to discern what causes this reification—or how it can be evaluated, criticized, undermined—and how this is related to their prized “culture as a process.” In doing so, they reduce the possibility that this process will continue: to stick with the metaphor, they overlook the enormous dams being built upstream, which will permanently alter the landscape. Instead, they file this under “change” and disregard the questions it begs. Were the rivers we step in today similarly altered? Was this alteration really of the same mode of cultural change as the ideal suggests?

The primary method for undermining reification is not merely to take people into the apparently buzzing bumbling world of street level culture and chide them for ever imagining it was somehow a cohesive, integrated whole: it is to help figure out why it appears and often functions according to rules and norms that make this totality appear natural and inalterable, like the course of a river on a map. To quote James Boyle, describing legal culture in a properly dialectical fashion, to undermine this reification is to “lay out the normative topography, the
geography of assumptions within which issues are framed, possibilities foreclosed, and so on.”87 As I said, above I see this as a vital first step to investigating the cultural production of intellectual property rights: as tangential as it might seem to engage in outlining this framework, I hope it is clear why it is necessary. Having outlined the issues of conceptualizing culture within both the balanced copyright movement and the discipline of Cultural Studies, I will now outline my own conceptualization.

What we talk about when we talk about Culture

To start with a tentative definition, culture is the meaningful product of complex interrelationships between social norms, policies and practice. This interrelationship, though it is mobile and may shift over time, has a history and, in so far as the culture is effective, it is effective in the confines of a certain space. Thus part of what I am arguing is for the specificity of a culture in a certain time and place. The purpose of this is to be able to discuss, on the one hand, the efficacy of a culture and the interrelationship of culture and law; and on the other, the role of the state in imposing a certain cultural understanding.

The levels I am suggesting are not all that unique. But they all appear, in different moments and discourses, unaccompanied by their contingent, mutually constituting levels under the simple designation of “culture.” In other words, aspects I am designating below as C1 or C2 are discussed simply as “culture” which creates a difficulty in discussing different modes according to different terms. Those familiar with Raymond Williams’s definition (from Keywords and other places) will find much that is derivative in them. The framework I’m adopting to describe the

87 Boyle, Shamans, Software, & Spleens, 15. Despite the apparent determination of this geography, Boyle also presents this as a process that is undetermined, is not a conspiracy or evidence of a deep structure at work. As the following should suggest, I find this judgment to be an empirical question to be discovered rather than an already accomplished ideal to be assumed.
levels of a cultural inside is building off Hannerz’s description, but it is also related to what David Harvey says would be a key concept were Williams to update his *Keywords* today: space. It may be common sense to notice that cultures appear more complex at the ground level than from afar, but it is equally true that moving quickly from one cultural space to another creates a disorientation that can only lead to the conclusion that there is something essentially different about those two spaces and the practices and beliefs of their relative inhabitants. How to define space and how space fits into this conceptualization will be touched on below.

For now, I am suggesting three different levels:

**Culture 1 (C1)** is the on-the ground, micro-level culture. C1 is the anthropological version of culture; the referent of de Certeau’s *The Practice of Everyday Life*. It is at once an atomized, creative and dynamic process of transformation, and a widespread, patterned set of common customs and practices. As Hall said in relation to ideology—which could be a synonym for culture in this conceptualization—it is the “the practical as well as the theoretical knowledges which enable people to ‘figure out’ society, and within whose categories and discourses we ‘live out’ and ‘experience’ our objective positioning in social relations.” From this level, it can seem to be the ground level of collective social action or a sclerotic force of traditional order and undefined social norms. It is at this level of culture that the contradictions of the concept itself are most apparent because they are both more and less reified than at any other level; but these contradictions are largely the result of an uneven development between these levels across both the diversity and commonality of everyday life. This diversity is apparent both within and between local, regional and national spaces, but as Adorno points out in terms of “administration,” there is

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political utility in denying diversity within communities and highlighting it between them. Therefore something as practical as wearing a headscarf, weaving cloth, or chewing coca leaves can come to have a political significance far beyond banal patterns in use. This is to say that banal practices are often seized upon as indicative of a culture. They then become useful for the purpose of administering a political movement in cultural terms. This is to say that, even at this level, a dialectic exists between processual development of local practices and closing force of tradition or administered culture from the top level.

In the anecdotes mentioned at the end of the last chapter, C1 is the level of the Bolivian apparel producers and Ecuadorian shopkeepers, whose “work” and livelihood are dependent on producing illicit reproductions of mediated culture. The latter—the brand apparel, the media on those discs—is a primary example of Culture 2 (C2). This is at once the flow of (mass) meanings across space and the archive of materials held to be meaningful over time. Spatially, the need for mediation would occur, as in Benedict Anderson’s Imagined Communities, “in all communities larger than primordial villages of face to face contact.” But this only considers the social, political mediation; even in primordial villages, the narration of the natural world—for purposes of explanation, instruction, and even mere entertainment—takes place at an epistemological distance. The efficacy of the “deep horizontal comradeship” this implies can’t be denied simply because it has significant political implications or it ignores or stifles the possibility of individual deviance. As Anderson says, “Communities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined.” The more widespread the community imagined—and hence the more likely there are distinctive local practices and particularities—the more mythical it becomes, the more its boundaries become defined not by what is common to the group but by what supposedly separates them from the Other—even if the Other can be found in your midst.

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The ambiguity between inside and outside, conceived in the Western tradition in terms of national sovereignty, has been most productively contemplated by contemporary theorists of international relations. When Inyatullah and Blaney work to reimagine sovereignty “in a way that works against the ‘empire of uniformity’ imposed through the reign of straight lines”\(^9\) that national borders supposedly represent in relation to culture, they are focusing on the problem of difference in general; but in terms of culture, they are encountering the problem of culture as mediated administration: roughly, in order for a political entity to be effective against other, similar political entities, it must impose some cultural uniformity on the community it hopes to represent. This administration of culture is mediated through the C2 in order to create a real, embodied efficacy at the ground level of C1. This crucial link in the chain of legitimation creates ethical questions that can’t be ignored—who represents this community? How can they be said to be representative of its culture? In Spivak’s important challenge to the idle use of these terms, “Can the Subaltern Speak?” Yet in terms of the study of culture the first order of business is not discern which myths are true or false but which ones are alive or dead—which myths about the community have cultural efficacy—and why. Thus the political question of the connection between C2 or C1 and the administrative ethos above, discussed further below, is primary.

The technological aspect of C2 which has long been the focus of communication\(^9\) and media studies is as important as the social psychological aspect: on the one hand, the McLuhan-esque notion that media act as an extension of our human capacities; on the other, the understanding of hegemonic discourse as being the most likely content of commonly shared materials, as in Stuart Hall’s “Encoding/Decoding” thesis. In short, the social power of mediated information is contingent on the interindividual, socio-ideological territory of commonly held

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\(^7\) And which is central to even Anderson’s discussion—where the original nations were largely facilitated by the rise of the newspapers, novels and official state languages of “print-capitalism.”
meanings and the widespread ability to negotiate them cognitively. Hall says the most common position of the viewer in relation to this media is one of negotiation, which allows for a key moment of agency and, as chapter four argues, labor on the part of the negotiator.

This negotiation, on the other hand, requires a learning process that is deeper than the practical logic of C1. This is the reason for Althusser’s inclusion of “the cultural” alongside the other ideological state apparatuses—of churches, schools, family and the law.93 I would argue that all of these are also cultural and the power they wield in society to define the culture at a more fundamental level is a functional (and in some cases, formal) force which mediates between the levels above and below to help (re)produce the practices that most closely adhere to the dominant range deemed legitimate as cultural. On the other hand, the performance of practices at C1, the individual conformity to local patterns of “customs in common,” is not necessarily evidence of a commonly held narrative—or evidence that the subject performing the practice believes something about it. It can also be evidence that the narrative (and the practice it narrates) in question must be negotiated—and that failure to do so will result in a coercive punishment.94

For this reason C2 is more difficult to describe as a broad category common to all cultures. Though Innis made such an attempt, it was largely to discover the way C2 works in the service of administration. It is less easy to make generalizations of C2 itself. This is because its importance depends on whether culture is primarily understood as a time-binding or space-binding—or, in the words of Regis Debray, whether the mediation of culture is intended to transmit culture throughout the ages or merely communicate it to a dispersed population.95 There is a basic social process here of making meaning, of creative appropriation of the ambient resources, of the pleasurable feeling of deeply experiencing a song, a story, or an image. The degree to which it is

mediated by discs and distant signals or folk songs of village elders varies significantly between societies—and even between individuals within these societies. Likewise, whether it will necessitate, in Debray’s terms, only the “interest and curiosity” that sustains communication or the “transformation if not conversion” required by what he calls proper transmission of a transhistorical truth. Transmission, in other words, would require the alteration of practices at the C1 level as well as beliefs about them at the C2. This is often, though not always, determined by how much this level of mediation, in any given culture, is supposed to make the potentially malleable processes of C1 look more like an administrated model imposed from above—or vice versa.

Thus **C3** rears its head. **Culture 3**, for the purposes of this analysis is a meta-cultural model of society. It is the fundamental legitimating narrative—and what Poulantzas calls its “institutional materiality”—which outlines and enforces the appropriate practices for all the rest of society. It is a quintessential example of what Adorno meant when he said, “Whoever speaks of culture speaks of administration as well.” For the purpose of this dissertation, it is most closely associated with the Anglo-American form of the law, the state, and the dominant relations of power and production. On this topic, Rosemary Coombe, ever cautioning against the use of “culture as a noun” makes this observation:

For the past two decades, critical anthropologists have been renouncing "culture"- recognizing the origins of the concept in forms of colonial governance, acknowledging its complicity with orientalism, and showing how many, if not most, constructions of tradition and cultural identity were reifications that served and continue to serve the interests of settler and colonial elites. Less remarked upon, but no less important, is the emergence of a reified and stable concept of "law" in the same processes of colonial subjugation. Allying themselves with the inexorable and universal forces of science, progress and rationality, colonial rulers developed a concept of law that was the antithesis
of culture, coded as superstition, irrationality, timeless stasis and organic closed systems. Peter Fitzpatrick suggests that these mythic, cultural worlds were constructed as the mute ground that enabled a European "we" to possess "law." In other words, this colonially generated image of non-European "cultures" establishes the racial foundation for law's modern identity. 

Therefore, part of what is at stake in discussing this level as cultural is to contest the notion that the law—along with the state and the economy—are not objects of some obscure branch of the natural sciences. This is especially the case in relation to the culture in question—that of the reified culture of property—because it denies its own political and cultural construction.

In general C3 is simply the macro-level objectification of the dominant culture—one of the primary objects of cultural studies—which may or may not be mediated through C2 and which may or may not be effective at the level of C1. In other social contexts, it may be a theory about the relationship between the state and the economy or narrative connecting the law to religion that would otherwise be seen as a mediating form of C2 culture, but which has risen to the status of an organizing apparatus of scientific, administrative knowledge: it claims a special form of authority above and beyond any others. This doesn’t mean that every practice and every other mediation has to conform exactly to it, just that none can be seen to oppose or otherwise threaten the effective rule of this culture. It is, therefore, the threshold that is supposed to limit culture at the other levels. In the anecdote in the previous chapter we find this in the new legal culture being prescribed by the Ecuadorian Intellectual Property Institute and enforced by INTERPOL, which, in turn, are being directed in their project by the dictates of the World Intellectual Property Organization and the Trade-Related aspects of Intellectual Property (TRIPS) riders of the World Trade Organization agreements. Likewise, the balanced copyright critics oppose what

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*Coombe, "Culture*
they see as a new, maximalist model of cultural administration, what Lessig calls “the culture of regulating culture.”

In short, when effective, culture at this level provides “a dominant cultural principle upon which depend[s] the cohesion and integrity of the politically constituted social whole.” This is the level where a dominant cultural narrative legitimates the political execution of formal social control and denies the fact of functional power. This is especially the case in nominally capitalist, democratic countries where the single law of the land must be based on some sort of social contract, and the power resulting from economic inequalities is denied by appealing to the supposed freedom of the market.

In the terms of Ellen Mieskins Wood, this “pristine culture of capitalism” is primarily characterized by a sense that the political is separated from the economic, that the economic is an independently functioning realm of social life, separate from any political control. By pristine she refers to the ruling class of the Early Modern English state, which she says relied on “purely ‘economic’ modes of appropriation.” But to do so, they had to use the state apparatus to instantiate a culture of “political freedom and economic unfreedom.” It is pure in the sense that the theory of liberalism—exemplified through Locke’s defense of property—depicts the coercive force of the market as an independent force when it is actually constituted through the political. In effect, therefore, the only way that the political can be separated from the economic is through the cultural—through enforcing practices that adhere to this subjective orientation, mediating these practices as normal through mass representations, and ideologically masking the unequal access to legal and economic resources under the universal banner of “freedom.” This is

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basically the essence of the reified culture of property in that is central to this project. The following chapter will look more closely at this development in its Early Modern context. The point of carefully describing this level of culture *qua* culture is to be able to discuss the model of the state—and of capitalist culture—that was imposed on these populations.

In discussing it abstractly, this level of culture is the most problematic because it is only really active when it is effective throughout the cultural hierarchy—that is from C3 down to C2 and C1—yet as a narrative it takes as its object the totality of interactions between all three levels. In conditions where it is obviously imposed, it is the controversial structure which ostensibly determines the levels beneath it in one way or another. In a more organic situation, it can be seen as a macro-reflection of the patterns found further down the hierarchy. Either way, in this conceptualization, I am arguing that there is some form of structural determination—a cultural efficacy—and a key force of this determination is the *culture* of law, the state, and the economy. Note here that I am not separating law, the state and the economy into the divergent fields normally dealt with by the alternative disciplines mentioned in the introduction: I am arguing that this structural determination is also cultural. Therefore, in addition to speaking about the different theories of how these levels work, how these divergent forces are aligned, and how the system remains effective, it is essential to see the law, the state, and the economy as cultural in themselves.

The culture of law, the state and the (macro)economy should also be understood as having two distinctive components, both of which have a culturally specific characteristic. Most obviously, the *content* of these is cultural. This includes: the specificities of what and how the law regulate; the method for generating and enforcing laws through the state and in relation to civil society; and, the forms of connection and coercion that can be effected through the supposedly independent realm of the economy. But less apparently, the formal *structure* of law is also cultural. In the case of the western ideology of the law, the structure assumes that all the communities occupying the territory of a state operate under the singular “rule of law” governed by the central
authority. In turn, this means that all the areas of the country, demarcated and recognized by the international community as the space of the sovereign state, are the property of the sovereign state, with all the rights and responsibilities that adhere to this. In short, this form of state comes from a cultural assumption about territorial jurisdiction which claims that, however the law is made by that state, whatever the process, the central state is the supreme authority. If the C2 is the narrative through which the state gains its legitimacy as the nation, the C3 is the formal structure of law through which the territory of the state is inscribed by what Inyatullah and Blaney call, “the magic of straight lines.”

The presumption of this structure is a controversial. A commonplace objection amongst postcolonial critics is that the nation is a cultural construct, that it is often an oppressive and violent force for creating a dominant culture in place of a diversity of cultural practices. In other words, one of the important arguments advanced by postcolonial critics is that “the nation” is not the same as “the state:” there may, in fact, be a variety of communities that have aims, practices, viewpoints, and even histories conflicting with that of the central state. I am sympathetic to this argument. However, pushing back against this is the geopolitical reality, which (almost exclusively) recognizes the central state as the legal authority of the entire territory. Postcolonial critics are right to criticize the ideological notion that the nation-state is representative of all its inhabitants, but this geopolitical fiction is not just an illegitimate mediation of the nation by powerful political elites: it is also an internationally recognized political reality that local communities must negotiate.

In fact, one of the original understandings of a cultural inside was defined along national lines as a way of organizing sentiment around the administrative functions of the state. The observations about the artificial nature of all nationalist productions of this kind, particularly in light of current political realities—for instance, the relatively minor but increasingly frequent and highly visible presence of non-citizens or the foreign born within state boundaries and nominal citizens outside of them—is certainly warranted.

On the other hand, in so far as the state has a unique power to, in the words of John Stuart Mill, “stretch the power of society over the individual” it is also the case that, over time, it has the potential to determine the actions, if not the beliefs, of whoever is subject to its power. Cultural Studies scholars are often more likely to consider the issue Mill was most paranoid about (namely the determining role of social norms and popular opinion—though they usually use the genealogical assessments of Foucault or his poststructuralist contemporaries) rather than the role of the law or the state in determining action. It seems that this particular Realist fiction (i.e. of the state) is particularly important in precisely the circumstances which it is often claimed they have less importance: those of the condition of economic globalization. Despite the dominant rhetoric, the state is absolutely necessary for creating the supposedly spontaneous interaction of private property rights in the free market. This dominant cultural logic determines the landscape of whatever cultural processes occur.

In modern societies, the policies which determine practices are legitimated through the state in the form of laws. According to most ideals, these laws are decided upon democratically or are, at the very least, not doctrine handed down from a supreme leader whose authority was based on some metaphysical being rather than the will of his (property holding) subjects. This notion of

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law says that it is supposedly something that we agree upon as good; it supposedly allows for the continuation of the most meaningful and sustaining cultural practices and the prevention of the most detrimental, both of which are, again, ideally, defined by the people who engage in those meaningful practices. This may not always be the case, and it is an empirical question whether it is or not. But it is true that, from an external perspective, according to the dominant culture of international relations the law and the state are held to be the highest agents of determining cultural meaning and practice, regardless of the democratic participation involved or the legitimacy of the policies on the ground.

In short, within this conceptualization, the argument that C3 can determine C1 through C2 follows from the cultural assumption that it should determine these things, at least within the boundaries of liberal democracy. The general implication of this argument, on the other hand, is that the conceptual problematic I’ve laid out is relational, and the cultural efficacy—the power of the cultural imperatives to legally define social practice—of any level will depend upon the particulars of the concrete conjuncture.

This doesn’t necessarily mean that the actors or agents or individuals or subjects in this field must believe in the narratives that supposedly lie behind their actions at every moment, but that the pressures of the field will force them to negotiate at every moment with this dominant definition. Note that this means that there is a dialectic here between the culture of power and the power of culture. In other words, whatever the means through which the dominant definition is imposed, the simple fact of its dominance will have an effect on the culture it inspires in the field; however, the less this position is guaranteed by blunt force (a possibility that Bourdieu is often remiss in considering) the more it will depend on the manipulation of other kinds of
already legitimate culture.\textsuperscript{102} Thus, according to Perry Anderson, when Constantine declared Christianity the dominant religion in the Roman Empire, he co-opted this emergent cultural outlook as a strategy for holding onto the power he felt was slipping from him.\textsuperscript{103}

The purpose of this framework is to analytically delineate these aspects of culture in its totality. The abstract schematic above is a work in progress and, as with all abstract schemes, it must be tested against the concrete reality it purports to describe. The divisions between the levels should be understood as relational and mutually constituting. It doesn’t necessarily follow from the structure that every practice at C1 is determined by the C2 and C3 above, or that every dictate handed down from C3 will necessarily find its effective expression at the levels below. Part of the purpose of this construction is to provide a baseline by which we can investigate the important deviations and interactions between them.

Different political, social, and cultural theorists will give particular weight to any one of these levels, narrowly arguing for the principle efficacy of one level or another. \textbf{This makes the theory of how these different levels interact itself a product of a specific cultural moment and a particular ideological framework.} In my case, I am arguing that there has been a dearth of attention paid of late to the law and the state, to the functional force of the economy, and to the issue of structure in general. This is especially evident in the discussion of culture within the balanced copyright position. They, like contemporary Cultural Studies scholars, rely on a characterization of “culture as a process” which ignores the functional closure at the C3 level.

Most critics of Intellectual Property Rights—at both the domestic level within the US and the international level—don’t discuss Culture 3 as cultural, except in focusing on what is more


commonly understood to be the object of cultural studies through the question of “cultural policy.” This refers strictly to policies governing the C2 level that now retains both the mythical force of the bourgeois public sphere and the 1960s flair of the counterculture, particularly as it is now commodified and distributed via the media that largely dominate that level. Questions of free speech, of the ability of individuals to creatively engage with the ambient cultural materials, dominate this discussion. In so far as Culture 3 is understood as cultural—as the law and the state are seen at this level—it is as a similarly mythical guarantee to the freedom at this level, which too stringent a property right is in direct violation.

While the levels of C1-C3 help to analytically describe the space of the cultural efficacy of a certain regime, the levels don’t describe the efficacy itself. If these layers are understood as horizontal, parallel dimensions, organized in a spatial hierarchy, cultural efficacy is the vertical crystallization whereby the specific aspect of each dimension is articulated with the dimension below and/or above it. It may be temporary (i.e. conjunctural) or more fundamental, but even finding this coagulation of culture does not explain why or how the efficacy exists: it simply helps us to note that this structuring element is regarded as somehow reified by subjects whose actions mutually constitute that efficacy. Moreover, there may be many practices and theories that lie outside this vertical column of cultural efficacy, but in so far as they are not a threat to this efficacy itself, they are simply marginal or “deviant.”

Likewise, in so far as they are populated by particular actors with varying degrees of social power, these layers can also be understood as layers of different positions of social strength. This doesn’t mean that individual actors have unlimited ability to affect the change or reinforcement of the principles dominant within a field, but that they have the institutional resources and social authority to proffer the dominant logic of culture as if it were an independent, even creative,

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assessment of the social formation as a whole. From each perspective, through its immediate locus of efficacy, the world appears more or less malleable. This is, in effect, because they have a claim to understand the specific knowledge through which the field operates. A key element to this relation, as this dissertation will argue, is the predominant legal interpretation of property rights.

In very minimal terms, the specific questions [i.e. bracketing the fact that many of the mediations at level 2 are meant to explain “natural” phenomenon] corresponding to these levels could be summarized as follows:

C1. “What do people do?”—assuming that there is a pattern to what is done;
C2. “Why do they do this?” or “What does this mean?”—assuming, again, that actions have a meaning, which is a cultural assumption in itself; but also assuming that there are a large number of contingent, mediating factors that can explain this, including narratives.
C3. “Why is this good or right?” making this last level the most purely ideological—but also the most directly defended with the formal, legitimate coercion of the state and social institutions, leading to the circular response, “Because it is legal.”

A purely Kantian understanding of action and duty would say that actions at C1—patterns of use—are done purely because they are right or good. The question of Cultural Studies, however, is about how what is seen as right or good was granted that status; what is the role of the mediation through C2 in making this so; and what other, alternative practices are denied, ignored, or subjugated in order to make C1 appear to conform with the meta-patterns above. It is the question, therefore, of how these patterns (m.) pattern (v.) the practices below. Politics, therefore, become essential to this interaction—even as power itself is often contingent on localized forms of symbolic/cultural capital. To paraphrase Bourdieu, a key stake in the field of culture is the power to define the definition of culture.
This is a cynical understanding of the relationship of law and culture. Contrary to either a natural law interpretation—which would argue that the laws we have at C3 are given by god or nature—or to pluralist interpretations—which would say that laws are a social creation that are arrived at by a deliberative process of debate and mutual consent—I ultimately argue, alongside Poulantzas below, for an understanding of law and culture which says it is the result of conflict and struggle, and eventually requires coercion for its implementation. There is a diversity of practices at the ground level. They may be informed by meta-narratives of one kind or another, with some mediation between communities. Whether it is in the interest of consolidating power, acquiring resources, subjecting labor, or merely claiming cultural superiority, one set of practices eventually wins out over others and decertifies them as legitimate through the use of the power of the state—the power of coercion that gives the C3 its oomph.

This is just one understanding of how these orders affect one another; the framework will allow for other interpretations of the vectors of force within it. This understanding of culture is most clearly evident in neo-imperial situations, such as that mentioned by Coombe above; clearly intellectual property rights are like this imposition. This argument has been made by many critics. The two distinctions I contribute in this debate are to present a clear understanding of the concept of culture, and to outline the depth of the culture being imposed. Most critics are willing to discuss the contours of IPR, but the total imposition is one of liberal property rights and free market capitalism, both of which serve many of the same entrenched interests that critics deride for their power grab. When we look at the whole package, rather than just Intellectual Property Rights, and, at the same time, consider the reasons given for the total imposition, it becomes harder to simply contest one part of that whole. This conceptualization of culture is intended to aid critics in seeing this imposition in its totality. It helps demonstrate the distinction between the content and force vectors in one culture rather than another, and the “empty idea of liberty” that the hegemonic narrative of western capitalism puts forward at the expense of all others.
This understanding allows for—even necessitates—agency in the descending levels of culture. Without the process of embedding C3 into the mediating and ground level cultures, it would not have any cultural efficacy. These processes are akin to the creative work appropriation that Culturalist scholars have long pointed to as evidence of the existence of resistant readers. This labor of appropriation is necessary for the instantiation of cultural value just as it is for the production and reproduction of economic value.

**Dialectical Forces Acting in the Framework**

Despite the attempt at specificity in this preliminary framework, it is difficult to escape the problem of exhausting this term—of risking the conclusion that, if everything is cultural, nothing is cultural. My hope is that by constituting these levels dialectically—and showing the forces involved in crystallizing a structuring form of cultural efficacy—it can be a useful analytical tool. However, as stated above, part of what makes it useful is the acknowledgement that these divisions only make sense only when one takes into account their possible interrelationships and the forces interacting between them. To help keep the conceptualization in motion, therefore, let me specify three contradictory sets of forces acting on, in, and through this hierarchy. These dialectical tensions are: dynamic vs. determined culture; formal vs. functional power; and, endogenous vs. exogenous culture. The latter then sets up an argument for outlining the specific, western understandings of culture, civil society, and the state, and the paradoxical relationships between liberalism and democracy, negative and positive rights.

**Dynamic vs. Determined Culture**

To return to the opening discussion of the chapter, the discussion of culture as a process focuses on the dynamic mode of culture. The conceptualization above articulates a determining
level of the hierarchy that would take away from the dynamic agency of the subjects at other levels, leading proponents of a conceptualization of culture as a process to argue for a more bilateral form of determination whereby, if there is a determining effect of the law, the state, and the economy, it is somehow the result of an accumulation of patterns and forces projected upwards, from C1 through C2 into a structure at C3. This “common law” understanding of legal culture—where the law of a modern nation state is based in some way on unwritten “ancient traditions”—is actually the progenitor of the Natural Law theories of Locke. It also is in accordance with the reactionary conservative understandings of law in Burke and Hayek.

However, even in this case, a structure exists which determines future processes. In this dialectic between determination and dynamism, many scholars of contemporary Cultural Studies have sided with the latter. This has left critical conceptualization of the force of determination either to the more narrowly focused, ancillary disciplines of political theory, legal studies, and economics; or limited it to a Foucauldian, astructural characterization of power.

In his most recent appeals, Lawrence Lessig, the widespread practice of piracy to be a dangerous precedent in criminality and warns that the continued ability of the average person to regularly break the law threatens to undermine the force of the law itself. The pragmatic solution he presents in his latest book, *Remix*, is to find a way for the determining glove of the law to fit more tightly over the obviously dynamic Culture—in this case a dynamic interaction between C1 and C2 that is made possible by new technologies—without stifling that very profitable dynamism.

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105 This is also similar to the neo-Parsonian theory of “structuration” developed by Giddens, which is usually less appealing to Cultural Studies scholars in general than that of the ideas of structure presented by Bourdieu. However, it is usually the notions of habitus or symbolic/cultural capital which are appropriated from the latter, thus ignoring the actual level of structure—the field—that Bourdieu insists is necessary to fully comprehend the other two concepts in his problematic. Cf. Alex Callinicos, “Social Theory Put to the Test of Politics: Pierre Bourdieu and Anthony Giddens,” *New Left Review* I, no. 236 (1999) William Hamilton Sewell, “A Theory of Structure: Duality, Agency, and Transformation,” *The American Journal of Sociology* 98, no. 1 (1992)


107 Lessig, *Remix*. 
The question that structures his inquiry is related to the “moral platform” that should be imposed in relation to copyright that will both shape the behavior of the coming generation and retain more general cultural efficacy of the law. He says that “we should always be thinking about how to moderate regulation in light of the likelihood that the target of regulation will comply. It does no one any good to regulate in ways that we know people will not obey.” Yet his libertarian ethos circles back to warn that, “developing the habit of mind, especially in youth, of avoiding laws because they are seen to be wrong, or silly, or unjust, develops a practice of thinking that could bleed beyond the original source.”108 In other words, the lack of maximalist IPR’s cultural efficacy at the C1 level—at the level of basic practices—threatens to destabilize the more fundamental efficacy of the cultural assumption in “the rule of law.”109

His commitment to the “bigger problem” of “Reforming Us” follows from Lessig’s long-stated concern, explored more fully in chapter 3, with shifting the balance of social control to making “to make culture serve power”—rather than simply hoping the law alone will restrict culture.110 Determination for Lessig follows something like the classic definition of the term, as offered by Raymond Williams in Marxism and Literature. Williams was trying to counter the charge of an “economistic” determinism in theories of base and superstructure. Writing during the waning of the national-led era, where the welfare state had polluted the capitalist mandates of the pure market-determined culture, Williams had the difficult task of trying to articulate “the full concept of determinism.” For Williams, the process of determination is, itself, dynamic

For in practice determination is never only the setting of limits; it is also the exertion of pressures. As it happens this is also a sense of ‘determine’ in English: to determine or be

108 Ibid., xx, 283.
109 At the bottom of this slippery, Hobbesian slope lay, “[g]hettoes burdened by the drug trade. [...] Latin American governments that have no effectively free judiciary or even army because the wealth produced by prohibition enables the drug lords to capture control.” (xv) He thus characterizes the corruption of the wealthy as the same as the corruption of the youth, playing to both sides of the political spectrum.
determined to do something is an act of will and purpose. In a whole social process, these positive determinations, which may be experienced individually but which are always social acts, indeed often specific social formations, have very complex relations with the negative determinations that are expressed as limits. For they are by no means only pressures against the limits, though these are crucially important. They are at least as often pressures derived from the formation and momentum of a given social mode: in effect a compulsion to act in ways that maintain and renew it. They are also, and vitally, pressures exerted by new formations, with their as yet unrealized intentions and demands. ‘Society’ is then never only the ‘dead husk’ which limits social and individual fulfillment. It is always also a constitutive process with very powerful pressures which are both expressed in political, economic, and cultural formations and, to take the full weight of ‘constitutive’, are internalized and become ‘individual wills’. Determination of this whole kind—a complex and interrelated process of limits and pressures—is in the whole social process itself and nowhere else: not in an abstracted ‘mode of production’ nor in an abstracted ‘psychology.’

Williams’s definition of determination—the setting of limits and the application of pressures—includes within it both determination and dynamism. He calls the setting of limits a “negative determination” and the pressures that are applied to and through these as “positive determinations.” These determinations are mutually constituted, yet it is the limits, the structure, which takes some precedence in shaping what Williams calls the “total social process.” His vision of this process necessitates a moment when the limits and pressures expressed in “political, economic, and cultural formations” are activated through “individual wills.” Despite the differences of the problematics, this understanding of the individual negotiation of the structure is

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similar to the habitus of Bourdieu and the interpellated subject of Althusser. In each, the practical agency of the individual subject, defined by the context, is willfully “determined” to maintain and renew the structures of culture through what they understand to be the correct practices of that culture.\textsuperscript{112} The structure is able to carry out its effect, but only because it has some efficacy at the ground level.

While Williams, above and throughout, considered the question how the economic base determined the political and cultural superstructure, the model I’ve presented above shifts the pathways through which these forces act. In this model, the cultural efficacy of the total social process Williams talks about works less from the determining base to the determined superstructure. The materialist concerns remain and, in the current context, one of the key questions is the way property is defined and distributed. The question in terms of cultural articulation of the ideology of property is how these are legitimated, how they are anchored together such that the mode of production—which requires specific practices, mediating social relations and juridical structures—is sutured into a social formation. Culture, here, is both a form of the vital processes that keep these functioning, and the essential limits it places on what is or is not possible. Retaining the dialectic found in Adorno, the reification of the administrative culture occurs not just through the denial of history by the agents closely policing the operation of the structure: it most fully occurs when the average practitioner permanently adjusts their horizon of action and expectations. This readjustment can happen in terms of the economic model, the political model, or even the entire cultural formation itself. Once the entire edifice appears as if it is, in the terms of Barthes, denotative rather than connotative, its reification is complete.

Still, moments arise when key anchors are shorn from their moorings, when a crisis of economic production and accumulation coincides with a crisis of political legitimacy: at these times there is an opening for discussion about those anchors themselves, about rearranging the limits, and harnessing the pressures in a novel, more productive or generally beneficial way. Lessig recognizes that the current conjuncture threatens to be such a crisis: he also recognizes that the understanding of law that Maximalists hold is fragile and, if pushed by a strong social movement, would take little force to break it.

It is difficult to cram Williams’ nuanced, dialectical understanding of this process into Lessig’s narrow conceptualization of social reality. Lessig himself is working to add nuance to vacuous, fundamentally determined, neo-classical social formations presumed by the Law and Economics tradition. As stated in the introduction and explored further in chapter three, this tradition argues for the necessity of using economics to understand the actions of individuals in relation to the law. But in this, it assumes the efficacy of both the state and its liberal ideal throughout the social formation; though Lessig’s engagement with (and background in) this movement is part of what makes him relevant today, it is also part of his problem. Lessig sees that the Law and Economics movement, and the Austrian and neo-classical economists (Hayek, Von Mises) that provide its basic social theory, are able to see the individuated appropriation, but they have no sense of why the individual does what it does. Therefore it is assumed that its motivation must come from some inherent quality—either, as Williams cautions, an “abstract mode of production” or an equally “abstract psychology.”

Lessig, long before he was writing directly about intellectual property rights, recognized this faulty logic. He saw that informal cultural norms and social forces were needed to mediate the “abstract psychology” of the rational actor into its proper political role in the “abstract mode of production.” He remains unable to provide a satisfactory answer but, in short, the problem of the points of determination and dynamism are as follows. For the mode of production, the
determination comes from role of the state but the application of pressure comes from the economy: the narrow limits of acceptable practices in relation to property provided by the state serve to channel the vital forces of the civil society into the market economy. For this to work, however, one must assume a certain psychology.

Culture, therefore, picks up the slack by, in the words of Terry Eagleton, “moulding human subjects to the needs of a new kind of polity, remodeling them from the ground up into the docile, moderate, high-minded, peace-loving, uncontentious, disinterested agents of that political order.” However, in Williams’ time, as now, the primary forces able to discipline these subjects are directly through the state and indirectly through the economy: in truth these are both the same since the political apparatus is what constitutes the rules and roles within the modern economy. This means, in order for libertarianism to work, subjects must be disciplined using a political apparatus which denies it is political—i.e. it is beyond the capacity of those subjects to alter the apparatus in their favor. The only source of legitimation is through the cultural aspect of these apparatuses. Yet this creates a culture that is always already determined and, therefore, hardly “free.”

Formal vs. Functional Power

Lessig positions the problem of dynamic vs. determined culture in relation to what he senses to be the undermining of another key dialectic within this hierarchy. It relates to the discussion of culture above and to the discussion of democratic legitimacy below. It is the dialectic between formal (de jure) and functional (de facto) power. I derive these terms primarily from the early twentieth century, US legal realist Robert Hale who argued for the necessary constitutional...

distinction between formal versus functional liberty.\textsuperscript{114} As I address in chapter two and three, Hale’s observation is as old as the culture of property itself: it is the obverse, democratically focused articulation of what Ellen Wood claims to be the essence of this culture in its purity. If the political is separated from the economic, then the formal liberty that we all have as citizens is undermined by the lack of functional liberty. Or, as Hale said from the other direction, coercion was not only effected through the formal, public state; it was also affected through the functional coercion of inequalities in economic power.

Within the analytical hierarchy above, this is a caveat that says that—as a formal guarantee, defended by the state, explicit as C3—law is certainly used to determine the processes of culture in the various levels. It has the potential to solidify certain practices, creating a “status-quo neutrality,”\textsuperscript{115} and, to return to the most important element of this project, reifying certain practices as natural, pre-political. Yet formal, legal measures are only one dimension of power used to determine this cultural efficacy. This is coupled with functional power that exists within the social formation working through and beyond the formal guarantees of the state. In the words of Nicos Poulantzas, “relations of power, go far beyond the state.”\textsuperscript{116}

This would seem to contradict the notion of law or the state determining culture, again leaning more in the direction of a Foucauldian understanding of micro-political struggles.\textsuperscript{117} In cases where the dialectic leans more in the direction of functional rather than formal power, this may be the case. And, indeed, the fact that certain decrees lack cultural efficacy illustrates that even formal power must have a functional effect. However, responding to this “seemingly libertarian” conception, Poulantzas asserts that “the State plays a constitutive role not only in the


\textsuperscript{117} One of His more concentrated accounts of this is found at Michel Foucault, \textit{The History of Sexuality}, Vintage Books ed. (New York: Vintage Books, 1980), part 4, Chapter 2, "Method".

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relations of production and the powers which they realize, but also in the totality of power relations at every level of society.” On the other hand, Poulantzas cautions against “statist” conceptions: “it is struggles which make up the primary field of power relations and which invariably have primacy over the state.” In other words, the formal guarantees of the law, in so far as they help constitute relations of power and solidify the terms of the struggles, play a determinate role, even if there is a surplus of functional power beyond these formal guarantees. Thus was ultimately what Hale was arguing: the formal law of the state doesn’t necessarily coerce people into, for instance, the wage relationship, but by guaranteeing property relationships in a certain way, it allows for the inequality of economic resources to be used as a functionally coercive force. It was, effectively, “law-making by unofficial minorities.”

From the opposite direction, Lessig is concerned that the challenge to the legitimacy of current copyright law posed will undermines all formal power—i.e. the law—precisely because the state lacks the functional power to enforce formal IP protection. In the case of intellectual property rights, this actually represents a reversal of the terms of power. As mentioned in the introduction, for many years the economic expense of the technology required for production and distribution of mass media culture gave large US corporations functional control over the inflows of C2 at national and, arguably, international levels; though these were guaranteed by formal rights to the content that flowed through their networks, these were secondary to their virtual monopoly over the process of distribution. Alterations to the technical environment have allegedly undermined this monopoly and their functional control, making formal rights more important in preventing alternative methods of distribution. Thus the formal changes—the implementation of ever more extensive private property rights in intangible materials—are meant to cement what was an informal, but functional, determination of the national and international division of cultural

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118 Poulantzas, State, Power, Socialism, 45.
labor—and its proceeds. Lessig, in his latest book, recognizes this change, but he sees the former situation, of economic monopoly, sanctioned by law, as a “natural” product of the technology.

I will speak more about intellectual property rights and the division of labor below. For now I want to highlight the assertion that there is power beyond formal rights or laws. I find that, following the early work of Foucault, many Cultural Studies scholars see power mainly in terms of the power of the state or other social institutions. When economics is considered, it is considered in relation to the state and society; the relative freedom of the economic in advanced capitalist countries is seen as evidence that this social formation has a different kind of efficacy. When nominally Marxist or Structuralist arguments are considered from this perspective, they are filtered through this relational prism such that the conclusions they reach appear overly deterministic or, to paraphrase Foucault, more fitting for the 19th century. This has resulted in a well developed sense of the power of social institutions not formally integrated with the political apparatus of the state—and thus a useful understanding of functional, relational power. While this understanding could, theoretically, be applied to a variety of aspects of social life, it is rarely considered in terms of the economy as a source of social power. Yet the functional power of money, if not of capital, is quite an important one in just about every society—and especially those that are predominantly capitalist where the de facto disciplinary power of the economy is constituted through the formal de jure guarantees of the state.

One of the reasons for this is that the economy is characterized as possessing the same dynamic, mercurial, even democratic quality that is usually attributed to the cultural by “culturalist” scholars. As mentioned in the beginning of this chapter, in capitalist societies, this is the solitary space of “culture as a process.” Without an alternative space of non-economic

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120 In addition to finding works like Discipline and Punish or Birth of the Clinic compelling in their understanding of the changing forms of power, the study of cultural policy—the closest Cultural Studies scholars get to studying policy—is usually informed by Foucault’s lectures on Governmentality, if not directly meditating on them as a source of explanation.
interaction able to have a similar effect on the social process in its totality—a space of civil society—it is difficult to imagine the “free market” as a disciplinary mechanism on par with the state. Therefore the perspectives that validate “culture as a process” more readily recognize the functional power of symbolic or cultural capital than of financial capital. The latter wields far more functional power than is usually admitted in the determination of the cultural, particularly in contemporary, Western societies. The functional power of capital is not separate from the formal “political” power of the state, which guarantees its functional capabilities against any form of expropriation. These functional capabilities are clearly significant—more so than the functional control over the ambient media culture by a handful of corporate conglomerates.

For the purposes of this dissertation, the notion of functional economic power will be especially highlighted in terms of the functional power that is granted to the holders of property in the means of social production through the formal, legal protection of property. This focus on the power of productive property is informed by a broader critique, most cogently developed in the early 20th century by Legal Realists like Robert Hale. For Hale and other legal realists, the power that the coalition—or class—of citizens wielded through their ownership of productive property was extremely important. As Barbara Fried summarizes:

Hale, along with a number of other Realists, argued that the so-called private power exerted by private parties to a bargain was in fact public power delegate by the state through its laws of property and contract. Such laws granted individual owners [. . .] the right to withhold property entirely and the privilege to waive that right on condition that others meet the demanded price, and these laws were ultimately backed up by state force.\(^{121}\)

Hale’s characterization of the function of economic power, ensured by the state, helps to give legs to the notion that C3 can determine the cultural formation throughout the descending levels without there being a sense that agents at these levels lack agency. This is due to the fact that, although the predominant force of this efficacy functions through the supposedly informal vector of the economy, the latter is sanctified through the formal channel of the law. The latter, in turn is a cultural production that, though reacting to the functional power of the economy in relation to the cultural, has more often worked to help refashion culture in the interests of capital. The functional potential of the economic may be more powerful, but it rides on the rails of the law. This seems especially true when there appears to be no regulation at all.

This characterization may do more to cloud the distinction between functional and formal power, but it is essential to understanding the vectors of power that exist within this conceptualization. It also bears a unique relation to the final set of forces at play in the conceptualization of culture above: the tension between the endogenous and the exogenous culture.

**Endogenous vs. Exogenous Culture**

As stated at the opening of this chapter, the purpose of outlining the above conceptualization of culture was to be able to speak about it as a “cultural inside” despite the apparently dynamic processes of culture that take place within it. In the framework I suggest, I have divided this inside into three levels. This allows us to speak specifically about the different levels of culture and how they may or may not be determined or dynamic. For instance, most of the scholars who articulate an understanding of “culture as a process” are focused solely on the C1 and C2 levels. Maximalist IPR represents an attempt to control these in a more determinate way; but the focus on this debate about IPR alone obscures the fact that these processes are already controlled at the C3 level by a reified culture of property. The maximalist push is really just an
attempt to extend this model of culture and social life into a new realm that even the proponents of balanced IPR see as especially lucrative.

I have also suggested a possible question corresponding to each level—“What do people do?”; “What does this mean/Why do they do it?”; “Why is this right or good?” The increasing abstraction of these questions is not just a consequence of their tending towards an ethical philosophy or a genealogy of morals; it is also evidence of the increasing distance from the site of cultural practice, from the practice of everyday life. As mentioned above, the top down control (at C3) of this practice (at C1) can only be mutually constituted in so far as the principles of C3 are legitimated as good by a claim to be somehow universal. Immanuel Wallerstein posits this as a “gigantic paradox,”

Culture is by definition particularistic. Culture is the set of values or practices of some part smaller than some whole. [. . . ] [Yet] there can be no justification of cultural values and/or practices other than to some presumably universal or universalist criteria. Values are not good because my group holds them; practices are not good because my group does them. To argue to the contrary would be hopelessly solipsistic and force us either into an absolutely paralyzing cultural relativism (since the argument would hold equally for any other group’s values and/or practices) or into an absolutely murderous xenophobia (since no other group’s values and/or practices could be good and therefore be tolerated.)

This paradox is compounded by a boundary problem: what is the geography of this culture? It is inadequate to proffer the circular definition that it is the space in which those practices adhere. The suggestion I have offered—the top level culture of the law in the state—is echoed by Wallerstein, who asserts “the so-called nation-states” are “our primary cultural container.”

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However, he notes that these are of “relatively recent creation:” “A world consisting of these nation-states came into existence even partially only in the sixteenth century. Such a world was theorized and became a matter of widespread consciousness even later, only in the nineteenth century. It became an inescapably universal phenomenon later still, in fact only after 1945.”\textsuperscript{123} In short, my way of getting around the boundary problem of culture is to focus on the level of the state, but point out the contingent, historical nature of that political reality.

Whatever the epistemological origins of culture or the nation, the political container of the state is less a consequence of any particular quality of the practices or beliefs contained within it than the geopolitical fact that the state was, after 1945, understood as an administrative unit within what International Relations scholars term the “international system of states.” Therefore there is a definite violence in assuming that, within any given political unit, there is an organic connection between the levels of culture. The latter can only be assessed based on a historical sociology of the cultural formation within any given state. However, without a clear conceptualization of the different levels of culture, the question of how organic this connection is remains even more hypothetical than the conceptualization itself.

In any case, something like a distinction between the endogenous and exogenous must exist in this conceptual framework, even if they are only analytical categories. It is only with a clear set of distinctions about what constitutes the inside or outside of a state-culture that one can pose questions about its efficacy or legitimacy. Postcolonial critics challenge the notion of the sutured national community. On the one hand, claims to represent “the nation” or “the culture” are often tinged with xenophobic, racist tendencies. On the other, a diversity of communities and therefore cultures can be bound within the borders of the state: as evidence of this, indigenous movements in Ecuador and elsewhere in Latin America argue for a “plurinational” state and

\textsuperscript{123} Ibid., 92.
International Relations scholars like Scholte argue for the transnational—meaning “cross border”—space of society. In each of these cases, the Realist state may be undermined or contested, but the geopolitical reality is that the state remains the supreme authority of a given territory. This assumption, as Wallerstein implies, is itself a product of a certain culture. Chapter two will explore the origins of this form within the Anglo–American context.

As an ideal, this can be expressed as a legal, political configuration at the level of C3 mutually constituting the dynamic freedom of the descending levels of culture. The first assumption in each of these is that there is a sovereign state that determines the law of the entire territory. The spatial dimension of this state, as mentioned above, is determined by the legitimacy that adheres to its boundaries both internally and externally. Therefore the space of the state is not necessarily determined by the culture: political boundaries, especially in the case of the colonial dissection of Africa, often take culture into account only to divide and conquer. The recognition of borders, therefore, is most often an arbitrary consequence of history.

There are then different strategies for dealing with the diversity contained within these boundaries. In part, this depends on what the function of the central state is assumed to be. In accordance with the framework developed above, the spatial conquest by the state may or may not result in a fundamental alteration of C1 or C2 through C3. However, this determination is partially made from outside, particularly dependent on how strong the state itself is relative to other states. As Bertrand Badie points out, this political dependency may result in a particular class of domestic elites gaining the most from the state’s international relations, but in order for anyone to operate legitimately, from within the state, on the world stage, the state itself needs to be

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recognized by external actors as legitimate. The adoption, therefore, of policies that are, by definition, exogenous to the cultural history of the inhabitants of the state, policies that are objectively opposed to any number of actual local practices that could be said to be endogenous, may ultimately be seen as domestically necessary.

As mentioned above, this tension of endogenous vs. exogenous, therefore, is not an absolute but a relative category. In part it acts as a supplement to categorizations created by Raymond Williams in his *Sociology of Culture*, which charts the permutations of dominant, emergent, residual and archaic culture, adding the categories of “alternative” and “resistant” for good measure. In this case, there is no distinction between when an “emergent” aspect of culture emerges out of a mercurial churning of creative energy within the culture itself, and when it is inspired by or imposed from without. It could certainly be asserted that all cultures are hybrid cultures, that any nation or cultural inside is always already a collaborative enterprise with others, both inside and out. But even in this case, even in the case where the “multicultural” is assumed to be the norm, the fundamental construct with which we are working is the cultures that constitute the “multi.” Thus we are back to the problem of how to outline the apparent crystallization of an isolated, endogenous culture. As with the notion of a cultural inside, it will be contingent on a certain perspective at a certain time—a snapshot of when the ideology appeared, from whence it came and how it became hegemonic.

In short, far from closing off borders or assuming the realism of concepts, the notion of endogenous vs. exogenous helps to account for the fact that the process of culture is transnational. It makes possible the valuable concept of “transculturation,” which Mary Louise Pratt appropriates from the field of ethnography, “to describe how subordinated or marginal groups select and invent

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126 Inayatullah and Blaney, *International Relations and the Problem of Difference.*
from materials transmitted to them by a dominant or metropolitan culture.” It is also a way of using this conceptualization of culture to account for what radical geographers like Richard Peet and David Harvey discuss in terms of “uneven geographical development.” Without having a concept of culture which attempts to account for the mechanisms of its functional coagulation it is difficult to see how there are “intercultural” or “transcultural” flows at a local, national or even global level.

In other words, the final tension between endogenous and exogenous helps to cement the conceptualization of this cultural inside. In relation to the global projection of intellectual property rights, this is due to the substitution of what used to be merely functional power in the informal, neo-imperialist relations between the US and the developing world with a more formal guarantee. The latter, in effect, hopes to determine cultural practices at the everyday level—in Ecuador as much as in China or the USA—despite the dynamism that might exist both within and between the different levels of culture that I’ve explicated above. This is ultimately the context in which to understand the TRIPS and WIPO regulations to which Ecuador and the merchants of Guayaquil are responding. The local culture in Guayaquil displays a striking disconnect from the international regulations being imposed—and a secessionist movement (“Guayaquil Autonomo”) aims to disconnect the city from the nation-state. Nevertheless, the site of the struggle for local culture—between formal international harmonization and local autonomy—becomes the state.

**History, Culture, Property Rights, and the Liberal Paradox**

I have now outlined this tentative conceptualization of culture animated by these specific, relational dialectics. Before closing, I should make some mention of where I stand on a very

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important dialectic: that of history. Since much of the analysis of this conceptualization relies on seeing it in action over the long term, understanding this more overarching dialectic is the last piece of the apparatus I’m presenting. I reject a teleological view of history, of history having a meaning and an end. However, I do believe it is essential to understand the way these dialectical forces above have worked themselves out over time. This is especially the case with dynamic/determined culture and formal/functional power which help to round out the distinction between endogenous/exogenous. Thus I would agree with the method of historical materialism in so far as looking at actual relations rather than ideal types helps us to better understand the contemporary status quo. In so far as I’ve said the tension between endogenous and exogenous is a more conjunctural snapshot, the use of historical sociology as a methodology helps to build backwards from that snapshot and better understand how it came to be. In other words, the conceptualization and these related analytical dialectics help to undermine the process of reification. The obverse is also true, however: alternative accounts of history bolster the narrative at C3 by making the development of its relationship seem more organic, natural, or mutually beneficial in retrospect. In other words, as E. P. Thompson, an early scholar in the Cultural Studies tradition, asserted

History does not become history until there is a model: at the moment at which the most elementary notion of causation, process, or cultural patterning, intrudes, then some model is assumed. It may well be better that this should be made explicit. The moment at which a model is made explicit it begins to petrify into axioms. [. . . ] Even in the moment of employing it the historian must be able to regard his model with a radical scepticism (sic), and to maintain an openness of response to evidence for which it has no categories. 128

Thompson’s call for “empiricism” in history, on the other hand, shouldn’t preclude the use of concepts or models. In fact, though he angrily, and famously, derided, “the poverty of theory,” paying attention to the theories which inform the implementation of a particular legal, political, economic structure is essential to judging these as history. It is not necessary to see theory as a second order form of production, but instead as a mediating level of culture which can as easily illuminate as obscure the levels above and below. Theory is one kind of cultural mediation among many, another form of ideological practice which “transforms the forms of representation and perception in which the agents of a social formation ‘live’ their relations with their world.” In this way, much of the hierarchy of culture outlined above fits within the Althusserian structure of ideological practices. Geras elaborates Althusser’s understanding of this structure:

> The raw material of ideological practice, in turn, is never reality itself. It always consists of abstractions, ideas, intuitions, which are themselves the results both of previous ideological practice and of other subsidiary practices (empirical, technical), which Althusser mentions in this connection without expatiating upon them. So the raw material from which theoretical practice ‘begins’ (the process cannot have an origin, strictly speaking) is never reality as such, but always an abstraction of one sort or another. It is transformed by the application of means of theoretical production, Generalities II, into a product, Generalities III. The means of theoretical production are the basic concepts of a science at any given moment, more or less unified within a specific theoretical framework which will determine the problems capable of being posed and resolved by the science. And the Generalities III which are the product of theoretical practice are the scientific concepts embodying knowledge.

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Without privileging the theoretical as a specialized form of knowledge production, I highlight the way Althusser’s explanation provides a similar process, a similar layering of the cultural production, increasing in abstraction, towards a set of “scientific concepts embodying knowledge.” The relational quality of these concepts and their explanatory force, however, is not solely reliant on their cohesive mediation between the abstract and concrete. The power of concepts to describe reality becomes contingent on their cultural, social, and political efficacy, on their ability to shape the reality of the social formation to more closely adhere to the abstract model presented. This ideological practice may, in general, have an autonomous existence from the determination of the political above.

Therefore, a variety of theories and ideas can exist in the cultural understanding of social practices: there can be, in the terms of conceptualization, a variety of C2 mediations of C1. Conspiracy theories about Masons, 9/11 truthers, economists at the Bureau of Economic Affairs and Marxist understandings of political economy all produce scientific or quasi-scientific explanations. In general, these can also follow a chain of legitimation up to the C3, finding religious, utilitarian or other philosophical justifications for the widespread implementation of their understanding of basic practices; but the ultimate consecration of a conceptual paradigm, at least in the contemporary worldview of what Alain Supiot calls homo juridicus, is having C3 enshrined in law and state policy.

If we take the hegemonic narrative of western culture existing at the level of C3, it corresponds, in the present case, to a formal, theoretical model of how law, economics and politics works. This model is itself supposed to be analytical description of human interaction at the other levels of culture, making universal claims for itself. Because of this, it is usually not seen as a level of culture at all. Instead, it is described in pragmatic terms adopted according to the scientific dictates of disciplinary knowledges. The history of the model, its efficacy on and embeddedness in the other levels of culture is described in terms that are dictated by the model itself. As Althusser
said of all natural law theories, “the state of nature is no more than the origin of the society whose
genesis they wish to describe.”

In effect, this makes any positive attributes of the contemporary social formation an
outgrowth of western (i.e. democratic capitalist) civilization—and its more complete
implementation a kind of natural force of progress. Thus the description morphs into a normative
and proscriptive determination. Still, the formal law of C3 can determine practice at the level of
C1 only in particular circumstances. In some cases, C3 may be the result of a long (endogenous?)
process through which patterns in C1 are solidified into positive or common law. In this case, the
formal legitimacy and functional efficacy of C3 in relation to C1 seems less problematic in the
short term; this risks what legal theorist Cass Sunstein calls a “status quo neutrality”—seeing
practices as pre-political, when, in fact, they are the result of a protracted political battle whereby
winners have imposed their will on the rest of society.

The ideal of the Western Liberal tradition—as Habermas describes it—sees the mediation
of C2 as essential to the legitimation process. This is especially the case as the law that is meant
to proscribe culture and practice, the unitary “law of the land,” is given jurisdiction over far flung
communities. Mediating between these is even more necessary than in the small scale, rational,
critical public sphere that supposedly legitimated the liberal-democratic law of the early Western
republics.

From the critical, Cultural Studies perspective—and the Frankfurt School before them—the
question was how and why the nominally democratic polities and ostensibly pluralist societies
would largely acquiesce to the what Polanyi discusses as the fascist direction of the corporatist
welfare state. The ease with which post-war capitalism was able to stifle the internal strife of the

interwar years could not be explained by the interaction of C1 and C3 alone—it wasn’t simply the top down imposition of a new cultural climate: there had to be some psycho-socio-cultural mediation between these levels to make this new efficacy and legitimacy stick. Indeed the process of using all three levels in order to impose new ways of life was being perfected by the early, administrative communications researchers whom Adorno rejected.

The efficacy of the C2 level, of the level of mediated communication and creative expression, was seen as a primary ground on which to set up a struggle against this model. Althusser’s separation of it as an autonomous space of social agency and cultural production should be understood as an elaborate version of the same. Though it was joined with diverse movements, many of which were striving to show, by example, a new way of living at the C1 level—the Situationist return to the authenticity of directly lived reality—the outburst in northern/western cultures—alongside the rising Third World—in 1968, largely at this level of efficacy, seemed to confirm this hypothesis. But though this movement targeted a certain level of culture, it was never meant to be a change only of this level.

Likewise, as chapter 2 of this dissertation points out, the origin of copyright was indeed meant to stifle free speech: but the target of this speech wasn’t merely the isolated freedom of expression, the potentially offensive outburst of an angst-driven artist confined to permanent adolescence. It was speech for something, about something. It was largely related to altering the terms of the newly universalizing state—either to narrowing its jurisdiction or altering the content of its law. The site of this struggle, as in many others, was the social property relationship legitimated by law and protected by the unitary, territorial state. The current critics of IPR, however, largely allow for both of the above to remain beyond reproach. Here lies the central contradiction that most mainstream critics of intellectual property are unable to solve: this is the paradox between liberalism and democracy, explored most fully in chapter 3.
In terms set out here, the best way to conceive of this is that the culture of pure capitalism necessitates a single state, with sovereign jurisdiction over an ever expanding space. The legitimacy of this jurisdiction supposedly hinges on the fact that it is there to secure political freedom: the state is there to protect everyone, equally, from the state. However, it is also legitimated by its protection of property, which is distributed unequally. The supposed formal, political freedom is therefore undermined by a functional economic unfreedom: on the other hand, the dynamic freedom of economic production, of the social production of value, is ultimately determined by these same juridical laws. The democratic force of politics is, therefore, limited by the liberal restrictions on the political.

Proponents of this pure system see it as a natural phenomenon; in fact its fundamental presumption is that it is based not on an indirect mediation of practices, through C2, but that it is a direct representation of them at C1. The microfoundations—what might be called the C1 of neoclassical understandings of culture—in this theoretical paradigm are assumed to be “endogenous” to all societies, and thus have no real cultural specificity except what they are given in any particular context. However, they argue, this natural rationality can only emerge in a context where there are clear private property rights (defended by the state) and clear restrictions on the power of the state in abrogate those property rights. Thus the legal framework, imposed from above, is not considered cultural: it is considered the implementation of a natural order. This natural order uses the formal power of the state to enforce the functional power of the market through the rearranging of society along the lines described above.

The simple and exclusive defense of private property seems a readily acceptable, even minimally effective form of state. But in its totality, it has much deeper ramifications. As I outline in subsequent chapters, the dynamism of the market that this is supposed to sort values is contingent on

1. The commodification of anything of potential value;
2. The subjugation of any and all agents to the functional force of the market in the calculation and distribution of all value, including the value of the agents themselves. Once implemented, since it originates in an atmosphere where property is already unevenly distributed, formal guarantees of property morph into a functional coercion of non-property owners by property owners. Further, the goal is ultimately to eliminate the ability of people to operate outside of the market, thus destroying the dynamic of “self-help” in all ways except through the market. The simple division of labor therefore becomes a social division of labor and the accumulation of the value produced through whatever process of social or natural production flows primarily to those who own the most property.

In the debate about intellectual property, the balanced position condemns the extension of property rights to the intangible products of the mind or of, in its limited version, “culture.” The argument is that this locks down a process that would otherwise be open. It also denounces the unjust appropriation of socially valorized objects of culture by corporate owners. These arguments mistake the pure, formal theory of property to be a representation of reality. The reality is more often the result of the functional power of those with property, such that, “whenever, through the development of industry and commerce, new forms of intercourse have been evolved [such as that of digital technology and so-called globalization] the law has always been compelled to admit them among the modes of acquiring property.”\(^1\)

The conjunction of contemporary capitalism insinuates other contradictions. The libertarian defense of private property and construction of the limited state based as it is in Lockean natural rights overlooks several key points of contention. The on the one hand, it ignores the privatization of resources whose value was generated with public or communal labor—a move that David Harvey has termed “accumulation by dispossession,” but was equally true in Locke’s time.

This is only one half of the meaning of primitive accumulation—a process whereby the direct producers are not able to provide for themselves except through selling their labor to others. These conditions are functionally coercive—and the theory behind what makes market capitalism work intends them to be. On the other hand, the scale on which enterprises operate should undermine the small-holder vision of personal property that populates these ideological offenses. Though they are granted the same constitutional status as subjects of the law, multinational corporations are quite different entities than individual property owners or even small-scale producers.

This conception and these dialectics will be fleshed out more fully in the process of articulating the arguments of the dissertation below. The overall point to take away is that the conceptualization will help to differentiate levels of culture such that we can see how it is possible to see culture as, simultaneously, a process and an administered structure. The early sections of this chapter discussed the preference given to the former by both balanced critics of IPR and the dominant strain of cultural studies. In relation to IPR, this is important because critics focus on the dimensions where culture seems to remain a process, and fail to see the totality of its administered closures. I don’t mean to deny the insight of these perspectives—or the ideal of culture that they rely upon. Chapter four more thoroughly analyzes what the implication of this preference is in relation to what might be called cultural commodities. The later sections of the present chapter have outlined a conceptualization of culture that takes seriously the proposition that the processes of culture can be enclosed in an administrative culture of law, the state, and the functional power of economic actors in the capitalist articulation of all three.

In the project at hand, the purpose for outlining this conceptualization was to make feasible to discuss what I’m calling the reified culture of property. The following chapter looks at the origins of this reified culture in Early Modern England and the writings of Francis Bacon and
John Locke. The process through which their cultural ideal was imposed on the population is a
good example of one technique culture at the C3 level is able to achieve cultural efficacy
throughout the cultural hierarchy. Namely, it was by destroying all the competing practices at the
C1 level, invalidating any competing narratives at the C2 level, and instantiating the dominant
narrative of “improvement” as the solitary justifying narrative of the newly hewn unitary state.
The degree of naked coercion displayed in its implementation seems starkly removed from the
process of implementing IPR on a global scale. But, as this dissertation aims to show, it is the
implementation of the deeper culture of property that is the real context of the latter. Thus we
must return to the source of both before coming back to the present implementation of IPR.
CHAPTER 2: Property, Value, and Primitive Accumulation in the Liberal State

To perceive the magnitude of the [English] Civil War’s accomplishments it is necessary to step back from the details and glance forward and backward. The proclaimed principle of capitalist society is that the unrestricted use of private property for personal enrichment necessarily produces through the mechanism of the market steadily increasing welfare for society as a whole. In England this spirit eventually triumphed by “legal” and “peaceful” methods, which, however, may have caused a great deal more real violence and suffering than the Civil War itself, during the eighteenth and early nineteenth centuries on the land as much as in the towns. [. . . .] not all historically significant violence takes the form of revolution. A great deal may occur within the framework of legality that is well along the road to Western constitutional democracy. Such were the enclosures that followed the Civil War and continued through the early Victorian era."

In the previous chapter, I outlined a framework through which law and the state can be seen as a mechanism for imposing a model of culture. I designated this as the top level of a hierarchy of culture and outlined several dialectical forces that, acting through this hierarchy, are able to establish what I’ve termed a column of cultural efficacy within the descending levels of culture. This exercise was meant to help in describing the forces that have helped to instantiate a reified culture of property, particularly within Anglo-American society. Much of the legitimacy of this cultural dominant rests on a certain understanding of value in relation to property and the state. In the reified form, this culture says that any value produced using productive property

should flow back to the owner, even if that value was objectively the result of a much broader process of social production. Conversely, it also claims that the owner’s right to that property is based on the fact that it has value. The dominant narrative of property assures us, again, that this value is the result of an “improvement” the owner’s labors have effected on the property and, therefore, the owner has a right to the property. This circular argument forms the foundation of the liberal defense of the state. I attributed to Locke the earliest and most coherent version of this defense, while admitting that he was likely part of an emergent “structure of feeling” within certain sectors of the English ruling classes.

The relation of this reified culture of property to the contemporary debate about IPR is twofold. On the one hand, it is precisely this reified culture which provides the underpinning of the maximalist IPR offensive. As Rosemary Coombe argues in her book *The Cultural Life of Intellectual Properties*, most advocates for maximalist intellectual property rights make arguments that are rooted in a Lockean understanding of property as it is presented in his most widely read essay “The Second Treatise of Government.” Here, Locke argues that, “Whatsoever he removes out of the State that Nature hath provided and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.” Coombe discusses this particularly in reference to trademark law, which, in the past few decades, has begun to move away from seeing trademarks as something that companies are required to protect in order to give customers some modicum of quality assurance, and towards seeing it as a property in and of itself. The implications of this shift are certainly interesting to chart, but in challenging the legitimacy of the Lockean notion of property only in its applicability to Trademarks, copyright, or publicity

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135 As Laslett points out, Locke’s *Essay Concerning Human Understanding* could also claim this honor (the third choice being his *Essay on Toleration*), but it is often seen as in basic contradiction with the *Treatises*. He even speculates that Locke’s own awareness of this inconsistency could be one reason he resisted having the *Treatises* attributed to him within his lifetime. John Locke, in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

136 Ibid., 288.
rights, Coombe reifies the overall arguments about property, labor (or, as Ellen Meiksins Wood discusses it “improvement”137) and the role of the state as the cultural background from which these claims to property emerge.

On the other hand, Coombe and others challenge this Lockean notion on the grounds that its conception of value is flawed; they note processes of digitization and globalization make a broader process of social production visible in relation to the objects of IPR. While they fail to challenge the reified culture of property, the conversation they begin opens up the discussion—and the visibility—of the larger process of social production that creates value throughout the capitalist economy. In this, the debate about IPR has much to teach us about the reified culture of property which it, unfortunately, fails to challenge in any fundamental sense.

The present chapter is focused on the pre-history and implementation of this reified culture—on the moment when most aspects of it were non-existent. In conceptual terms, it looks at the historical origin of the framework of culture I outlined in the last chapter. Briefly, it shows the moment when the modern nation-state was consolidated in 17th century England. This political formation allowed for a certain model of culture (C3) to be instantiated on the population—largely in terms similar to Locke’s understanding of “improvement”—and to reshape English society, culture, and its ecology in the direction of what is now modern capitalism. I argue that the peculiarly “pure” form of English state, relying as it did on the notion of Natural Law, made the cultural aspect of this model more important than most. However, unlike today, this culture was not reified. A fierce struggle ensued and, far from a natural development, the population in question had to be coerced into accepting this model of culture. The origins of the modern system of IPR are found here, but the use of copyright was largely a move to secure the larger culture of property against this revolt. Likewise Locke pens his defense of the liberal state

and culture of property in the context of trying to stave off further threats to this emergent culture of property. His success in this endeavor can be measured by its continued reification to this day.

As I’ve argued throughout this project so far, the debate about IPR is really more about the history of property rights and what the present debate can tell us about the reified culture of property. The present chapter looks at the moment of historical development of this reified culture of property and extracts several key points in relation to the political forms and cultural ideologies that make this reified culture effective in the current day.

First I will look at the development of the basic conception of a national law, administered by the state. This seems like a natural phenomenon in contemporary, Western societies, but in the early seventeenth century it was virtually non-existent, with various authorities of the rising state, the receding clergy of the Roman empire, private merchant lawyers, and the judges of local feudal courts locked in what legal scholars Tigar and Levy call a “jurisdictional covetousness” over which court had a right to govern which populations, territories and transactions.  

Looking at this state consolidation may seem like an arcane employment to readers overly focused on the narrow topic of IPR, but it is especially relevant to the contemporary discussion of IPRs on a global scale. As Keith A. Maskus points out, “The TRIPS agreement is important beyond its strengthening of IPRs. It is the first multilateral trade accord that aims at achieving partial harmonization in an extensive area of business regulation. Undoubtedly, it forms the vanguard of efforts to establish deep integration of domestic regulatory policies among countries.” In the early modern era, the merchant class was the most animated about the need for a centralized law as the parcellized and overlapping authorities made it difficult to complete

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138 Michael E. Tigar, *Law and the Rise of Capitalism*, New ed. (New York: Monthly Review Press, 2000), 47-48. Note that they have a fairly pure version of what they mean by Bourgeoisie here in terms of their role as traders and urban artisans. But they introduce a much more complex history, mentioned below, whereby the ideas of freedom they presented where always a short lived bargain amongst the people who engaged in the original struggle to gain it, right from the beginning of the early *berger* communes in middle age Western Europe.

transaction between even relatively nearby spaces. One result of the centralization of this era was to project merchant law upwards into the central state in order to ease commerce for the merchant class. Maskus employs the euphemism of “harmonization” in his account, but what he really means is that there will be a single law governing all transactions involving IPR—but also all transactions that could possibly be subjected to its logic—and that this will make it easier for the transnational capitalist class to conduct their affairs. Maskus sees this as a vanguard that will be replicated in future accords; but it is really just a continuation of the process that began several hundred years ago with the consolidation of a single “law of the land” within the Early Modern English polity.

Critics of this process refer to harmonization as “a polite form of economic imperialism” and Samuel Oddi underscores the use of a “natural law” defense of patent ownership which justifies the imposition of US standards onto the rest of the world. If harmonization continues the form of state consolidation began in the seventeenth century, the natural law defense rests on the cultural content that was secured in that struggle. However, like the process of harmonization in IPR, this consolidation proceeded in stages, with the discourse of natural law appropriated by various political movements with different visions of what the future of English society might look like. In terms of the conceptualization of culture in the previous chapter, these competing theories were mediations existing at the C2 level that hoped to gain purchase on the political institutions. These institutions were increasingly articulated to the empty signifier of “natural law” at the C3 level, making the political struggle over the narratives of natural law and their consequential practices and relations one of the life or death of a civilization. In the end, these competing visions lost out to what became the Lockean defense of property. In the end this “natural law” was really a justification of the status quo that Locke had assisted in creating,

140 Oddi, “TRIPS—Natural Rights and a ‘Polite Form of Economic Imperialism’,“.

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employing the ideas of improvement that were central to the culture of property that had already been used to reshape England according to this model.

This natural law defense is the second subject of this chapter. On the one hand, I look at the distinction between the English and French legal system and the way the former is constituted based on natural as opposed to positive law. To do this I also look at contemporary liberal understandings of Positive and Negative rights, compare these to the presumptions of civil and common law, and connect these to the distinctive shape of the relationship between the state and the culture that develops in Anglo-American society. While this polity is ostensibly rooted in the traditions of both Liberalism and Democracy, I argue that it ultimately rests on the former, which permanently forms a backstop to the latter. I discuss this further in the following chapter in terms of Mouffe’s “democratic paradox.” The purpose of outlining it in both is to better understand what I am calling the reified culture of property. I argue throughout this project that the balanced IPR movement will only be successful in its endeavor by understanding and critiquing this culture of property.

As mentioned in the previous chapter, a perfect illustration of this is in the first implementation of copyright in the early English state. This was done to stifle the competing narratives of natural law along more democratic lines. The latter are a perfect example of what critics of maximalist IPR point to as “culture as a process:” they were creative appropriations of contemporary (religious) culture that produced competing interpretations (C2) of legitimate practices (C1) and regimes of governance (C3). The use of copyright to stifle this “free speech” was not merely in the interest of supporting the authority of the absolutist state; it was also a blatant attempt to undermine the possibility of that citizens or movement could use this process of cultural appropriation at one of these lower levels to challenge the legitimacy of the emergent culture of property at the C3 level. While the latter wasn’t coherent in the institutional sense, the process of implementing a culture of “improvement” in English society produced a chaotic
interplay of these movements and ideas. The process of its implementation, and the competing discourses, form the third subject of this chapter.

The final subject of this chapter is intercalated between these three. It is the account of what it takes to make a society “Natural” according to the Liberal orthodoxy of the reified culture of property. As this chapter outlines, the peculiar Natural Law presumption of Liberalism is that the property and rights that it secures against the state precede it. The English state, therefore, as a Liberal apparatus, is disavowed as such within the ideology of liberalism. This is necessary because admitting the political constitution of the cultural norms allows for the possibility of a democratic challenge to its reification of property. The assertion that the laws—in this case the cultural content of the centralized state form discussed above as the first subject of the chapter—protected by the liberal state precede that state’s existence ignores two very important historical facts in the actual formation of the English state. On the one hand, it ignores the struggle that ensued over the definition of Natural Law—the competing definitions of what this meant—and the fact that a large number of citizens within the polity had a different impression of what this would mean.

The fact of these deviant subjects could be explained away in some fashion, but these deviant subjects are an uncomfortable reminder of the constructed nature of the political arrangement of Liberalism. It is one thing to contend that natural law precedes the state and thus the state must be overthrown in order to resume ancient liberties. But when, in order to do this, the revolutionaries also have to fight with other revolutionaries about what those ancient liberties are, calling the cultural, political content of that state “natural” is highly suspect. Alongside this, however, is a second historical fact, discussed at some length, which not only calls into question this assertion of natural law, but also provides the evidence of the longevity and coerciveness of the project to impose the model I discuss throughout this project as the “reified culture of property.” Since the project and the model itself precede Locke by nearly a century, it is important to explain how it can be attributed to him after the fact.
In short, central to both Locke’s defense of private property and the Liberal state is the notion of “Improvement”. As mentioned several times, the core of this idea is that the natural right to private property is constituted through the individual appropriation and improvement of something from the common stock of nature and society. By improving, or increasing the value or profitability of the property, one justifies one’s ownership. The flipside of this, justifying dispossession, is that if you do not improve the land according to the dominant definition of improvement, it can’t be valid as property. The Liberal state supposedly exists only to defend the property owner from others who might try to invade his natural right. History invalidates this claim on two counts.

The ideology of Improvement precedes Locke by more than a century and the new central state, far from being ancillary to this ideology, helped instantiate it. As Rediker and Linebaugh discuss below, the state forced laborers to build ports for commerce, to drain swamps, enclose land, and chop down forests for the various agricultural projects of early English capitalism. This massive state involvement in the project of improvement, the rewards of which were then, after the fact, claimed as a natural right by the newly landed classes lucky enough to own them, puts the lie to the minimal state involvement in the economy which Liberalism claims as one of its central dogmas. This chapter gives a brief account of some of these efforts as a way of underlining the interpenetration of the political and economic spheres. The purpose of this in relation to the larger project is to underline the involvement of the state in the order Liberalism claims as natural. As mentioned below and in future chapters, this is replicated in the monopoly rights and government aid given to the content industries who now claim IPR. Recognizing this “primitive accumulation” of productive property, and the state aid the accumulators receive in the process, is an important historical challenge to the reified culture of property. In this context it is the first historical challenge to the improvement defense of natural law—and evidence of this culture preceding Locke.
But the underside to this effort is more central to both the instantiation of this culture and
the challenge that history provides for it being “natural” or even based in any way on individual
improvement. As I have already reiterated several times, the more important aspect of process of
what Marx calls primitive accumulation is the creation of a population who has nothing to sell but
their labor: in other words, the elimination of this population’s ability to provide for itself. The
state projects mentioned above were targeted not only at the process of creating an improved
environment for an unplanned capitalist future; they were also aimed at reducing the autonomous
populations who were able to subsist without working for the enclosing landlords. This was not
the most explicit goal of this project, but it was its effect. The goal, to return to the first subject of
the chapter, was to eliminate the spaces “beyond the pale” where the power of the central state
didn’t reach and people were able to exist outside the range of its administration. But it was also
to eliminate divergent practices and “idle” citizens who weren’t laboring according to the new
cultural mandates of improvement. Poor laws and work houses, threats of prison and deportation
to the colonies were all used to discipline these subsisting populations into submission to the state
and the nascent capitalist order. In the end, this is the history of eliminating the commons,
conquering divergent definitions of Natural Law, and instantiating the new culture of
Improvement that we now understand as the reified culture of property that connects all four
subjects of this chapter and provides the pre-history of Liberalism as we understand it today.

This culture is now firmly reified. In so far as contemporary critics of maximalist IPR
support “culture as a process” they fail in this endeavor in so far as they fail to challenge this
reification. As evidence, I provide a short anecdote which demonstrates the continuity of this
culture of property in the current debate over IPR. After this, I will move on to the main
business of this chapter, as outlined above. I will return to the topic of IPR, and the anecdote
below, in the closing of this chapter.
“Nobody puts baby in the corner—that’s where we keep the serfs!”

In 2005, the American Film Institute—an organization created in 1967 to, “preserve America's fast-disappearing film heritage”¹⁴¹—asked a jury of filmmakers, artists, critics, historians and others in the “creative community” to score a ballot of the “100 Movie Quotes.” The project was part of its continuing effort to remind people the role that movies play in our lives and the way that viewers use movie quotations in their daily lives such that, “circulating through popular culture, [the quotes] become part of the national lexicon.”¹⁴² At the top of the list were lines from *Casablanca* (“Here’s looking at you…), *The Godfather* (“…offer he can’t refuse…”), and *The Wizard of Oz* (Toto, Kansas), with the top honors, predictably, going to Clark Gable for his final utterance of “I don’t give a damn” in *Gone With the Wind*.

Near the bottom of the list, barely making the cut at #98, is a line from the 1987 movie *Dirty Dancing*: “Nobody puts Baby in the corner!” The circumstances of the quote aren’t all that significant, as is the case with most films that skim so closely to the edge of cliché—almost to the point of camp. And if it wasn't meant to be camp at the time, their utterance by the beefy Patrick Swayze with the kind of conviction one usually reserves for denunciations of crimes against humanity certainly merits the attention that has been paid to it within the “national lexicon.” On the other hand, there is little evidence that the film’s actor, writer, or director meant this to be anything but an epiphany, and a solemn, heroic intervention, on par with fighting off the invading Russians, which was what Swayze and his dirty dancing partner, Jennifer Grey, had done in their previous film together.¹⁴³ Thus, as Coombe would argue (and the AFI would likely agree) while

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¹⁴³ *Red Dawn*, which, for many years held the Guinness record for the most violent film in terms of the number of acts of violence per minute, and was a kind of Lockean (or more Hobbsian) wet dream for NRA nuts.
there is obviously something that the filmmakers have produced which has inspired this interest, it is the interaction of film in the culture that help to solidify its place in our common consciousness.

In relation to this quotation, there is obviously something more than just the object itself that people refer to when using this phrase. Coombe discusses this excess by referring to Rochelle Dreyfuss’s work on trademark where Dreyfuss separates the “signaling function” of the trademark with that of its “expressive capacity.” Dreyfuss calls this capacity the mark’s “expressive genericity” in the “marketplace of ideas” and tries to separate this function from its function in the marketplace. Trademark’s legal function is supposed to be an indication given to a diffuse consumer base as to who is responsible for the creation of a product. While diverse origins are given to this as an idea, in US history, it is traced to the late nineteenth century when, on the one hand, commodity consumption was becoming widespread and, because of increased transportation infrastructure (i.e. railroads), these commodities ceased to be mainly provided by local companies or individuals with whom consumers had a direct relationship. Creating trust and establishing responsibility for the product was central to the legal defense of trademark since interlopers using a similar mark would undermine the consumer’s ability to make decisions based on their relationship with the sole legal owner of that mark.

In short, the “signaling function” of trademark is supposed to give people information about, to use Locke’s terminology, whose labor is behind the commodity in question. The

144 Though, as deconstructionist film critics like Peter Brunette have often pointed out, as difficult as it is to define the author of a written work, the auteur paradigm is even less fitting for a cultural object with such a myriad of producers. Cf: Peter Brunette and David Wills, Deconstruction and the Visual Arts: Art, Media, Architecture, Cambridge Studies in New Art History and Criticism. (Cambridge [England] ; New York, NY, USA: Cambridge University Press, 1994); Peter Brunette and David Wills, Screen/Play: Derrida and Film Theory (Princeton, N.J.: Princeton University Press, 1989).


146 Rochelle Cooper Dreyfuss, "Expressive Genericity: Trademarks as Language in the Pepsi Generation," Notre Dame Law Review 65 (1990): 399. I will bracket for the moment the much more interesting question of the way this labor is actually much more fetishized by the use of trademarks, but I will get to this shortly, particularly in light of the recent (cntd.)
trademark “owner” is protected from other producers using the same mark or name to sell similar items, but this is primarily to reduce the confusion consumers might have. Owners are therefore required to prove a cultural association exists between their exclusive mark and the product in question. They are also supposed to prevent it from becoming too generic—such as in products like Kleenex, Xerox, or Google where the mark itself becomes the general term for the kind of product sold and thus no longer refers to a particular product produced by a particular company. Protecting this cultural association as a legal right is primarily meant to serve the consumers but, with the expansion of the “expressive capacity” of trademarks this is muddled somewhat. The ubiquity of trademarks in our everyday lives has led to the use of trademarks to signal something beyond the owner’s intention or to express something more than the signaling function of the marketplace.

Dreyfuss is concerned with the first amendment implications of letting the trademark owner control every appropriation of their “ideogram”—a concern that Coombe shares. Coombe looks at appropriations of diverse trademarks by local culture jamming organizations, amongst others, and notes the ways that IPR protection stifles freedom of speech. She states that Cultural Studies scholars of both the Structuralist and Culturalist paradigms are unable to address the “logic of the commodity when applied to cultural forms.” She states that, “Intellectual Property laws enable such commodification and create conditions for a dialectical cultural politics shaped by the relationship between those who claim proprietary interests and those who seek to appropriate such signifiers [e.g. trademarks] for new agendas.”

Siva Vaidhyanathan, in his *Copyrights and Copywrongs*, declares that it is precisely because of these concerns that Locke wouldn’t approve of having his “theories of real property misapplied

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147 Siva Vaidhyanathan, *Copyrights and Copywrongs*, declares that it is precisely because of these concerns that Locke wouldn’t approve of having his “theories of real property misapplied problems with sourcing Mattel toys in China and Dreyfuss’s extended discussion of the company’s earlier attempts to tamp down on the “expressive genericity” of the Barbie doll.

to copyright” as he was “one of the strongest critics of both censorship and monopoly power.”

This is certainly a major concern for Locke in his other writings, but as with all things of value that “[circulate] in the popular culture,” Locke’s articulation of property rights, and the use of his arguments to justify virtually every kind of what Marx called “Primitive Accumulation,” illustrates that there is a significant culture working against any attempt to cordon off a range of objects that can be profitably deployed by simply saying, “that’s not what Locke meant.”

As if to prove this point, in August 2007 news reports began circulating that Lionsgate Pictures, which holds the rights to *Dirty Dancing*, issued a lawsuit and an order to cease and desist to 15 companies that had been using line “Nobody puts Baby in the corner!” on clothes and other commodities. Despite the fact that Lionsgate has no trademark on file for the line, the lawsuit claims that these companies owe damages and restitution to the "Plaintiff [who] markets and sells merchandise with the movie trademarks through approved licensees as part of the *Dirty Dancing* line of approved merchandise.”

The case eventually settled out of court, apparently because one of the merchants agreed to enter into a licensing agreement with Lionsgate. In this case, it is hardly clear that there would need to be a fee paid. The line itself was not trademarked by the studio at the time of the lawsuit; and a phrase of this length could not be copyrighted. Lionsgate simply claimed that because they had copyright in the larger work and a trademark in the name of the film, they should be able to own any trademark related to these properties. If the companies in question weren’t being threatened by a lengthy, expensive lawsuit—and a jury trial—it would have made sense to claim they were making legal use of the phrase since there was technically no trademark infringement since Lionsgate had no registered trademark in it.

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While paying the licensing fees was a reasonable way to avoid a costly lawsuit, the resulting agreement consecrates Lionsgate’s legal claim as valid. As an article by James Gibson in the March 2007 edition of the *Yale Law Review* argues, “risk averse” licensing actually helps to solidify claims of property rights holders. Since US law is unclear on when a use of copyrighted or trademarked material would fall under fair use, licensing uses that would probably not have necessitated the license is a worth the usually small fees compared with getting sued. Over time, the market for these previously unnecessary licenses can be used in a court to help accrue new rights to the owners of IPR. The mechanisms through which this happens are the licensing market (for copyright) and consumer surveys (in trademark) both of which are inordinately influenced by the reliance of market based understandings of value and the dominant understanding of property, in which all value produced using a property should flow back to the owner.

When the case was first announced, the reports about it reveal the depth to the culture of property in Anglo Saxon sphere of influence that no mere misapplication of Locke can explain. In news stories, Lionsgate was described in the following terms: “the studio responsible for the timeless classic *Dirty Dancing*,” “the producers of the iconic *Dirty Dancing*,” “The studio behind 1980s cult hit *Dirty Dancing*,” and “the makers of iconic movie *Dirty Dancing*.” But Lionsgate wasn’t even a twinkle in its executives’ eyes in 1987 when the film was released by Vestron Pictures, a production spin off of distributor Vestron Video. Lionsgate acquired the rights to *Dirty

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Dancing when it acquired Artisan Entertainment in 2003, which used to be, among other names, Live Entertainment, which acquired Vestron’s catalog when the company went bankrupt in 1993. In other words, Lionsgate was not, as various news reports asserted, the “studio behind,” nor was it “responsible” for “making” or “producing” Dirty Dancing. Only one news post by the movie review website Rotten Tomatoes correctly described Lionsgate as “the studio that owns the film’s rights.” In other words, the Lockean argument than labor justifies ownership is refracted into an assumption that, if the property is owned, then the owner must have created its value.

This is, admittedly, a single example; but it is indicative of a larger impulse. It shows the force of the Lockean notion of property—and, the inflection it and the liberal tradition have been given over the past two centuries. Coombe criticizes the idea that has developed where “if something has value, then that value should go back to the owner,” but the more fundamental assumption about property—and not just intellectual property—is that, if it is legally owned by someone, it’s not all that important how they got it. This is also a misapprehension of Locke’s central questions, which had more to do with the nature of power and obligation, and, most importantly, the correct structure of the state; but, as this chapter will argue, it actually shows a very common application of Locke and of theories of property and the state in general as they have operated in the liberal tradition; it is an interpretation that uses history and tradition to justify its legitimacy but depends on asking none of the difficult questions about the history of the material social relations themselves; an interpretation, in short, that none of the critics of IPR are wont to question and that structures the policies of the capitalist state and the hegemonic cultural practices it is asked to enforce as “negative” laws.

Returning to the early 17th century and trying to source these ideas gives significant insight into the current push for stronger Intellectual Property Rights because it shows that, though the

http://www.rottentomatoes.com/m/dirty_dancing/news/1664954/
specifics articulation may change, the purpose behind it often stays the same. As Michael Tigar and Madeline Levy say in their book *Law and the Rise of Capitalism*,

The eighteenth-century bourgeois notion of the laissez-faire state as a neutral arbiter was nowhere in evidence in Tudor England; the state was concededly an instrument, shared by the crown and its powerful allies, to smash resistance to a new system of social relations. The later legal ideology of property as a natural right was an ideology for those who already owned land or were in the process of acquiring it in the normal course of trade [or, it’s worth noting, nascent Imperialism]; it was another way of saying that whoever had managed to capture a portion of the earth in the previous hundred years’ troubles ought to be able to keep it.\textsuperscript{156}

Tigar and Levy are right to find a contradiction in the state coercion used to instantiate the social relations that modern liberalism sees as “natural.” A point I can’t highlight enough is that the doctrine of “natural law” sees the relations the state protects as pre-dating the state. Using the political state apparatus to reshape this population and its culture should be an anathema to a consistent version of liberalism. More surprising than this inconsistency, is the astounding fact that each generation of citizens residing in the nominally liberal west need to be reminded that “the moralization of the means of violence has been the task of liberal and progressive intellectuals since they first competed with clerics for moral authority.”\textsuperscript{157}

While the expansion of IPR is certainly not accompanied by the same degree of physical violence, the “legal ideology of property as a natural right” performs a similar function in the current era. As chapter six explores in more detail, the monopoly of most US and European media conglomerates was not originally in the content that they distributed, but in the distribution

\textsuperscript{156} Tigar, *Law and the Rise of Capitalism*, 192. Levy evidently didn’t help with the 2000 revision of the 1977 book and is therefore not listed as an author of the work, but I will continue to cite her in text for most of the work is still the result of a joint effort.

system itself. This was as true in the era of video cassettes as during the studio system. So the original production company of *Dirty Dancing* was a subsidiary of Vestron Video, who made most of their money by redistributing older or even new independent films. When it was bought during bankruptcy, it was the catalog of copyrights more than any real property that was being bought by Live Entertainment, another video distribution company. It was relatively difficult in starting and profitably maintaining a competitive media distribution company—which was the most important monopoly to even the biggest production companies, particularly on the global scale. IPR made certain that only the legitimate “owner” of the media would be able to distribute it with the kind of profit margins enjoyed by the major global media conglomerates. In short, the Intellectual Property Rights were the insurance they needed to guarantee a return on their investment in distribution infrastructure. Digital technology was supposed to facilitate this, but it has also undermined it in that it is easier than ever to distribute. In so far as IPR is supposed to help them, it is to retain their monopoly and prevent the devalorization of this sunk capital: in other words, increased IPR on a global scale, like private property rights in the 17th century “was another way of saying that whoever had managed to capture a portion of the earth in the previous hundred years’ troubles ought to be able to keep it.”

The purpose of going back to the seventeenth century, as mentioned above, is to outline the early articulation of this culture of property as well as to see the social struggles that produced it and the parallels to those over IPR today. Having this broader goal of a cultural critique of property rights and the state in general makes intellectual property rights themselves often appear secondary to the broad sweep of the study. However, what it reveals is that the artificial division between property rights and intellectual property rights maintained by critics of the latter misunderstands the stakes of the struggle. The model of economic development Locke supported was based on agriculture, thus making land—real property—the most important asset. But even Locke realized that the only way this asset could be “improved” was if there were laborers to work
the land for its owner, the value of their labor appropriated by said owner. Dispossessing cottagers served a twofold purpose in the imposition of this model. Primitive accumulation is both the consolidation of resources and the use of that material position to compel laborers into a wage-relationship: this was, in the end, what property meant in Locke’s time. In our own time—or in the post-industrial, informational economic model which is ascendant—the objects covered by intellectual property rights serve the same socioeconomic function. Focusing too closely on the objects themselves, drawing distinctions between them and that which came before, ignores the basic similarity in the purpose these property rights serve.

This makes it all the more important to embed both property and IPR in the history of the use of the state to impose and enforce models of socioeconomic development. The present chapter shifts the stakes of the present struggle over intellectual property to the role of “models” as meta-cultural ideals (what the previous chapter referred to as C3) and the relation of these models to the agency of the populations subjected to them. Looking at the Early Modern processes that coercively instantiated the capitalist oriented understanding of property, value and the state is essential to recognizing the nature of the more contemporary struggle. There is much we can learn from this history.

On the other hand, as Walter Benjamin says, “every image of the past that is not recognized by the present as one of its own concerns threatens to disappear irretrievably,” which is another way of saying that history is almost always the history of the present. Contemporary critics of maximalist IPR are familiar with the era of enclosure, but often only in a metaphorical sense. Christopher May asks if IPR are the “New Enclosures?”158 James Boyle describes IPR as “the second enclosure movement” in a 2003 article that carefully compared it to the 17th century enclosures and followed this up with a 2008 book subtitled “Enclosing the Commons of the

Mind," and Peter Drahos (w/ Braithwaite) discuss the expansion of these rules on the international level through TRIPS as a form of feudalism. Lawrence Lessig, one of the most visible critics of IPR invokes this moment in his “creative commons” organization. Many others are keen to the parallels between our moment and the enclosure movements of yore.

However, this past is often read through the lens of the more general reified culture of property. Benjamin also says, “The past can be seized only as an image which flashes up at an instant when it can be recognized and is never seen again.” The framework through which they have “recognized” this history almost guarantees the misrecognition of the stakes of the struggle. These scholars recognize that there is something to be learned from looking at this earlier moment. They invoke the spectre of feudalism, of the enclosure of the common as a similar occurrence, but its effects are seen as immutable. This is clearest in the distinction that all insist needs to be made between what Lessig (following conventional economic discourse) calls “rivalrous” and “nonrivalrous” resources. The definitions themselves imply already the model of what C. B. MacPherson calls “possessive market society.” As Lessig puts it, a resource is nonrivalrous when “your consumption [of it] does not rival my own.” For example, “no matter how many times you read a poem, there’s as much left over as there was when you started.”

The distinction between real property and intellectual property is in this quality. Even while he mediates his interpretation somewhat, in relation to a commons in rivalrous resources, Lessig cites the standard “tragedy of the commons” article by Garrett Hardin. Hardin says the commons without property and enclosure results in a Hobbesian struggle over resources between what

160 Drahos and Braithwaite, Information Feudalism.
164 Ibid.
MacPherson calls self-interested, “possessive individuals.”

The result: “Freedom in a commons brings ruin to all.”

In addition to denying the fact of actually existing commons in rivalrous resources—which Lessig barely acknowledges—Hardin’s perspective presumes both the state apparatus and the cultural disposition of a modern capitalist order. In short, Hardin (and Lessig) presume the reified culture of property that, before the seventeenth century, did not exist. Lessig may be making a strategic accommodation in leaving this culture of property unquestioned, but my suspicion is that he isn’t able to see the more fundamental similarity. Because of this misrecognition, he assumes the enclosures are beyond question. Here Hardin’s own defense of enclosure seems apt:

Every new enclosure of the commons involves the infringement of somebody's personal liberty. Infringements made in the distant past are accepted because no contemporary complains of a loss. It is the newly proposed infringements that we vigorously oppose; cries of "rights" and "freedom" fill the air.

To be clear, I agree with the project of the balanced copyright movement. I think Lessig, especially, is right to vigorously impose these new infringements. However, the basis from which he works implies the acceptance of infringements made in the distant past. The use he and others make of the history of property, this “image which flashes up at an instant,” doesn’t do justice to the complexity of that moment.

This project is an attempt to prevent this misrecognition and the historical oblivion Benjamin says it portends. This erasure is a common component of the liberal defense of property, as is the pattern of primitive accumulation which preceded it. The definition of primitive accumulation, again, is not just that it moves common resources behind fences; it also must force the population that used to rely on the use of that common into a working relationship

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165 Ibid., 21-22.
with the newly minted owners. Freedom here was, at least initially, the freedom to work for the landlords. By focusing only on the problem of IPR as if it is in isolation from the problem of the reified culture of property in general, critics of IPR tacitly agree that the rest of this bill of goods is accurately described on the label: “Freedom,” “Liberty,” or (at least) “Economic Growth.” Therefore I begin with looking at these fundamental questions of law and culture in relation to property and the state in the two traditions I identify as Liberalism and Democracy. From here we can look at the culture of improvement central to the Liberal state and the process of its imposition on the Early Modern English population.

**Natural Law, the Modern State, and the Utopia of Property and the Market**

“If earlier Marxists had been less obsessed with the French, and more preoccupied with the English, Revolution, the model itself might have been different. Instead of one climactic moment, the Revolution, we might have had a more cumulative, epochal model, with more than one critical transition.”

To begin this section, I will briefly place it this discussion in the context of the framework of culture developed in the previous chapter. In outlining this framework, I defined C3, as “the level where a dominant cultural narrative legitimates the political execution of formal social control and denies the fact of functional power.” I identified this as closely related to the ideology of the law in Western cultures, and I claimed that “the argument, within this conceptualization, that C3 can determine C1 through C2 follows from the cultural assumption that it should determine these things.” By this, I meant that the conceptualization of the state as being able to determine culture is itself cultural. Before we can discuss the content of the presumed cultural efficacy of the state

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167 Thompson, "The Peculiarities of the English,"
form, we must consider the cultural, historical nature of this form itself. Contrary to the ideology of Natural Law, in the words of Pierre Bourdieu, “Nothing is less ‘natural’ than the ‘need for law,’

Clearly the feeling of injustice or the ability to perceive an experience as unjust is not distributed in some uniform way; it depends closely upon the position one occupies in social space. The conversion of an unperceived harm into one that is perceived, named, and specifically attributed presupposes a labor of construction of social reality which falls largely to professionals. The discovery of injustice as such depends on the feeling that one has rights (“entitlement”).

In other words, the idea that we have been wronged depends upon a prior framework of cultural norms, most often consolidated in the structure of law that is consecrated and reproduced by legal professionals of some kind. Bourdieu might bend the stick too far in saying that it depends, therefore, on a set of formal laws—it is circular to say that the discovery of injustice depends completely on an understanding of justice. Obviously one could feel wronged without any appeal to professional. The distinction is between feeling wronged—which might be a completely individual opinion—and identifying that feeling with something beyond the individual, with an abstract feeling of “justice” relies upon a social framework most often constituted through some sort of venerated official.

Then again, my own perception of how justice is defined is intercalated with the peculiar frontier mentality of American culture, captured in old westerns and Dirty Harry movies, which says that justice is prior to—and sometimes even an anathema to—the professionals charged with making and executing the law. Even in these narratives, however, the fantasy of vigilantism largely stems from what Bourdieu refers to as the “position one occupies in social space.” The feeling of injustice as much as the idea one has the “right” to balance the scales is related to the

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functional power one has both before and after the infraction: Dirty Harry, after all, was still a cop—with a very big gun.

The French tradition is more open about the role of the law in helping to protect minority rights—which is to say that the formal power of the law is presumed to take particular care of those who have less functional power. Both systems may accomplish their ideal with the same degree of success. However, as this chapter will illustrate, the Anglo-American tradition of “natural law” is particularly craven in its disavowal of the power of formal rules in supporting primarily those with the greatest resources of functional power at their demand. This is another way of arguing, following the conception of the previous chapter, that the cultural efficacy of the idea of the Law—as well as the purchase of any particular law—within the structure as a whole and on different individuals occupying different positions in social space, will largely depend on the dialectic of formal and functional power. While I emphasize the tendency for law to be used as an ideological cover for what would otherwise be a craven form of coercion, this is by no means the only way it can be used. As legal scholar Michael Tigar, observes of the long sweep of Western law in both traditions, “[though] there remained contradictions between the formal guarantees of freedom and fairness inherent in bourgeois legal reality of state power, some of these contradictions were resolved in favor of legal ideology, not power.”

Of this legal ideology Bourdieu says that, culturally, our participation in the procedures of formal law, in appealing to professionals, in taking our grievances to a trial, produces a struggle in which differing, indeed antagonistic world-views confront each other. Each, with its individual authority, seeks general recognition and thereby its own self-realization. What is at stake in this struggle is the monopoly of the power to impose a universally

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recognized principle of knowledge the social world—a principle of legitimized distribution.\textsuperscript{170}

This notion of the law—as being absolute, as having the power to “impose a universally recognized principle of knowledge”—points to a particular ideology of the law which, in turn depends at once on an absolute authority to defend it and the legitimacy of that authority in the eyes of the population it governs. As mentioned above, the law as universal authority is a culturally specific form of the state, which I described in the previous chapter and will elaborate historically below. The function of the modern state depends on a modern, Western notion of absolute jurisdiction over a certain territory, all its inhabitants, and all their practices. From a certain perspective within that polity, therefore, the efficacy of law (and therefore a state) may appear to be motivated by a desire for some people to make other people do something else—something, it would seem, that those other people would rather not do—rather than the need to resolve conflicts per se.

On the other hand, as Bourdieu indicates, the supposedly objective rationality of the law lends credence to the notion that law or state is merely a mediator between interests. This assumption is understandable since it is largely what is assumed in the bourgeois\textsuperscript{171} notion of the law (or what Tigar calls “legal ideology”) which Bourdieu is describing. This objectivity, on the one hand, assumes a deep equality before the law—everyone is equally subject to its judgments including those charged with executing it. In terms of its democratic development, there is

\textsuperscript{170} Bourdieu, “Force of Law,” 837.

\textsuperscript{171} I mean bourgeois here in the French sense of a modern, cosmopolitan, democratic citizen—as in the Bourgeois of Habermas’s Public Sphere. The class orientation of this is less important than the ideological strictures that Habermas says adhere to the law in this tradition—i.e. that it is a mediating level of social and political regulation to which everyone has access and everyone is equally subject. The property restrictions—as well as restrictions of race and gender—obviously make the supposed instantiation of this ideology in the institutions of the state suspect, but the ideology of the law as performing this democratic function is crucial to the legitimation of modern liberal democracies. Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society.
supposedly some contest of ideas that plays out in the decision of what is right—in establishing, as it were, the content of the law.

The ideal, then, is that we all agree to abide by that definition of “right,” of law, even if we don’t believe it. In other words, at some point, we give are our consent to be governed by the outcome of this verdict. On a basic level, then, this corresponds to the model outlined in chapter one on the following relationship between different cultural levels. In effect, the conflict over cultural practices (C1) is played out in a politics of representation and conflictual theories of what is good or right (C2); in so far as one set of these practices and theories is able to secure its purchase on the levels below, its legitimation is projected upwards into governance mechanisms (policies) at the C3 level. A diagram which allowed for this kind of politics would thus be:

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[C1] \text{Practices}^1 \\
\rightarrow \text{Politics [c2]} \rightarrow \text{Policy [c3]} \rightarrow [c1] \text{Practices}^3
\]

\[
[C1] \text{Practices}^2
\]

The democratic ideal, therefore, is that there are two sets of conflicting practices (at the C1 level) which correspond to two interest groups in society, likely with two different narratives at the C2 level legitimating their claims to legitimacy. They are given equal footing under the law. They engage in politics—in a battle of, in Habermas’ formulation, rational, critical debate—and, in the end, an objective rule or policy emerges. This, then, results in a policy mandating that both parties begin to adhere to the new practices. In other words, because both

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172 The lack of active consent in early modern models is discussed in relation to Hobbes below.
173 This is the formulation that is usually attributed to him in Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. The discussion that he has of the contradictions within this field will be central to later discussions.
groups have consented to be governed by the outcome, it is given that one of the “energetically defended” behaviors will cease—or at least cease to be legal.

It is through this political process, according to the democratic version, that the law comes to determine culture and, conversely, that certain cultural practices begin to dominate over all others. After the fact, the law would be seen differently by those two sets of people: those people who already believe in the validity of the practice and those people who simply obey the law regulating it. In this case, the idea of those “energetically defended” behaviors being “deviant” is an *ex-post facto* ruling. The law establishes the norm, but, ideally, it happens with the full, rational participation of the people involved.174

The result of this assumption, in nominally democratic countries, is that if a hypothetical survey of practices were to be taken wherein the culture is evaluated at the present, it would be rational to assume that, if this process of deliberation takes place now, then the practices we engage in today must have had some similar process of vetting. Or, if we are more deterministically minded, that the best practices and cultures would have emerged in some other form of social competition.

This Democratic understanding of the legal process could be projected onto the state if it didn’t already presume its existence. It is, after all, a view of the law in terms of an isolated trial or round of legislation that, much like the microfoundations of neoclassical economics, cannot exist outside of a broader model of society. It can be projected onto the state only by way of discussing some sort of body of law as its background, which in most cases is embodied by the state. Though I discuss it as separate from the Liberal tradition, in truth the processes it describes are assumed to

174 It is this understanding of contracts that has often been credited to Ronald Coase who is seen as reviving the Law and Economics tradition in the middle of the 20th century. Coase argues that you wouldn't actually need the state to create this state of affairs, that, transaction costs being nil, people would reach these agreements according to the law of perfect market competition without being coerced by the state. Like the liberal and Natural Law theorists below, he assumes, as a foundation, the environment that he expressly hoped to create with his theory. Cf. R. H. Coase, “The Problem of Social Cost,” *Journal of Law and Economics* 3 (1960) His ideas have also led to a the auctioning of spectrum rights as FCC policy, a circumstance that will become important in later chapters.
exist in all modern states. Democratic consent forms one of the crucial claims of the modern state’s legitimacy, even in Liberal states which ultimately disavow its necessity.

In the Liberal tradition, the “discovery of injustices,” the “feeling that one has rights,” is seen as something in opposition to the state. Thus, the tradition itself depends on assuming that there is already a basic agreement that the state is meant to defend. Hence, Hayek—an Austrian political economist central to the Liberal retrenchment in the twentieth century—asserts that, government “cannot use coercion except in the enforcement of general rules,” but simultaneously denies that democracy should be the method for discovering these rules. Where these general rules came from or what gave them legitimacy is, of course part of the ideological work Hayek committed himself to—following close behind his mentor Ludwig von Mises. In this sense, the state is not seen—or should not be seen as—an organ specifically for resolving social or cultural conflicts. The “general rules” are already agreed upon: in so far as the state fails to help uphold these rules, then it is no longer legitimately the state. In other words, the full development of the Liberal ethos relies on the disavowal of the political stage of this process of law making.

If this seems like a strange position for a revolutionary doctrine to take, it is only so in a certain context. According to Perry Anderson:

Hayek distinguished between two intellectual lines of thought about freedom, of radically opposite upshot. The first was an empiricist, essentially British intellectual tradition descending from Hume, Smith, and Ferguson, seconded by Burke and Tucker, which understood political development as an involuntary process of gradual instrumental improvement, comparable to the workings of the market economy or the evolution of common law. The second was a rationalist, typically French lineage descending from Descartes through Condorcet to Comte, with a horde of modern successors, who saw

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David Held et al., eds., *States and Societies* (New York, NY: New York UP, 1983), 129. The quote is originally from *Constitution of Liberty*. 

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social institutions as fit for premeditated construction, in the spirit of polytechnic engineering. The former line alone led to real liberty; the latter inevitably destroyed it.\textsuperscript{176} It followed from this, that “an authoritarian regime that repressed popular suffrage but respected the rule of law could be a better guardian of liberty than a democratic regime liable to the temptations of economic intervention or social redistribution.”\textsuperscript{177} In other words, inherent in the liberal theory of liberty and freedom, the law and the state, is this break on democracy.

Animating this chapter at this point, therefore, is first of all the construction of the centralized state. As I mentioned at the start of this chapter, this is a culturally and historically specific institution and the model of a central state apparatus of the modern variety evolves from a certain set of struggles, internally and externally. The legitimacy of this institution at this point can no longer be solely secured through the ideology of religion or the institutions of the feudal monarchy. It necessitates the objectivity of the law. This objectivity, as I’ve already intimated, is consecrated in different ways within the two different traditions Anderson articulates in relation to Hayek. I will return momentarily to the history of this centralization, but first I need to elaborate more on the distinctions between these traditions. This is necessary because, as Anderson indicates, one tradition of law—the Liberal tradition—articulates its objectivity in a way that has a peculiar effect on the way the state consolidated. More specifically, the Liberal tradition is largely based on the disavowal of the state as a legitimate institution for the exercise of politics. Instead, as Anderson intimates, politics is relegated to an economic sphere which liberalism denies as political. This distinction has an effect on the manner in which the English state is consolidated, as well as the way it is used to create this space of economic “freedom.” Central to this is the Lockean definition of natural law which takes property and the production of value through “improvement” as the core of its defense. The latter is the foundation of what I am terming the


\textsuperscript{177} Ibid., 16.
reified culture of property. I argue throughout this dissertation that the contemporary debate about IPR is really about this regime of property rights. Understanding the distinct tradition of this regime—and the process through which it consolidated its power at the national level in Early Modern England—is crucial to understanding this debate.

Bourdieu, and most theorists of law, make the distinction between Anglo-Saxon traditions and those of France and Germany. In the latter, often referred to as civil law, “legal doctrine [takes precedence] over procedure.” This means the pronouncement of doctrine legislates what ought to be. This is supposedly the opposite of the Anglo-American tradition in which, “the law is jurisprudential (case law), based almost exclusively on the decisions of courts and the rule of precedent.” This is often called “common law,” but in the present chapter it forms the basis for what is ultimately understood as “natural law.” These two models correspond, loosely if not completely, to the two understandings of the state—that of the French and the English—outlined below. While Bourdieu discusses them as distinctive legal cultures, he suggests there is actually a continuum between them by mapping them onto what he calls a “division of legal labor” within the juridical field which helps “the body of rules and procedures with a claim to universality” that is known as the law. In other words, both of the above traditions (the “theorist” of civic law vs. the “practitioner” of common law) contain (and are constituted by) the other tradition’s dominant

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179 Bourdieu’s sociological understanding is usually summed up in terms of a game that takes place on a field. It has an oddly neo-classical bent in that the positions within the field and the dispositions which people are inclined to enact upon taking a position, or habitus, are structured around competition for the capital in the field. However, since most of these fields are related in one way or another to the production of knowledge, the competition is usually for the cultural or social capital to define the stakes of the field. In other words, the competition itself is for the ability to create or destroy the value of other positions based on the amount and quality of a certain kind of capital each of these positions can accrue relative to other positions and, especially, the dominant position. In most fields related to knowledge creation, there is a general sense that the field should be autonomous in terms of its relation with other fields—in other words, that the knowledge created shouldn’t necessarily be related to direct economic or political gain in the broader field of power. Still, as he indicates here, the relationship the field has within the broader field of power affects the stakes of the struggle as well. A good introduction to this is in Bourdieu and Wacquant, An Invitation to Reflexive Sociology. The quotes here are from, Bourdieu, "Force of Law," 821.
reflex as an opposite pole within its articulation of the juridical field. He doesn’t speculate on why, in one tradition, one pole dominates, except to say:

The relative power of the different kinds of juridical capital within the different traditions is related to the general position of the juridical field within the broader field of power. This position, through the relative weight granted to the “rule of law” or to government regulation, determines the limits of the power of strictly judicial action. [ . . . . ] [The hostility between these traditions] serves as the basis for a subtle form of the division of labor of symbolic domination in which adversaries, objectively complicitous with each other, fulfill mutual needs [ . . . ] [such that] the most lowly judge (or, to trace the relation to its final link, even the police officer or prison guard) is tied to the pure legal theorist and to the specialist in constitutional law by a chain of legitimation that removes his acts from the category of arbitrary violence. 180

Whether this “complementary exercise of their functions” is convincing will depend on who you ask. In any case, the point is that the function of law is somewhat determined by the role given to it within the overall ideological structure. And in societies with either model of law, the “chain of legitimation” Bourdieu describes is similar to the column of cultural efficacy discussed in the previous chapter. The absent figure of the demos forms the Other within this chain of legitimation, holding into place the tension that constitutes the legitimacy of liberal democracies. Within the civil law tradition, as discussed above in terms of Democracy, the promulgation of the law by the legislator or legal theorist is supposedly linked to the institution of the law in relation to the settlement of some dispute within society through some process of mediation. The common law tradition makes the site of this dispute the trial and the judge (or in some cases jury) helps to

decide what is right and just based on his/her interpretation of the written law and the jurisprudence based on precedent.

Between the two traditions, one might expect common law—which would, theoretically, be more flexible to changes in social practice—to effect more social changes over the long sweep of history. On the other hand, if the Civil Law tradition was overly “doctrinaire” one would expect that the fear would not be from democratic activism from below. In general, the reverse is true. However this is not just due to the ideas turning on one another in the ether of thought or spirit. For instance, Daniel Lazare argues that the conservative bent of the common law tradition in the US is especially pronounced because, during the 18th and 19th centuries, there was no alternative tradition pressing from a closely neighboring polity: “Happily ensconced in an Old English backwater, [the USA] could afford to make due with Old English constitutional ideas.” Lazare sees the British constitutional reforms of 1832 as evidence of this continental influence. Barrington Moore, however, sees it from the other direction. The ideal of the French system, which is borne of the French Revolution, is likely a counter pressure on that of the Anglo-American, but more because it lived on only as an ideal:

If the menace of the revolution and military dictatorship had not ended at the Battle of Waterloo, it is highly unlikely that England would have resumed in the nineteenth century those slow and halting steps towards political and social reform that she had given up at the end of the eighteenth.

In either case, the dialectic between these two traditions is invisible in the Liberal Hayek’s pure understanding of Liberalism. The democratic impulse is a constant threat to the liberal tradition because, “If democracy resolves on a task which necessarily involves the use of power which

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cannot be guided by fixed rules, it must become arbitrary power." 184 “Arbitrary power” is, for Hayek, the opposite of “the Rule of Law.” Again, one might think this would map more closely onto the “Common” and “Civil” law traditions, but, as Anderson points out above, it is the reverse. For Hayek, under the “Rule of law,”

Government confines itself to fixing rules determining the conditions under which the available resources may be used, leaving individuals to the decision for what ends they are to be used. [Arbitrary government] directs the use of the means of production to particular ends. 185

These ends will usually have something to do with “social justice” or “redistribution” but these are false promises186 which, economically, cannot be delivered. In the end, it is just a power grab that an unprincipled state will attempt.

These views are essential to understanding the evolution of the Liberal understanding of property and the state that animate this chapter. Von Mises, Hayek’s Liberal mentor and a germinal Austrian economist, said of private property, “the foundation of any and every civilization,” that “politically there is nothing more advantageous for a government than an attack on property rights, for it is always an easy matter to incite the masses against the owners of land and capital.” 187 In other words, the populist legitimation of redistribution is easy to secure, even if, in his understanding, it has no hope of creating the material benefits it promises. For von Mises, however, this was not only a threat to liberty, but was an economically unnecessary redistribution

185 Ibid., 81.
186 Or in present times, what George W. Bush called Chavez, Correa, Morales and other left leaning Latin American presidents: “purveyors of false populism” in his 2007 State of the Union address. Since they were all democratically elected with wide margins on the basis of these plans, it actually seems to be true populism. But in contrast with the Free Trade agreement with Colombia, to which he was referring in this section of the address, it is not one that, according to his ideology, can deliver on its promises.
since, “in a capitalist society, the deployment of the means of production is always in the hands of those best fitted for it”

Von Mises is the most open about the model of society—capitalist—he thinks ideal, and what it takes for it to remain that way. It will require “that behind the rules of conduct whose observance is necessary to assure peaceful human cooperation must stand the threat of force [. . .]. One must be in a position to compel the person who will not respect the lives, health, personal freedom, or private property of others to acquiesce to the rules of life of society.” Liberalism absolutely requires this force of compulsion—in the same measure as Democracy ultimately results in some law governing a community’s practices. Both, therefore, require the cultural form of the central state. The difference is that, in the former, the cultural content it is supposed to implant on that community is given in advance.

Here we find ourselves back to the earlier discussion of the relationship between culture, practice and Law. Following Bourdieu, we can say that, in a democratic context, the problem of legitimizing the law and the state often comes from a sort of dialectic between the Civil Law and Common Law traditions within a particular juridical field as it operates within a wider field of power. In other words, there is a sense that the law is based both upon certain abstract principles “of coherence and justice” that can be discussed, considered and pronounced (or, in the correct terminology, promulgated) to form a body of positive law AND this body of law will be subject to “the urgency of practice” and the “more or less extensive freedom of interpretation granted them in the application of the rules, judges introduce changes and innovations which are indispensable to the survival of the system.” This dialectic between principle and flexibility makes it possible to imagine a process where different, divergent practices are judged in a just manner to produce a

188 Ibid., 67.
189 Ibid., 37.
190 Bourdieu, "Force of Law," 824.
policy of practices that minimizes the potential “crisis of legitimation.” In other words, though we still have a great deal to answer about jurisdiction, sovereignty and efficacy, it is at least more explicable how the model—where culture is determined by state policy via a process of politics rooting out rival practices—becomes legitimate. Active democratic consent—rather than the presumed consent of Hobbes or even Locke—is necessary for this legitimacy to continue.

On the other hand, in the context of Liberalism, the tradition of the Law is rooted in a different model, which denies this internal dialectic to the law. Though it is often discussed as Common Law, it is more often referred to as Natural Law. As Norberto Bobbio defines it, natural law “holds that man—all persons without exception—possess by nature, and thus irrespective of his own will and still more so of the will of one or a few others, certain fundamental rights, such as the right to life, liberty, security, and happiness.” In this way, the state is not really necessary: one puts things down in Positive Law simply so that we’ll all understand what the state does—and there is a certain sense in that even making these notes is more of a reminder than the state deserves. The tenets aren’t up for argument; they cannot be changed. There is no need for the messiness of that “political” step mentioned in that earlier model. It has already been done: we now understand the policy which regulates our practices and our culture. There is plenty of freedom allowed in comparison to the absolutist state; there are just a few things that are no longer up for contestation. This is what I mean in the previous chapter when I argued that, while there may be some ways in which there is a “free flow of culture,” founding a critique of any form of property on liberal principles alone is bound to circumvent much of the possible critiques one could make.

This brings us to the subject of the model—what I refer to above and in the previous chapter as the cultural content filling the cultural form of the state—which these traditions imply and,

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191 Norberto Bobbio, *Liberalism and Democracy*, Radical Thinkers ed. (London: Verso, 2005), 5. Following from von Mises and Hayek above, it would make sense to add, emphatically, “property” to those rights. We’ll do that shortly.
with the power of the state apparatus, can impose. As I mentioned in the previous chapter, declaring that a dominant model of social organization of any kind can be imposed on a population is a contentious claim within Cultural Studies. In addition to the more recent ethnographic and post-colonial work focusing on the complexity and diversity of culture, is E. P. Thompson’s argument that models are only manufactured after the fact by historians. His epigraph to this section is informed by this perspective in that he is criticizing fellow historians’ conflation of the French and English revolutions in their model of how capitalist modernity developed. Models, for him, obscure as much as they illuminate.

History does not become history until there is a model: at the moment at which the most elementary notion of causation, process, or cultural patterning, intrudes, then some model is assumed. It may well be better that this should be made explicit. The moment at which a model is made explicit it begins to petrify into axioms. […] Even in the moment of employing it the historian must be able to regard his model with a radical scepticism (sic), and to maintain an openness of response to evidence for which it has no categories. \(^{192}\)

It is a fair critique of the discipline. His observations helped to inspire Ellen and Neal Wood in their understanding of the English revolution, explored below, which help to connect the two abstract traditions of law and politics mentioned above to historical development of the “peculiarity” of English law—and the reified culture of property.

But his caution against employing *ex post facto* models in evaluating history should not obscure the explicit use of models by administers of the state itself. Here the observation of James C. Scott is provocative. Discussing models in terms of “state simplifications” he says:

\(^{192}\) Thompson, "The Peculiarities of the English," 350.
These state simplifications, the basic givens of modern statecraft were, I began to realize, rather like abridged maps. They did not successfully represent the actual activity of the society they depicted, nor were they intended to; they represented only that slice of it that interested the official observer. They were not, moreover, just maps. Rather they were maps that, when allied with state power, would enable much of the reality they depicted to be remade. Thus a state cadastral map created to designate taxable property holders does not merely describe a system of land tenure: it creates such a system through its ability to give its categories the force of law.

To reiterate Scott's claim, the “state simplification” that guided the modern state wasn’t necessarily a fantasy or a utopian myth: aspects of the reality could be found within the borders of the territory governed by the state. This is similar to the observation I made in the previous chapter that a variety of practices may coexist within a certain space or community, even alongside the dominant column of cultural efficacy. The distinction is when the state seizes on one of these practices as legitimate in ways others are not and then projects it upward as ideals of practice. Once it is legitimated at that level, as Scott says, “when allied with state power” it could remake reality to better fit its categories of legitimate practice. As he puts it, “it creates such a system through its ability to give its categories the force of law.”

The model of the Liberal state implied by the tradition therefore, didn’t have to have a complete “map” of how it would reshape these territories. It was unnecessary to have a plan in the sense that twentieth century state planners understood it. All that was necessary was to have a certain idea of what should be done with that state and to see it illustrated in a handful of practices. Seizing on that one culture—on a culture of improvement—and all that it implied could then

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193 James C. Scott, Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed (New Haven, CT: Yale UP, 1998). It’s worth noting that, though he looks at problems of planning, he categorically refuses the notion that he should be seen as a proponent of Hayek, Freidman or their perspectives and denounces attempts to have him bunched with them.
guide the state—and its apologists—in “reshaping reality” and “giving its categories the force of law.” In this way, what I identify as the liberal tradition consecrated by Locke was inaugurated in a much earlier era, where the fact of central state power was mutually constituted with the expansion of this cultural model throughout the polity. In short, it took the cultural content to fully realize the cultural form of the Liberal state—and vice versa.

Having outlined these two traditions briefly, I will now look more at the distinctive English model and the process of its imposition. As I’ve mentioned, this process eventually leads to the reshaping of both the material reality of the English territory and the legitimate orientation of the English subject according to what I’ve discussed in terms of the reified culture of property. While the latter is evident at the end of the process, we can see aspects of it at its conception.

As mentioned, Wood presents some counter-intuitive interpretations of the historical distinction between the French and English understandings of the state. In her book, *The Pristine Culture of Capitalism*, she asserts that the model of historical development used by most historians of the origins of capitalism is not something that can be seen anywhere in history:

> The model is, rather, a composite picture formed largely by a retrospective superimposition of the French revolutionary experience upon the example of English capitalism, and, conversely, an interpretation of the French political experience in light of English economic development. It is only the French Revolution, seen through the eyes of post-revolutionary French historians (and German philosophers), that conferred upon the bourgeoisie its historic status as an agent of progress. ¹⁹⁴

Though she would seem to be chastising others for their sloppy conflation of two different revolutions, her real purpose is to discuss the status of the English revolution with which this chapter is concerned. Wood provides some important correctives and broadens our understanding

of what actually happened in the British case—and how it might make the results witnessed in “the present crisis” a more understandable phenomenon. The main thrust of her argument follows closely on arguments that she and her husband have made about what is distinctive about capitalism and its relationship to the state.

The overall effect of these arguments is to say that, in conflating the French and English Revolutions, commentators have missed the fact that there were actually two very different kinds of revolutions, only one of which, the British, had much at all to do with capitalism. On the other hand, our understanding of the state, informed as it is by this composite understanding, overshadows what she sees as an important (and counterintuitive) distinction between the two at the beginning of the seventeenth century. That is, though the French had an idea about what the state should look like (articulated by Bodin), it was not constituted as an institutional reality. In contrast, the English state was much more coherent and centralized, yet, in her opinion, there were no English theorists of the state:

The conceptual and ideological weakness of the ‘state’ in English culture is determined by its early and more complete evolution of a ‘modern’ relation between the state and civil society associated with rise of capitalism. It is not at all as paradoxical as it might seem that the concept of the state has been least well defined precisely where the formal separation of state and civil society characteristic of capitalism occurred first and most ‘naturally,’ while the idea attained conceptual maturity in states that long retained a fusion of the ‘political’ and the ‘economic’, in the form of royal absolutism and its ‘modern’ descendants, where the formation of ‘civil society’ was a conscious project of the state.”

The importance placed here on the idea of the “fusion of the ‘political’ and the ‘economic’” is a code for what Wood finds distinctive about capitalism—and uncapitalistic about the French

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Ibid., 34.
bourgeoisie. Namely, Wood sees the French model as being based mostly on a continuation of the ideology of “politically constituted property,” which is where the state takes an active role in deciding property claims. Property in this environment is nakedly consecrated by the political power of the state. Conversely, the absent English state is based on what I’m calling the reified culture of property, which says that the state is only there to defend prior claims to property, thus separating its functions from those of the “purely economic.”

As I mention below, it is a strictly analytical distinction to say that the economic is or even can stand as isolated from the state in the sense she discusses as “economic coercion.” For the economic coercion to function, the state must be used to first of all implement these relations and then to help reproduce them. However, in speaking of the “purely economic” coercion of the English state, she points to the contradictory disavowal of the force of the state in relation to Natural Law and the simultaneous disavowal of the political constitution of the economic. The distinction is useful, however, for discussing the supposed difference between Civil and Natural Law; these, as the previous considerations on law mentioned, are also associated with France and England, respectively. One of her earliest statements on this distinction contains passages which, despite somewhat instrumentalist language, cut to the most significant aspect of the English culture of capitalist administration:

To speak of the differentiation of the economic sphere in these senses is not, however, to suggest that the political dimension is somehow extraneous to capitalist relations of production. The political sphere in capitalism has a special character to the extent that the coercive power supporting capitalist exploitation is not wielded directly by the appropriator and is not based on the producer’s political or juridical subordination to an appropriating master. Nevertheless, a coercive power and a structure of domination

Wood, “The Separation of the Economic and the Political in Capitalism,” 196
remain essential aspects of this exploitive relation, even if the ostensible freedom and
equality of the exchange between capital and labour mean that the ‘moment’ of coercion
is separate from the ‘moment’ of appropriation. Absolute private property, the contractual
relation that binds producer to appropriator, the process of commodity exchange—all
these require the legal forms, the coercive apparatus, the policing functions of the state.
Historically, too, the state has been essential to the process of expropriation that is the basis
of capitalism. In all these senses, the ‘economic’ sphere rests firmly on the ‘political’,
despite their ‘differentiation’.  

In this sense, the idea of private property in countries dominated by this reified understanding of
the state in relation to the economy is based on ignoring the fact of the economic sphere’s
constitution through the political. Both before and after the fact, this requires a cultural suture
which reifies the economic as an independent realm, as a space of freedom from political
influence, as a space which democratic pressure should be exercised as consumers rather than
citizens. In these last few phrases, I describe this culture as it has evolved into the present day.
But much of its most reified assumptions existed at the start of this order.

My purpose in making these distinctions is to argue that difference evident between these
traditions helps to underline why the Liberal version of the state is able to rest on the disavowal of
the political. This is because it is able to rest, instead, on a cultural ideal of the already constituted
separation of the political from the economic. The English state, in this regard, was used to
implant a model of culture which, paradoxically, denied the state (or economy) as political. It is
this peculiarity of the cultural model in question which allows for the reified culture of property to
seem natural in the eyes of both IPR critics and promulgators of international IPR treaties.

197 Ibid.: 81.
Wood makes her distinction not only between the French and English traditions, but also in relation to changes in the new English state following the overthrow of feudalism. In this earlier feudal relationship, in Wood’s understanding, we should see that the ability to get wealth from people was made possible by their political position—what she calls “politically constituted property.” As it luck would have it, the description she provides of the coordination of the market and state corresponds (at this moment, anyway) precisely to issues that, today, would be covered under intellectual property rights. These, on the other hand, make the broader argument that, in England, politically constituted property didn’t exist at this point, somewhat flimsy. Or, more precisely, the concept of purely economic coercion is more clearly revealed to have a political basis and, therefore, more in line with her description above where, “a coercive power and a structure of domination remain essential aspects of this exploitive relation.”

In this regard, as mentioned in the opening pages of the chapter, some of the critics who bother to look at this moment in history make the connection between the feudal order and that of the imposition of IPR on a global level. Most explicit in this connection are Peter Drahos and John Braithwaite who argue that there is a parallel between these two moments in that, “both involve the redistribution of property rights.” 196 By focusing on this earlier moment, rather than the era of capitalism after this reified culture of property takes hold, they are, in effect, aiding in this reification. The comparison they make is between this feudal moment and what liberal economists speak about as the practice of “rent seeking.” The latter is another term for what Wood calls, “politically constituted property” and the ideology of liberalism claims that it is not supposed to exist in the competitive, a-political economic it consecrates as legitimate. However, as this chapter illustrates, and the following chapter elaborates, this distinction was always merely analytical. While Drahos and Braithwaite are right to criticize the practices they illuminate—and

196 Drahos and Braithwaite, Information Feudalism, 2.
provide one of the most trenchant, informed critiques of the global imposition of IPR—they
would do better to look at the practices they note as, not exceptional, but as the rule of the reified
culture of property. In fact, the feudal era had a very different use for the objects covered by
intellectual property rights and the focus only on their role as “politically constituted property”
obscures their role in helping implant the reified culture of purely economic property that
followed.

Wood is inspired to make her distinction between political and economic power by the
work of Robert Brenner. In both, the distinction hinges mostly on the relationship of peasant
laborers to landlords. This is an important discovery and it should be taken into account: in the
relationship between some peasants and some landlords, it could be said that, formally, the latter
had set the former free. Christopher Hill and Neal Wood both say that this happened mostly in
the south and east—the areas of the country, notably, that supported parliament in the Civil
War. On the other hand, there were much larger legal struggles going on and the role of the
state was central.

In the broader society, the market for the goods that everyone might need to buy
(including, to a certain extent the market for the agricultural products) was largely controlled by
courtiers who had bought or been granted patents by the Tudor and Stuart state which allowed
them to be the sole producer or distributor of that good within the state. This was a very lucrative
office and Hill speaks vividly of the way that every aspect of a consumption and distribution was

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199 I say formally because, as the political events of the century display, it was hardly something that the average English
subject was willing to accept; and, on the other hand, I have serious doubts that a simple transition to market relations
would, within the same generation, also erase the customary relationship of power, not only between the lord and
peasant, but also further up the hierarchy. It would seem that, even giving in to the success achieved at the end of these
peasant revolts he mentions, the lord class would need significant political capital—legitimacy both above and below
their rank, secured by coercion or status obligations—in order to introduce a wholly new set of social property relations
on a whim.

200 Cf. ch. 5. Christopher Hill, The World Turned Upside Down: Radical Ideas During the English Revolution (New York;
controlled—and every product priced higher—by the patent owners. To be clear, these were not patents granted to a person who necessarily had any knowledge or stake in an industry. Ostensibly it was, as most protectionist policies are, intended to help generate local industry, but Hill is skeptical. On the whole, they were monopoly privileges bought from the government in order to enrich both the government and the monopolists. It was not a tax per say: it was a form of what we can only call “politically constituted property” despite the fact that it is affected though the market and, hence, doesn’t really involve any “non-economic” coercion. This presents a hybrid sort of capitalism in relation to the state—or one that is so impure it doesn’t have the decency to hide the naked political basis of its economic coercion.

On the other hand, it also privatized this function of the state and incorporated another person into the pool of people who’d like to see it continue to exist. Since patents were also sold as a way of raising money (a necessity since, although they liked many of the functions of the state, landowners and merchants didn’t want to pay taxes in order to fund it) they also formed an economic bounty for the state itself. This polluted configuration is only further adulterated in the case of one particular patent—the copyright. The oft-quoted authority on the subject, Lyman Ray Patterson, describes in detail the way that the first iteration of this legal right applied only to the ability of printers publish. The Stationers’ Company was the private guild that, in 1557, was permitted as the only entity that could legally publish works within England. After years of trying to censor religious and seditious materials—and various articulations of what this would mean, exactly—Queen Mary, “desperate for an effective restraint of the press,” granted the company a

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201 Hill actually seems to delight at being able to enumerate the horrifying number of patents that were in force in the early decades of the seventeenth century. For bricks, soap, lace, linen, beavers, leather, pins, dyes, salt, pepper, vinegar, iron, glass, coal, beer, butter, lobster, and so on, they might not have affected everyone, but he contends that in 1621 there were 700 of them and “they affected the lives of hundreds of thousands of Englishmen. By the end of the sixteen-thirties they were bringing nearly £100,000 a year to the Exchequer.” Christopher Hill, The Century of Revolution, 1603-1714, The Norton Library History of England (New York: Norton, 1982), 25–26.

202 I’d argue that, more often than not, this is how it functions.

203 In other words, during Protestant administrations, Catholic publications would be potentially seditious and vice versa.
charter which would make it the only entity able to legally publish and all works subject to the license of the crown. In other words, in exchange for a lucrative monopoly on an emergent communication technology, the company agreed to only distribute materials that had been approved by the government. Moreover, it was given far more power than even the average London company: “Company powers were generally limited geographically, but the charter of the Stationers’ Company gave it an almost complete monopoly on printing, together with powers of national regulation.”

In short, these economic relationships were still very visibly secured by political means—and, particularly in the case of copyright, they visibly secured the political itself. At least that was the idea. Hill speaks of the difficulty of shutting down pirate publishers and Robertson asserts that the success of the Levellers, discussed further below, was largely due to their having their own pirate publisher. In France, a similar model was set up, with the possible exception of there being a special branch of the police to enforce censorship. Still the economic relationship was much the same. To be fair, Christopher Hill says that monopolies themselves were part of the discontent that led to the Civil War, but this was a century after Brenner’s social property relations had supposedly led to the complete capitalist revolution.

In short, to focus on the “politically constituted property” of IPR (or property in general) in the feudal era is to presume that property in general isn’t politically constituted and, therefore,

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204 Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville, TN: Vanderbilt UP, 1968), 29.
205 A simple description like this makes the FCC—and the TV and radio networks it allows monopolies in—seem like a rather old idea.
206 Patterson, *Copyright in Historical Perspective*, 32.
207 Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution*. Geoffrey Robertson, “Introduction,” in *The Levellers: The Putney Debates*, ed. Philip Baker (London: Verso, 2007), xv. He also interprets Levellers Overton and Walwyn as being “in truth freelance journalists who threw themselves into political propaganda for the radical wing of the parliamentary Independents. Their cause, asserted first against the king and then against the Presbyterians, was liberty of conscience and liberty of trade.”
that the reified culture of property wasn’t itself constituted through political means. As the rest of this chapter outlines, this was hardly the case. The distinction between the feudal era before it and French model beside it should be seen mostly in terms of the transparency and declaration of their use of formal state power rather than its presence or absence.

The contradiction that Wood mentions—that in the place where the state was most established as a sovereign entity, with supreme jurisdiction over all the subjects in its territory, it would also appear most ‘natural’—is not in inverted commas here because she is being clever. As we will evaluate below, the efforts of English administrators were often accomplished (or at least cemented after the fact) with as much positive promulgation and coercive enforcement as their so called “Civil” counterparts. Yet the appeal to common or natural laws had the effect of presenting the current relations as, in the words of Marx, “encased in eternal, natural laws independent of history, at which opportunity bourgeois relations are then quietly smuggled in as the inviolable natural laws on which society in the abstract is founded.”

The use of Natural Law arguments, in other words, made it easier to defend against alternative mediations (C2) of what the state should be doing.

As Christopher Hill says of such a concept—a natural or fundamental law—its beauty “lay precisely in its vagueness and in the assumption that it was self evident.” This was, on the other hand, what led to its entry into the European lexicon at this moment. Tigar and Levy describe the process wherein the church first helped “bourgeois” jurists revive Roman notions of Natural Law in order to found a new basis for religious doctrine that would embed the new merchant class “within its universal system of theology, morals and law.” This religious background explains why the popular struggles of the time, which were largely discussed in terms of religious ideology,

were also articulated in terms of Natural Law. These struggles therefore had an ideological edge to them that made the settlement of the *Century of Revolution* affected by Locke an attempt to quell these alternative interpretations. Wood and David McNally even argue that Locke actually appropriates one of these popular understandings—that of the Levellers—within the defense of property based on “improvement.”

On the other hand, once this model was adopted, and once the Natural Law had the “Rule of Law” of the state behind it, the isolated model of human interaction understood as “law merchant” was projected onto the whole of English society, then British society, and finally, the society of the Imperial Commonwealth.

The global imposition of this as “Natural Law,” as chapter five evaluates, is not in opposition to the idea of national sovereignty being developed at the time: instead, the use of the state to help aid the projection of economic power outside its borders was inscribed in its origins. Justin Rosenberg, building on Wood’s understanding, discusses this in terms of international relations.

The separation of the political and the economic indicates precisely the central institutional linkage between the capitalist economy and the nation-state: That is, the legal structure of property rights which removes market relations from direct political control or contestation and allows the flow of investment capital across national boundaries.

However, before there could be investment across national boundaries, these boundaries have to indicate something juridical. As promised above, having looked at the distinctions between these traditions, I will now return more directly to the process of state centralization. As also mentioned above, this process of centralization was inherently intertwined with the ideological inflection of the Liberal culture central to the discussion of this project. Both the process of centralization and


the process of imposing the reified culture of property are replicated in the current imposition of intellectual property rights on new places and things. Therefore understanding them is not just an idle exercise in historical navel gazing; it is essential in moving forward with the critique of this project.

**Imposing the Culture of Improvement**

If we were to look at a map of the legitimacy of power, of the clarity of law at this point in Western European history, it would be a confusing jumble similar to what Naeem Inyatullah and David Blaney term “Multiple and Overlapping Sovereignties.” They discuss this as in opposition to “the empire of uniformity imposed through the reign of straight lines.” They are speaking of international boundaries, but within the English state, the divisions within it were just as problematic. No such empire of uniformity existed and, for some within the polity, this was a problem. The “jurisdictional covetousness of the ecclesiastical, seigniorial and royal courts” described by legal scholars Tigar and Levy was accompanied and interspersed by spaces “beyond the pale.” The meaning of this phrase is significant.

According to the *Oxford English Dictionary*, the earliest connotation is of “a stake, fence, or boundary.” At roughly the same time (c. 1400 C.E.), it meant both a staff that was used by fighting and, simultaneously a post soldiers used “to represent an opponent during fighting practice.” The three together—the pale as a boundary, a weapon, and a representation of the other—represent a set of connotations that resonate with the pattern of feudal law: it is a space in which the political is much more at play in the indeterminacies of the body politic. The ideology

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of Catholicism provided some common ground, but this tenuous hold was contested and arbitrary, particularly in England where it was substituted earlier for a local Protestant interpretation. The major cohesion, as mentioned above, was made in opposition to other religious dominions. Thus the supposed contrast—made by Montesquieu amongst others—between the Laws of Islamic countries encircling Western Europe and, slightly later, of Catholic (or “Roman”) law in the rest of Europe contrasted to that of England. To speak of a space “beyond the pale” in this environment is, therefore, somewhat of an anachronism: there was barely a pale to go beyond.

This fact was not lost on the different authorities vying for absolute jurisdiction over populations and territories nor was it lost on those populations themselves. As Anderson puts it, “although the feudal class tried on occasion to enforce the rule nulle terre sans seigneur, in practice this was never achieved in any feudal social formation: communal lands—pastures, meadows and forest—and scattered allods always remained a significant sector of peasant autonomy and resistance.” The corollary of having no land without a master was having no person without a master: having no citizen without a legitimate space of freedom from direct political authority within the feudal order meant having people who were also sans seigneur. This status was, especially important in the towns. The presence of these spaces was essential to the struggle which ensued over the ideology of Natural Law as well as the material practices of early Modern capitalism. Tigar and Levy also find them to be most important in the development of the legal

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218 Roughly, “no land without a master.”
219 Anderson, Passages from Antiquity to Feudalism, 148.
220 Not least of which, the fact that the only way the Agrarian capitalist could get rid of his surplus yield was by trading it. Though it seems too obvious to really necessitate a citation, but Neal Wood makes this point in Neal Wood, John Locke and Agrarian Capitalism (Berkeley: University of California Press, 1984), 38-39. p. 38-39. It’s also worth noting that, since land and status were so intimately related, one of the most common ways to reinvest the surplus of trade from the cities was to buy a nice country property which could get you a title in the government. As well as making it difficult, therefore, to create a bright distinction between classes in terms of economics, when one combines this with the ideas of improvement of the agricultural capitalists, the state policy most beneficial to capitalism becomes clearer, if only as a cultural cohesion of class consciousness and the fact that all of the above began to see laborers of any kind as a kind of separate species.
status of the bourgeoisie which, in concert with the other competing institutions of feudal authority, played a key role in developing the legal ideology that was to revive the Roman Natural Law tradition, as well as to help project both upwards and downwards the effective control of the central legal authority of the nation-state.

In case it needs reiterating, the idea of the state as a single administrative authority with the power to enforce a single law over a defined territory—whatever the basis of its authority—as Wood contends, existed only as a fantasy in much of western Europe.221 On the other hand, the predominance of authority placed in the hands of the royalty, the church, and feudal lords effectively controlled the order in so far as it was necessary. As long as someone wasn’t trying to move from one place to another (an activity that would have been prohibited for many in the order) or to carry out a transaction between these jurisdictions, the “parcellized sovereignty” of the feudal order wouldn’t be all that apparent, nor would the actual absence of a supreme authority in all things temporal.

By the early seventeenth century, the two dominant English meanings of the phrase “beyond the pale” are more indicative of the predominance of the modern state. On the one hand, at this point, it refers to, a district or territory outside “determined bounds,” or not “subject to a particular jurisdiction.”222 This presumes, therefore, that there are more determinate bounds to the jurisdiction in which law is effective. The form of government that a territory like this requires is more absolute. The use of this phrase in relation to the area of Ireland not subject to English jurisdiction, the area “beyond the pale,” is, consequently, indicative of its Imperial gesture:

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221 I must, at this point, admit a shameful ignorance of all the social formations that existed in other parts of the world at the same time. Ibn Khaldun discusses at length the role of political authorities and laws amongst different peoples (a much earlier version of Montesquieu) which I will consider briefly below.

222 Pale, N‘. at 4a. The OED specifically says that the associating the phrase “beyond the pale” in with Ireland seems to be a later rationalization. They don’t provide any information on when that rationalization began to be used, but it is the efficacy of this rationalization that I’m focusing on—the fact that, even if it wasn’t used at the time, the institutional materiality of the state and the desired jurisdiction of the English empire was such that it could be used (then or later) as a description.
the desire, in some fashion, to eliminate the people and spaces which remained outside the pale of the law. It is a return to the imperial roots of the Roman notion of Natural Law in the form of *jus gentium*: a law for all peoples. The supposedly rational, progressive notion of this Imperial vision of the law justifies its imposition even as it erases the instruments of that imposition; its pretense is one of being, simultaneously, pre- and post-history. As Norberto Bobbio points out, declarations of Natural Law typically “take the juridical form of a unilateral concession on the part of the monarch, even though in reality they are the result of a bilateral accord”

Here, too, of course, we have another instance of the reverse presentation of the sequence between the historical events and the juridical agreement and rational justification to which they give rise: historically, the liberal state was the outcome of a continually and ever-growing erosion of the sovereign’s absolute power, and of the revolutionary rupture which occurred in historical periods of sharper crisis (such as the seventeenth century in England and the late eighteenth century in France); rationally it was justified as the outcome of an accord between individuals who are initially free and who come together to establish the bonds essential to a permanent and peaceful coexistence. [. . .] only by taking its starting-point at a hypothetically initial state of liberty and conceiving of man as naturally free, does it arrive at the construction of a political society as a society in which sovereignty is limited.  

To see the conditions referred to as “natural” as something that must be fought for and then subsequently agreed to—that requires careful construction—destroys the illusion of the state protecting them as merely negative liberty. Recognizing this makes possible the renewed struggle to rearticulate what this law means. In historical fact, if Tigar and Levy are to be believed, this struggle is a more accurate description of how the islands of bourgeois freedom were established.

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At the same time, the re-emergence of natural law as the justification for ecclesiastical and royal law owes as much to the bourgeois lawyers working for the crown and church as it does the ideas and practices carried across time and space from the east by traders and crusaders.\textsuperscript{224} In other words, as in the Roman era before, the idea of “Natural Law” was an empty signifier waiting for some powerful force to suture its meaning.

It is in this sense a metaphysical law, beyond politics and history and thus its expansion unlimited by space, time, or so-called “bad subjects.”\textsuperscript{225} As Althusser says of natural law theories, “the end of history [is] inscribed in its origins.”\textsuperscript{226} My invocation of Althusser here is not incidental. For the aspect of the law that becomes more evident in this later understanding of “beyond the pale” is its extension inward—or at the very least, in its governance of individual performance of the practices that provide evidence of this inner characteristic: following the axiom “kneel, pray, and you will believe” may not produce the desired result, but from the outside all the kneeling and praying (C1) can give the illusion of belief (C2). The presumption of this process from the C3 downwards, discussed above as central to the modern ideology of the law is similar to the process Althusser discusses in terms of “interpellation” of subjects in ideology. That Althusser uses Christianity as his primary example of ideology is, perhaps, a convenient anachronism. As Alain Supiot argues, religion is the perfect model to think about the way the modern state and law function:

We should not forget that the meaning of the word “religion” has changed into its opposite with the secularization of society. There is religion and Religion. Whereas previously Religion constituted the dogmatic foundation of society, nowadays [religion] is a question of individual freedom; a public affair has become a private one, which is why

\textsuperscript{224} To see these as separate people is also inaccurate as some of the earliest traders (and international financiers) were the Knights Templar. Cf. Tigar, \textit{Law and the Rise of Capitalism}, 68.

\textsuperscript{225} Althusser, \textit{Lenin and Philosophy, and Other Essays}, 181.

discussing religion today is unfailingly a source of misunderstanding. In medieval Europe, Religion was not a private matter and so has no existence in the sense of the word today. [. . . ] The fact that Christianity no longer has any constitutional position in certain Western countries in no way implies that the latter are not founded on dogma. States, no less than people, continue to be sustained by indemonstrable certainties, beliefs that are not the result of free choice because they are part and parcel of one’s identity. 227

Here, the other meaning of “beyond the pale” comes to the fore. Not only is it does define what is outside of the physical bounds of the newly defined territorial sovereignty, but what is “outside the limits of acceptable behaviour; unacceptable or improper.” In this, the state not only hopes to describe, in straight lines, the limits of its territory, but the paths people take to cross it—and maybe even what they wear while they do it.

The actions of the central state in this modern iteration were not merely to have control over the territory; it was also to enculturate its subjects to some set of norms. Christopher May, in his account of the pre-history of IPR, finds the need for this central state a function in the wider expanse of trade. May says that, as the "scope and extent of the change expands [. . .] exchange becomes impersonal." This impersonality makes it more necessary to have formal rules drawn up. In theory, if exchange alone were the object then this set of impersonal rules would be enough. However, May contends that, as exchange becomes even more impersonal, over even wider spaces, the formal rules alone are not enough—nor is the state apparatus itself.

That is, if the only real need was to enlarge the scope and scale of exchange among actors who chose to engage in exchange, there would be only a minimal need to have the rules adhere

227 Alain Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, trans. Saskia Brown (London: Verso, 2007), xiii-xiv. Though it is not necessarily the most rigorous example he follows this shortly after with, “Even those who today label themselves as unbelievers will readily admit to believing in the value of the dollars in their wallets, although these are nothing but scraps of paper.” One could also as mention this in terms of the belief in the value of real estate. With the oncoming recession, resulting from the bubble in housing, it would seem part of the resulting anxiety is the equivalent of the realization that the Pope is not infallible.
outside of the isolated exchange relation. We see this in relation to the current expansion of liberal conceptions of IPR and the criminalization of piracy. In this, the simple state expansion in space is not enough. The is a grey area in this theory of exchange sees the advantages of this freedom of exchange—guaranteed and enforced by the state—as being part and parcel of a more general freedom from state intervention in private interactions. This more general freedom—discussed in relation to IPR especially, in terms of privacy and free speech—sits uncomfortably with the expansive police force that would be necessary to guarantee and enforce the so-called freedom of exchange in property. Or, as May says more succinctly, "If enforcement was entirely dependent on active policing and force, the advantages of complex economic exchange would be unlikely to arise."  

Thus the rules themselves must become so natural that they are enforced informally and policed individually as informal social norms which help to mutually constitute the authority of the state laws and the actors which officially enforce them. This process of efficacy makes it necessary to have culture serve power. As May summarizes, "This leads to efforts to produce a legitimized and socially embedded set of norms and principles which will in most cases ensure behaviour accords with the formal rules without being policed." In the terms of this dissertation, it means taking a set of theories and behaviors that previously existed as one set of theories at C2 and one set of norms developed through behaviors, practices, and social interactions at C1 and to project them upwards into a universal set of behavioral guidelines that should discipline all actors throughout the social field.

On the one hand, as intimated above, the social and cultural fact of these rules has to become so natural that they are incorporated into the common habitus of the average actor. When this is posited as merely a problem of scale, it seems natural to expand its purchase in space;

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to make the actors involved police themselves through new social and cultural norms. But as this projects authority upwards into a universal state, it also reveals the need to make the rules adhering to exchange applicable to individuals who are technically external to the exchange. In other words, it means making the rules of that had previously only governed transactions in the market (or on the capitalist plantation) the rules of the total society. This was, in effect what occurred.

In the period between 1200 and 1500, the church funded universities for the study and promulgation of canon law as “natural law.” It saw the economic advantages of trade, even as it saw the detrimental social consequences. It sought to bring commerce into its system of morals. In this context, with the help of the nascent class of Bourgeois lawyers, it “translated Roman ‘natural reason’ into ‘natural law’ and set up God rather than the common consent of humanity as the arbiter of that law.” Still, the patchwork of jurisdictions created problems for merchants and distance from Rome made the church’s power both more and less effective. In England, the much earlier alliance of merchants and the king, the weakness of the Roman order to begin with, the international political and economic situation, and the reverberations of Luther’s 99 theses created an opportunity to eliminate the tie of religion to Rome. There were perfectly logical political economic reasons for the split with Rome, but ideologically it opened a Pandora’s Box.

As most sources agree, the English state was more centralized in general than any other in Europe at the time. The split with Rome was not supposed to do away with religion altogether: it was to meld the two major, competing judicial institutions and eliminate the (foreign) ecclesiastical court’s meddling in temporal matters. Religion, on the other hand—connection with the Devine—was to continue be the basis for the monarch’s temporal powers. I’ve already mentioned above the way patents and copyrights were employed to limit heretical and seditious works—a distinction, in this case, without a difference—but other policies reflect a continued

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attachment to religion as the basis of, as Supiot might say, the dogmatic resources of the state. Hence Anabaptists, whose beliefs about baptism threatened the idea of a single, national church, were banned from England for most of the last part of the sixteenth century. However, as Hill recounts it, the energy of popular antagonism to the church—and in particular the church’s support of the existing order—was so great that many of the revolutionary movements that constituted what Peter Linebaugh and Marcus Rediker have called *The Many Headed Hydra* were initially shaped in resistance to it.

To see the changes that took place in this period as being solely in relation to what could increasingly be understood as the concept of a domestic state, rather than those taking place on the broader European front would be to filter out much of importance. For instance, though Religion (here with Supiot’s capital “R”) was about a belief system questions about who was qualified to interpret the true word of Christ were hardly the only basis of the repeated anxieties about “popish plots” throughout the following century. Since Religion and State were equivalent, the involvement of another state’s religion could signal the attempt of another state to undermine one’s legitimacy. The English reformation was a first step in separating these two ideologically, but this was countered by a deification of the state itself, even as the supposedly rational roots of its legitimacy were being cast. In this regard, we could say that, though the English state might not have had a coherent theory of statecraft, its religious ideology stood in for it on some level.

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230 Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution*. Anabaptists basic belief was that children shouldn’t be baptized at birth, but that acceptance of baptism—reception into the church—should be the voluntary act of an adult. This clearly subverted the concept of a national church to which every English man and woman belonged: it envisaged, instead the formation of voluntary congregations by those who believed themselves to be among the elect. An Anabaptist must logically object to the payment of tithes, the ten percent of everyone’s earnings which, in theory at least, went to support the ministers of the state church. Many Anabaptists refused to swear oaths, since they objected to religious ceremony being used for secular judicial purposes; others rejected war and military service. Still more were alleged to carry egalitarianism to the extent of denying the right of private property. (26)

A series of edicts between England and Rome upped the ante and resultant split had the ultimate effect of setting up the king as Supreme Governor of the Church of England. Whatever domestic centralization had taken place over the previous centuries was now sealed (formally, at least) from external jurisdiction. The appropriation of church lands—including many areas of commons—had the effect of enlarging the gentry and the rising cost of wool in international markets created pressure to continue the trend of enclosures, to the point where Sir Thomas More’s *Utopia*, spoke of men being eaten by sheep. The Tudor state, already accustomed to suppressing rebels after having to do it several times during the split with Rome, was well prepared to start using force to introduce a new culture. The early outlines of this were already evident, but it wasn’t until Frances Bacon that it was given a full blown scientific explanation.

In this regard, it is difficult to draw a sharp distinction between the French and English routes in relation to actual statecraft. Both French and English schemes were dependent on creating not just a coherent polity, but a uniform culture in which it would operate. The peace of Westphalia (at which England was not present) helped accomplish the former for most of the rest of the European polities almost a century after England made the break; and the plans for what would be done within those polities was only mildly diverse. Colbert’s schemes for creating a

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232 In my understanding, since Westphalia was supposed to be a confirmation of the principle set down in the Augsburg confession, which actually happened around the same time that Henry broke with Rome, it could be said that the impulse behind both was coeval, but since the former wasn’t honored or extended to all these states until 1648, it is usually said to originate with the latter date. This, of course, is partly contested in Teschke’s book Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003). Much of Teschke’s argument is based on the fact that England is not usually accounted for here. On the other hand, I find it somewhat suspect that he contests the rational choice model of Gilpin’s neorealism by using Brenner, who seems to use a version of rational choice in his own analysis. It introduces a new perspective, but it seems to replace one kind of microfoundation for another and, as Mieville says, “to miss the wood for the trees,” particularly at the level of analysis that Teschke claims to be engaging, that of international law. China Miéville, *Between Equal Rights: A Marxist Theory of International Law*, Historical Materialism Book Series; 2 (Chicago, IL: Haymarket Books, 2006), 203, n. 21.

233 The formal agreement of Westphalia was to allow France, Sweden, Spain, the Dutch Republic and the area that is now Germany to decide on the religion of their country, which, consequently, meant defining the territory of that country.
system of communication for goods and military control of France differ only slightly in character from the Baconian schemes for agricultural improvement recounted by Neal Wood in *John Locke and Agrarian Capitalism*. In either case, the necessity of having a strong state to implement the plans was a primary assumption. Ellen Wood argues that there is a distinction:

The characteristic ideology that set England apart from other European cultures was above all the ideology of “improvement”: not the Enlightenment idea of the improvement of *humanity* but the improvement of *property*, the ethic—and indeed the science—of profit, the commitment to increasing the productivity of labour, the production of exchange value, and the practice of enclosure and dispossession.

Here the characteristic difference seems to be that France had a theory of the state which enforced a certain kind of culture; whereas England settled on a culture which would necessitate the action of a state for its implementation. The distinction has important implications for the democratic process down the road.

If the state is constituted as defending only one kind of culture, it is impossible to later alter it. On the other hand, once it is understood that the state is a space of political rivalry, if one sets out with a professed plan—to impose a certain culture—its acceptance by the population will be rewarded by specific ends, most often those ends have to have the ideal of “improvement of humanity” at their base. This, in turn, requires one to be upfront with what that ideal of humanity is. Depending on the extent of this plan, it then requires either the consent of the population on whom it is being imposed or some means of justifying the brutal imposition of an exogenous culture.

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234 On this, see the opening chapters of Armand Mattelart, *The Invention of Communication* (Minneapolis, Minn.: University of Minnesota Press, 1996).

235 Wood, *John Locke and Agrarian Capitalism*. Especially Ch. 3.

In effect, each posits an ideal subject and ideal practices which that subject will perform. Beyond the question of how successful any such program might be, this corresponds roughly to the earlier pattern described wherein one set of practices above others, and therefore one kind of subject, is accepted as legitimate. In the case of official “planning” in the 20th century sense, one is upfront about the role of the state in relation to its imposition of a model and the proposed goal. The goal may be to then re-configure society so as to make not only the interactions and practices, but the subjects themselves more closely resemble this legitimate ideal. The expansive control of the state would, in this regard, be necessary and justified by the benefits it would give to all. In this case, the push for a more democratic representation within this state is not necessarily motivated by only economic concerns such as those Ellen Wood describes as “politically constituted property”: it is also the desire to have a say in how the state plans to go about this business. It, in effect, renews the step of politics to the process of choosing which practices the policies should mandate. Ideally, this democratic aspect creates some sense of how the plan should be implemented, even if, ultimately, there would have to be a unilateral decision at some point.

In the opposite case of so-called piecemeal social engineering, which the Liberal hero Popper advocates, one begins from the idea that one already knows the subject in question. One therefore doesn’t need to advocate a plan based on transforming this subject nor does one need to admit the role of the state in transforming it. The subject—not the citizen—is simply posited and set in motion, as in the system Hobbes inherited from Galileo, such that, “all human actions could be resolved into elementary motions of body and mind which the scientist could recombine in a way that would explain everything.”237 In other words, it was based on a natural sensibility inherent in the subject. A democratic uprising against these policies flew in the face of natural law

and was, therefore, a barbaric abomination deserving of being destroyed. One effectively moves from “piecemeal tinkering” with a few things here and there—from the modest attempt to “reconstruct and run” social institutions which have mostly “‘grown’ as the undersigned result of human action”\(^{238}\)—to, in fact, holistic engineering. In this case, the need for some super-ordinate force to help the project is hardly something to get everyone involved in: it’s just a tool you use to get things done and can put away when it is no longer needed.

In the case of the early seventeenth century, the key issue was the absolute, yet piecemeal, construction of society rendered so that the “natural” subject of improvement could take its proper place on the stage of natural history. Since this subject was assumed to be natural, helping to make the world safe for him was more of an environmental problem—even if part of the necessary environment involved other people.

The subject posited here has been discussed in a variety of ways, but one of the more substantial descriptions of what this subject was is given by C. B. MacPherson’s *The Political Theory of Possessive Individualism*.\(^{239}\) Paul Smith has recently described this in contemporary American version as “the subject of value.”\(^{240}\) How we got from the Possessive Individual to the Subject of

\(^{238}\) Popper, "Piecemeal Social Engineering," 308.

\(^{239}\) MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*. Though MacPherson was an extremely influential historian whose germinal work could be widely read as an early version of (admittedly text-based) Cultural Studies. He, like many of the authors this chapter will explore, focuses almost totally on British history and political theory. My hypothesis for why he has only recently been getting some more interest is that, for many years, the central theories of Cultural Studies (particularly when it was trying to clean up all the Marx that had spilled on the table during the Birmingham years) originated in France. Most specifically, Foucault, whose theories of power and governmentality are actually much more useful for considering a regime like the one in the France of the 19th century. It is telling that, of the British political economists he speaks about the most, Jeremy Bentham ends up as the most central figure. Bentham was long repudiated by the pure liberal theorists like Mill for being a real threat to the kind of Liberty Mill thought was important for the model society. In short, Bentham, in 19th Century Britain, seemed a little too French. Cf: C. B. MacPherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

\(^{240}\) Paul Smith, *Primitive America: The Ideology of Capitalist Democracy* (Minneapolis: University of Minnesota Press, 2007). The most concise description of this is on p. 30. “The subject is a necessarily historical entity, construed as the requisite subject for specifiable regimes and modes of value production. [. . .] three particular features, each of which serves the maintenance of the existing apparatus of production and consumption including the wage relation, characterize the subject appropriate to the regimes of capital accumulation in the contemporary moment. This is what I call ‘the subject of value’ and it is (1) endowed with an ultimately self-interested rationality, (2) convinced of the principle of equality, and (3) dedicated to the concept of private property. In the American context, the role and power of this of the three is perhaps underscored by remembering that they are promulgated there under the rubric of ‘freedom.’”
Value is preceded by the earlier story about how this ideal subject was proffered. This ends with that ideal relationship of subject, its relationship to the state and the law, and its role in the creation, distribution and appropriation of value on an international scale being inscribed in international law. Central to each of these is the idea of private property and its profitable improvement.

Frances Bacon, mostly known as the wellspring of scientific reason, using the method of natural history, was also one of the forerunners of the seventeenth century advocates of agricultural improvement. Bacon died before the civil war broke out (and hence before the Interregnum and Restoration when the improvers had their heyday) but he participated in laying the groundwork for it—ideologically, politically, and, ultimately, materially. The imposition of the above stated market mentality, of this understanding of property, of the social division of labor, was not something easily secured. Nor, as Linebaugh and Rediker point out, was the infrastructure needed to advance it already present. They—and Christopher Hill—agree that these were actually mutually dependent ends.241

The sixteenth century enclosures (for purposes of wool farming) helped to create a large number of “masterless men,” peasants who had been “freed” of their feudal obligations. This was accelerated in the early part of the seventeenth century by endeavors that were meant, in some cases, to stifle it. Along with enclosure, the draining of fens and disafforestation was meant, not only to, in Neal Wood’s terms, “give permanent employment to such people, putting an end to their vagrancy,”242 it was also meant to execute “the obliteration of the communing habitus.”243 In other words, it was a process not only of building that space, of making it intelligible on the map, but it was simultaneously a removal, of both the people who were able to live there and their way

241 I take this account from Hill, The World Turned Upside Down: Radical Ideas During the English Revolution, ch. 3; Linebaugh and Rediker, The Many-Headed Hydra, ch. 2.
242 Wood, John Locke and Agrarian Capitalism, 65.
243 Linebaugh and Rediker, The Many-Headed Hydra, 43.
of life—i.e. their culture. Ultimately, they would then be incorporated back as willing, working subjects. In other words, on one level it was a disciplinary project, in Foucauldian terms—though, like the “discipline” that would he would find so exemplary in Bentham, it was discipline for a purpose, namely laying the physical and ideological groundwork for a fundamental change in social organization.

At the same time, with the increased use of punishment against these outliers, it also helped to strengthen the image of the state as a powerful institution above the village or manor level authority that had persisted for so long. Whether this purpose was clearly foreseen—whether the goal of capitalism per se was something already understood by the ruling classes of the day—is somewhat beside the point. These processes had their own advantages. It was useful in its own right to eliminate the communing *habitus* and disrupt the ability of these “Masterless Men” to subsist outside the emerging paradigm of wage labor. Their continued existence was a threat to that order: “Disafforestation and enclosure could thus be regarded as a national duty, a kindness to the idle poor, as well as of more immediate benefit to the rich encloser.”

Of course peasants did not take to this willingly, and the spectre haunting England at the time was less that they would join together and rise up—though that was feared as well—than that they would writhe around, uncontrollably and confound these efforts at building a new “improved” society. Linebaugh and Rediker find many references in this period to the character of Greek mythology they use as the title of their book: *The Many Headed Hydra*. They cite Sir Walter Raleigh, former landlord in colonial Ireland and author of the first English attempt at colonizing America, as making one of the first references to this in his *History of the World*, which he wrote while imprisoned for his part in a plot to execute King James I: “In it [he] mentioned

244 Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution*, 51.
245 Roanoke Island, which Queen Elizabeth I gave him permission to colonize, was started in 1584. It is unclear what happened to the colonists there, but they disappeared sometime between 1587 and 1590 and the colony was abandoned.
Hercules and ‘the serpent Hydra, which had nine heads whereof one being gut off, two grew in
place.’ Raleigh, of course, identified with Hercules, and he used the hydra to symbolize the
growing disorders of capitalism.”

This metaphor, “suffused English ruling-class culture in the
seventeenth century” and it increasingly saw the lower classes—particularly those that threatened
rebellion with anti-enclosure riots—as “unnatural” and, in the words of Francis Bacon
“monstrous.” Citing a little read treatise of his called An Advertisement Touching an Holy War
they outline the internal enemies that were “adequate to his proposed jihad.”

A death sentence was justified against those unavowed by God, those who had defaced
natural reason and were neither nations in right nor nations in name, “but multitudes
only, and swarms of people.” Elsewhere in the same essay Bacon referred to “shoals” and
“routs” of people. By taking his terms from natural history [ . . . ] and applying them to
people, Bacon drew on his theory of monstrousness. These people had degenerated from
the laws of nature and taken “in their body and frame of estate a monstrosity.” [ . . . ]

Bacon drew upon classical antiquity, the Bible, and recent history to provide seven

246 Linebaugh and Rediker, The Many-Headed Hydra, 36.
247 Manning has said that these were so common in the sixteenth century they can be considered a “national pastime.” William Robinson, "Book Review: Village Revolts: Social Protest and Popular Disturbances in England 1509-1640. By Roger B. Manning." Sixteenth Century Journal 20, no. 3 (1989) They were mostly based on local revolt against specific enclosures rather than a class conscious uprising thus Manning makes the distinction between social and political protest. The former were, “were directed against particular grievances in a strictly local context” which only rarely “translate their subpolitical behavior into more generalized rebellion and so break through into ‘political’ protest.” Frances D. Dow, "Book Review: Village Revolts: Social Protest and Popular Disturbances in England, 1509-1640" by Roger B. Manning." The Journal of Modern History 62, no. 2 (1990): 367. According to Dow, he also provides evidence that, “gentlemen played a key role throughout the period, instigating around 40 percent of the disturbances studied (slightly less in Elizabeth's reign). He emphasizes that gentry feuding and divisions of interest between lesser gentry (who were often tenants) and seigneurial gentry were often crucial ingredients in provoking disorder. Only in James's reign [the period in question] did yeomen and husbandmen overtake gentlemen in the league tables for provoking riots. [ . . . ] By the early seventeenth century, the determination to bend the idle to labor and to subject them to gentry control was as powerful a motive behind enclosure as the need to feed a growing population. Social as well as economic imperatives increasingly drew smallholders into the gentry camp and politically isolated landless cottagers, artisans, and laborers” Ibid, 367-368.
examples of such “multitudes” that deserved destruction: West Indians; Canaanites; pirates; land rovers; assassins, Amazons, and Anabaptists.  

Note here that, like the Liberal idea of natural law, this consists of a “reverse presentation of the historical sequence.” This order, despite the process of its harsh and complicated imposition is seen as natural: despite the possibility that these outsiders existed well before that order, anyone who doesn’t fit into the order that was being created was “unnatural.” For a “natural scientist” this logic lacks a certain rigor, but for political propaganda, it’s effective. Calling it an outline for “holy war” is therefore telling.  

The inclusion of Anabaptists in this mix was, at the time, a more general reference to the variety of Protestant sects cropping up—especially in the interstices of the power of the Tudor state. Though there were many other ways to construct seditious doctrine, the dominant ideology of the day was that of Protestantism and it was on this ground that these revolts were charted, especially right before and after the outbreak of civil war. As Anderson points out, much of the revolutionary ideas of the period were framed in terms of religion; nevertheless, they were still revolutionary and one can see the outlines of most of the “bourgeois” ideas of freedom and democracy within these movements. Chief amongst them was the notion, highlighted in Linebaugh and Rediker, that God was “no respecter of persons.” The phrase appears throughout the protest literature of the time—especially in the works of the Levellers like John Liburne and Richard Overton and the Digger Gerald Winstanley.  

We’ll consider below whether this religious tenor still gives its revolutionary doctrine an edge. For the moment, it’s clear that Bacon thought that it did. This was with some good reason. If religiously-hued, hegemonically-resistant terrorism is said to have inaugurated our own millennium, then the same can be said for Bacon’s: in 1605, Guy Fawkes—a Catholic rebel—

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249 Ibid., 39.
plotted with several others to blow up the House of Parliament to protest the Protestant government. “Remember, remember the fifth of November,” the poem commemorating the event, read in Parliament each year on Guy Fawkes Day, was the “Never Forget: 9/11” of the day.  Further, the Anabaptists represented “the specter of communism,” and Bacon wanted to “cut them off the face of the earth.” This meant not only “the expansion and intensification of state terror” but the elimination of the places where these ideas could take root. Realizing control over these spaces was a political project no less than an economic one: the targets of this “holy war” were “unnatural.” What was natural was the profitable improvement of land: the latter would become the cornerstone of Locke’s political doctrine.

But well before Locke took up Bacon’s ideas on improvement he had the opportunity to enjoy the work of the state in reshaping nature. Looking out over his family’s holdings in “the marshy lands of Somerset,” he would have known it had to be subjected to what Linebaugh and Rediker call, “the labors of appropriation.” One of these, was the draining of the fens—or wetlands

An Act of Parliament in 1600 made it possible for big shareholders in the fens to suppress the common rights that stood in the way of their drainage schemes. New plans and works, requiring unprecedented concentrations of labor, proliferated. King James organized hundreds in the drainage and enclosure of parts of Somerset in the early seventeenth century, turning a communing economy of fishing, fowling, reed cutting and

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250 Scott Horton, "Happy Counterterrorism Day," Harper's Magazine, November 5, 2007. Horton says that George Washington was so appalled at the holiday, “For him, America was involved in a struggle for its liberty, and the commemoration of Guy Fawkes stood for the opposite: government by fear, oppression of a minority, a celebration of arbitrary power. Guy Fawkes Day was the abnegation of the essential values of the Revolution.” Instead, “Guy Fawkes Day would mark that week with a new tradition: the exercise of the democratic franchise. It was to be the time in which the rulers are held accountable to the people.” I cannot vouch for this observation, but Washington’s order to end the holiday (cited in the article) seems to have been more of a diplomatic effort to keep Colonial US soldiers from offending their Catholic French-Canadian allies during the run up to the Revolutionary War.


252 Wood, John Locke and Agrarian Capitalism, 21.
peat digging into a capitalist economy of sheep raising. Coastal lands were reclaimed and inland peat moors drained in the Somerset “warths.”

It is true that Locke’s specific Somerset property might not have been subjected to these state labors, but the scale of the project meant that he must have known about someplace nearby that had. This process took a lot of work: as did the building of ports and systems for drawing water into London. As this was also the beginning of England’s colonization projects in the New World, and its expansion and intensification of its holdings in Ireland, the work was transatlantic. The newly founded Virginia Company, of which Francis Bacon was an investor, benefited greatly from the policy of transportation—the deportation of criminals as servants in the colonies. In 1617, this was extended to felons, but informal banishment policies soon followed for not only the Irish, Gypsies and Africans it had applied to in policies laid out in 1596, but for the poor and “idle:” “The minister John Donne promised in a sermon of 1622 that the Virginia Company ‘shall sweep your streets, and wash your dores, from idle persons, and the children of idle persons, and imploy them: and, truly, if the whole country [of the nascent USA] were such a [prison], to force idle persons to work, it had a good use.’”

If the ultimate effect is to discipline the labor force, Linebaugh and Rediker emphasize the increased use of public punishment—hangings, workhouses, prisons—much of which was focused on the poor and petty criminals. For instance, “of the 436 people hanged in Essex between 1620 and 1680, 166 were burglars, 38 were highway robbers, and 110 were thieves. In the 1630s

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253 Linebaugh and Rediker, The Many-Headed Hydra, 44.
254 Linebaugh and Rediker mention this as an aside, like I have, but the implication is that he was somehow unusual. Like today’s congress, this finding of conflict of interest is seen as evidence of a state representative’s impropriety. But like Baudrillard said of Watergate, this is not a scandal. Christopher Hill points out that, “nearly half of the MPs in the early 17th century were shareholders in trading companies; and a majority of these MPs acquired their shares after sitting in Parliament. These investors were ‘noticeably the most active MPs.’ The leading stratum of the gentry was moving towards acceptance of a capitalist society and Parliament was helping to educate it.” Hill, The Century of Revolution, 1603-1714, 33.
255 Linebaugh and Rediker, The Many-Headed Hydra, 59. When the authors comment, “He wanted America to function as a prison, and for many it did” it’s hard not to stop and note that this still seems to be the case.
thieves were hanged for stealing goods valued at as little as eighteen pence.”256 This was certainly one of the primary uses of the centralizing state apparatus at the time. The Star Chamber, the “royal prerogative court,” and Privy Council (both of which Francis Bacon at one time either led or sat on) are notoriously remembered in this period for its increasingly punitive measures, especially the use of torture, to deter opposition as well as enforce the aforementioned monopolies,257 in particular those of censorship.258 The increasing state power continued to find the monopoly of copyright statutes a particularly important mechanism for political control.

Here Linebaugh and Rediker overlook the other expansion of the state in this period, which I would consider as an early example of what Polanyi called a “double movement.” The idea of the double movement is that “leaving the fate of soil and people to the market would be tantamount to annihilating them. Accordingly, the countermove [or double movement] consisted in checking the action of the market in respect to the factors of production, labor, and land.”259 In a phrasing that has recently become widespread amongst theorists of economics, Polanyi saw this as a process of “embedding” liberalism. Liberalism here being, as described above, the idea that the state should be limited was expanded in this period to include its interventions in the economy. In retrospect this is somewhat contradictory considering the work the Tudor and Stuart states did to create the market economy. Likewise, the enclosure of land, long seen as an obvious “improvement” by most scholars after the fact, was something the state was both centrally

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256 Ibid., 51.
258 Robertson notes that John Liburne’s popularity was greatly increased when he stood up to the court in his trial for printing seditious literature, basically pleading the fifth and saying he had a right not to incriminate himself. In response, “The Star Chamber ordered him whipped all the way from Fleet Street to Westminster—a sentence carried out viciously before a large crowd who cheered this courageous young man, whom they dubbed ‘Freeborn John.’” Robertson, “Introduction,” xvii.
involved in and which they used the Star Chamber to stifle. Barrington Moore produces an account of this, which, on the face of it seems in contradiction with that of Linebaugh and Rediker, but when the reasoning is explained, it doesn’t seem that far from an attempt to mitigate the emergence of their Many Headed Hydra:

Since the English peasants had won for themselves a relatively envious position under the protection of the custom of the manor, it is no wonder that they looked to the protection of custom and tradition as the dike which might defend them against the invading capitalist flood, from which they were scarcely in the position to profit. [. . . .] The crown under Elizabeth and the first two Stuarts made some effort to mitigate the effects of these trends on both the peasants and the poorer classes in the towns. Large numbers of the peasants, cast adrift, were becoming a menace to good order, to the point where intermittent revolts occurred. One careful historian calls royal policy one of spasmodic benevolence. During the Eleven Years Tyranny, when Charles I ruled through Strafford and Laud without a Parliament, the attempt to apply benevolence may have been more vigorous. Such royal courts as the Star Chamber and the Court of Requests gave the peasant what protection he did obtain against eviction through enclosures.264

Polanyi himself saw it in roughly these same terms, saying that, even if enclosure was promoted as an improvement, the Tudor and Stuart regimes controlled the pace of conversion.

The ‘nationalization’ of labor legislation through the Statute of Artificers (1563) and the Poor Law (1601) [sic] removed labor from the danger zone, and the anti-enclosure policy


264 Moore, Social Origins of Dictatorship and Democracy: Lord and Peasant in the Making of the Modern World, 12–13. I’d also point out here that, Moore seems to indicate that, even if there was some change in social property relations officially, there was still much authority given to local customs. So even if the juridical change had occurred as Brenner discusses, there was still a great social weight to content with.
of the Tudors and early Stuarts was one consistent protest against the principle of the
gainful use of landed property. [. . . ] Change from arable land to pasture and the
accompanying enclosure movement [was a] trend in economic progress. Yet, but for the
consistently maintained policy of the Tudor and early Stuart statesmen, the rate of that
progress might have been ruinous, and have turned the process into a degenerative instead
of a constructive event.\footnote{Polanyi, \textit{The Great Transformation}, 39, 73.}

Of course, to come back to Linebaugh and Rediker, since the Poor Laws Polanyi mentions
decreed that “beggary was severely punished; vagrancy, in the case of repetition, was a capital
offense [and] the able-bodied poor should be put to work so as to earn their keep,”\footnote{Ibid., 91.} they are
likewise evidence that the interventionist state was hardly unneeded in these formative years. If
the state was the largest encloser, it was also doing a public service in organizing labor to build
infrastructure and keep the ruffians from causing disorder.

They, like those advocating for improvement, might not have had a clear vision of what
the relationship between the market and state should look like, but the desire to retain control of
the country—and to ensure the sanctity of the increasingly productive private property—led them
to create policies to stem the possibility that anti-enclosure riots and other social pressures from
below would threaten their grip. These were in addition to the punishment, banishment, and
transportation to the colonies Linebaugh and Rediker mention. Having looked at the process of
state centralization, I will now turn to the more specific content of that state in relation to natural
law. This followed roughly from the period when the civil war began, setting off a society wide
struggle to define the re-constituted state.
The Struggle Over the Properties of “Natural Law”

Ideologically and politically, the overturning (ever so briefly) of the monarchy unleashed precisely the forces the Stuart state had been suppressing. This wasn’t completely accidental, of course, as the popular classes were ultimately needed to help; but it would have been preferable to not open up this can of worms at all:

Court-favored monopolists were attacked by free-traders who looked to Parliament and common law; but below them was the mass of consumers and craftsmen, who also opposed monopolies but had little else in common with London merchants and gentlemen clothiers. Again, there was a rivalry between those who profited by and those who suffered from the Court of Wards, between enclosing landlords and the government which fined enclosers; but below this was the mass of tenants who wanted stability of tenure for their holdings and the throwing open of all enclosures. In yet another sphere, there was rivalry between prerogative and Church courts on the one hand, common-law courts looking to Parliament on the other; but spokesmen for those who existed only to be ruled will soon appear, declaring the law itself to be the enemy. In short there was a quarrel between two groups of the ruling classes; but looking on was the many headed monster, which might yet be the tertius gaudens [rejoicing third]. Once the unity of the Parliamentary class was broken, social revolution would be possible. That is why responsible leaders on both sides were so anxious to get what they wanted without war.264

Thus we can see the outlines of what was to come. Free traders, after all, not only wanted a reduction of the patented courtiers; they also wanted a state capable of helping create monopolies in the external economy in which Britain was increasingly (and for the first time) able to play a

role. The need for a single jurisdiction based on the idea of “common law,” which, at this point, was the same thing as a “natural law” in the mouths of latter-day Liberals. Edward Coke is the contemporary legal theorist most responsible for this rearticulation.265

As the author of the 1629 “Petition of Right,” Coke is rightly seen by Robertson as a sort of liberal hero who condemned “the king for illegal taxation and denial of habeas corpus.” But, as Hill mentions, the “common law” or “natural law” in question was specifically for that separate species of humanity, the propertied classes. The Star Chamber, which helped to enforce these patents and other royal prerogatives, was likewise a hindrance to this jurisdiction for precisely these reasons:

The policy of the leaders of the rebellion was clear and straightforward. They opposed interference with the landlord’s property rights on the part of the king and on the part of radicals from the lower orders. In July, 1641, [i.e. at the first moment of the Revolution] the Long Parliament abolished the Star Chamber, the main royal weapon against enclosing landlords, as well as the general symbol of arbitrary royal power. Radical threats from within the army, from the Levellers and the Diggers, Cromwell and his associates fended off with firmness and skill.267

The defense raised by Cromwell was specifically against radical threats to what Cromwell’s son-in-law Ireton called “fixed local interest”—that is threats against property. At the debates held at the Church in Putney between Cromwell and the members of his New Model Army over the future of the English state, Ireton said, “the main thing I speak for, is because I have an eye to

265 Hill, among other people, make this observation. He says that, “Coke believed that the common law had survived from the time of the ancient Britons, and that the Roman, Anglo-Saxon, and Norman conquests had left it virtually unchanged. Yet the law was changing, radically, in Coke’s own time; and Coke himself was the main instrument of that change. He it is, more than any other lawyer, to whom legal historians attribute the adaptation of the medieval law to the needs of a commercial society.” Ibid., 56.

266 Robertson, "Introduction," xii.

property.” By having an eye to property, Ireton meant making a property restriction a condition of suffrage within the new state. As in the US, the property restriction was long seen as a way of keeping Democracy without explicitly making Liberalism its limit. Those with a “fixed local interest in property would be less likely to vote for anything that would undermine its sanctity. When the US removed its property restriction, Marx declared, “The state as a state abolishes private property [. . .] when it removes the property qualification.” As he goes on to say, the issue is not so simple, but it seemed a likely threat to Ireton and other associates of Cromwell.

Ireton went on to subdue the Irish populations within “the pale,” dying in the process of introducing his property minded culture to wider empire. That someone so central to the revolution and the English republic had this view illustrates why it was, in some ways, an inconclusive revolution. Montesquieu famously said it was an “impotent attempt of the English to establish democracy among themselves[. . . .] Finally, after much motion and many shocks and jolts, they had come to rest on the very government that had been proscribed.” In other ways, it was both conclusive and, whether Montesquieu perceived it or not, different. Regardless of if he meant the restoration of 1660 or the “Glorious Revolution” of 1688 as resting “on the very government that had been proscribed,” the England in which Cromwell became Lord Protector had already helped the more radical elements, to paraphrase Liburne, rediscover their chains.

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268 “Extracts from The Putney Debates” in Philip Baker, ed., The Levellers: The Putney Debates, Revolutions (London: Verso, 2007) Though the most conventional reading of Ireton is that he is mostly looking at the domestic protection of property, the anxiety he seems to have—and the specificity of the idea of a “fixed local interest”—seems to be equally around the idea of “foreigners” coming in and then having a say in the government. There are overtones here of similar anxieties in the US around immigration, but this also seems focused on the idea that this would also give merchant capitalists from other countries who merely come to England to trade a say in domestic policy. In other words, there is an international component to Ireton’s concern. This didn’t stop him, of course, from making sure that English law was imposed in the foreign population of Ireland, but the position is more complex than the reading that Linebaugh and Rediker give, particularly since they are supposedly focused on it in a hemispheric perspective.


271 Cf. “England’s New Chains Discovered” in Baker, ed., The Levellers: The Putney Debates He was referring primarily to the new Cromwellian Republic, but recognized that the form was not all that different than the personal rule of (contd.)
And in so far as the possibility of an alternative culture of government remained, a series of Restoration policies helped eliminate it. As mentioned below, after the restoration, censorship of religious texts and movements was more strictly enforced, the better to prevent a religiously inspired uprising.

The radical threats—like the forces aligned against the king—were also diverse. The arguments of the New Model Army and the Levellers within it during 1647-48 were ostensibly over the issue of equal suffrage; but a common misinterpretation of this idea at the time might give a better sense of the ambiguity of the moment: namely, that suffrage meant “everyone should have to suffer equally.” Likewise, the signifiers of “freedom” and “liberty” had been opened up for very specific class interpretations. Making one of these “natural” was largely the stakes of the post-revolutionary struggle:

Words are deceptive because their meanings change. When members of Parliament spoke in defense of “liberty and property” they meant something more like “privilege and property” than is conveyed by the modern sense of the word liberty. [. . . .] But in the mouths of the Levellers the ‘liberties of Englishmen’ came to mean something very different and much more modern; ‘freeborn John’ Liburne was to make a democratic slogan out of what had been a class distinction.

Here Hill (and I) are using a certain definition of class—one which MacPherson sees as “defined at least implicitly in terms of productive property, [and which was] was an important criterion of different forms of government.” The emphasis on “productive” property is important for this...
understanding of class. In part it points to the already developed class relations such that a large number of people no longer had subsistence plots of land as cottagers or alternative means of survival through the various forms of commons that had previously existed. The flipside of this was the consolidation of the commons and small farms into much larger holdings. These were, on the one hand, arguably more productive and were one of the first spaces of English capitalism. This is the first meaning of “productive:” relative to the earlier arrangement, they were more productive. To the laborers forced to work—or not work—on this land by the compulsion of economic necessity, the distinction of “productive” more in the fact that they no longer had any way to produce for themselves: it was only by working these lands that they could live.

Therefore, speaking of productive property, and of the difference between owners and nonowners, helps explain concretely what it means to make an analytical distinction between classes. To speak of “the liberties of Englishmen” in relation to this distinction was less analytical: it was to take the memory of what had been a regular form of life—working for one’s own subsistence on the common—and ask for it to be reinstated. The Lockean tinge this distinction is given at the close of this century of convulsions makes talking about class seem passé in the present day, but if we think about IPR in similar terms, it makes more sense. The distinction between owners and nonowners of previously common spaces and objects seems more arbitrary: the legal assignment of rights exclusively to the so-called owners of property—both rivalrous and non-rivalrous—appears to be an infringement of a basic liberty. If we got really mad, we might even call it class war.

In MacPherson’s assessment, until the nineteenth century, most visions of democracy envision it as taking place in a classless or one-classed society. While many of the English radicals were concerned with their role in making laws, the “classless” society often had more of an appeal than its possibly democratic character. If Ireton (and many others) thought that opening up democracy to men without property would lead the state towards redistribution, one branch of the Levellers thought democracy would be incidental if everyone was able to produce for themselves:
“The ideal of all the Levellers was a society where all men had enough property to work on as independent producers, and where none had the kind of amount of property which would enable them to be an exploitative class.” Linebaugh and Rediker echo this in their discussion of the Levellers, saying that “The fork in the road at Putney pointed to either a future with the commons and without slavery, or to one with slavery and without the commons.”

Though they may overstate the case to some extent, the point they make about slavery and the commons is that, like liberty and freedom, these terms had a very specific meaning. And contrary to any ex-post-facto rationalization of the emergent capitalist order (i.e. Hardin’s “Tragedy of the Commons” mentioned at the beginning of this chapter), which would see the alternative they presented as some utopian scheme, “The commons were a reality, not a pie in the sky.”

As soldiers at Putney gathered wood for their campfire, they knew that the debates had relevance to all commoners. Those in Putney, for example, enjoyed common pasture, furze, turf, underwood, and stones, as well as river resources of smelly salmon, flounder, shad, roach, dace, barbell, eel, and gudgeon. The debates had a special urgency for those affected by the decision of Charles I in 1637 to enclose 236 acres of wastelands between Hampton Court and Richmond for a hunting park. Clarendon, the royalist, noted that the attack on common rights “increased the murmur and noise of the people,” which would eventually grow into a revolutionary clamor and bring down a succession of tyrants: Archbishop Laud, Lord Strafford, and King Charles I.

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275 Ibid., 15.
277 Winning these debates within the revolution hardly meant that they could be won in the country afterwards, no matter how popular they would have been. This was just the moment of the failure of the revolution within the revolution and, therefore, the closing of one door. The larger historical moment surely spelled the end of the commons as they had existed before.
278 Linebaugh and Rediker, *The Many-Headed Hydra*, 109. They also note, “The plunder of the Putney estate of his patron probably confirmed in a young Thomas Hobbes the love of private property and the loathing of the commons that he passed on to his pupil, the future Charles II.”
Again, they may overstate the significance of the popular force alone, but the fact is that, at the moment, there was still a living memory of what the commons looked like. I will look in the following chapter at the economic arguments about how efficient or backwards looking this was at time, but in any case, the point is that this was a culture that did exist for the people involved in this undertaking.

Likewise, the previous years had given them a real sense of slavery. This sense, however, was not colored in the way that the term has become in present US culture. In this latter sense, slavery is often understood as the indirect result of racism: the idea of white supremacy led Northern/Western Europeans to enslave brown and black people across the world. Linebaugh and Rediker punctuate this progression quite differently. For the men at Putney were mostly of European descent and yet when they discussed slavery, it wasn’t as something that should only be meant for other races: instead, it was understood as directly related to the dissolution of the commons. In other words, it was something all people could experience—and that many of them had experienced. The impressments of peasants into soldiers or sailors; the poor laws which forced them to labor on the projects of state building; and the simple enclosure of the commons and/or the loss of freehold status on the land.

They fought to abolish slavery. What was at issue, then, was not a rhetorical abstraction of political propaganda, but something real, experienced, suffered and known. A rough definition of slavery at the time would include these features: it began with an act of expropriation and terror; it affected children and young people particularly; it compelled violent exploitation; and more often than not, it ended in death. The hewers and drawers, or the laboring subjects of the Atlantic economy, met this definition in an era well before race and ethnicity came to define slavery. 

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279 Ibid., 111.
The cause of slavery was therefore directly related to the changing property relation in the commons. The debate that was ostensibly about representation in the parliament was understood as both a political and economic argument.

Colonel Thomas Rainborough, though not typically understood as a Leveller himself, was particularly sympathetic to the arguments being made in the army for universal manhood suffrage and comprehended the implications in a fairly reasonable way. He didn’t necessarily see the impressments of peasants into the army as a form of slavery—yet. But he saw that, if the soldiers who had been fighting weren’t given a vote, then it was a particularly unjust result. In the debates at Putney, one of his more memorable quotes lays out the conflict he saw with leaving Parliamentary elections up to the propertied. Responding to Ireton, he connected disenfranchisement to slavery:

Sir, I see that it is impossible to have liberty but all property must be taken away. If it be laid down for a rule, and if you will say it, it must be so. But I would fain know what the soldier has fought for all this while? Has he fought to enslave himself, to give power to men of riches, men of estates, to make him a perpetual slave. (sic) We do find that in all the presses that go forth none must be pressed that are freehold men. When these gentlemen fall out amongst themselves, they shall press the poor scrubs to come and kill one another for them.

Rainborough was generally convinced that people in general shouldn’t be bound by a government they didn’t choose and he saw that property was a slim condition on which to base the vote.

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280 Rainborough had a much broader argument, but it’s worth noting the similarity to this and the reasoning behind the 26th Amendment to the US Constitution, giving people 18 and up the right to vote, which was adopted in the midst of the Vietnam War when a draft made all men 18 and up eligible for military duty.


282 “With respect to the divine law which says, ‘Honour thy father and they mother’, the great dispute is, who is a right father and a right mother? I am bound to know who is my father and mother; and—I take it in the same sense you do—I would have a distinction, a character whereby God commands me to honour them. And for my part I look upon (ntd.)
also felt that, if it became the basis of authority, it could work either way: the poor man might vote for redistribution just as easily as a rich one.

A gentleman lives in a country and has got three or four lordships, as some men have (God knows how they got them); and when Parliament is called he must be a Parliament-man; and it may be he sees some poor men, they live near this man, he can crush them—I have known an invasion to make sure he has turned the poor men out of doors; and I would fain to know whether the potency of rich men do not this, and so keep them under the greatest tyranny that was ever wrought in the world.  

In short, the conversation about consent was a conversation about property; and the consequences of leaving the vote up to the large property holders meant the effective loss of the commons and their return to slavery and serfdom. To say that the distinction was drawn along class lines is to say that the definition of the government—and society—that prevailed would be forced upon everyone equally. It seems understood by everyone that there would be a single law, a law for all peoples, but the question became whose law would become hegemonic.

Importantly, the debate largely surrounded the terms of Natural Rights and the Levellers attempted to rearticulate this from the natural right of Merchant Law advocated by Coke and others and towards a natural right to the commons and small proprietorship. As MacPherson says, “they found the rot had set in with exploitative private property. The small private property of the independent producer was a natural right. The large private property which enabled its owner to exploit the rest was a contradiction of natural right.”  

The debate, in this regard, was less over

the people of England so, that wherein they have not voices in the choosing of their governors—their civil fathers and mothers—they are not bound to that commandment.” “Extracts from Putney Debates” in Ibid., 77.

285 Ibid., 75.

284 MacPherson, *The Life and Times of Liberal Democracy*, 15. MacPherson links this understanding of democracy to Jefferson’s idea of the “yeoman farmer” as the backbone of the country. It’s true that this idea had some radical results in American history—Lippmann, in *Public Opinion* all but says that, if the constitution was ruined by progressives, it was (cont’d.)
property as such than it was about whose property was more important. As the concentration of large landholders was clearly seen as a threat to peasant proprietorship (much less commons use by cottagers and others who didn’t own the land they worked), if parliamentary consent was limited to the former the majority of the latter would end up serving them in much the same way they had before their feudal dues had been commuted. Thus, whether as a cause, or an effect of the proposed legislative model, the goal of retaining some claim to these economic rights was as fundamental to the proposed political rights.

There remains some debate about this interpretation of the struggle. Hill makes a distinction between “constitutional Levellers” and what he calls “physical force Levellers.” The former were more concerned with issues of consent and were ultimately the people involved in the Putney debates. He says that they were “not in fundamental disagreement with the type of society that was being set up by the English Revolution. They accepted the sanctity of private property, and their desire was to extend democracy was within the limits of a capitalist society.”

MacPherson’s interpretation (and statements made within the debates themselves) makes this distinction debatable. In the end, for either side of Hill’s distinction “extending democracy” here opened the possibility that it move well outside the “limits of a capitalist society.” The explanation he provides for this interpretation, however, does provide some insight into the results of the debate. He claims the moderate constitutional wing—mostly embodied by Liburne and Wildman—was basically interested in reform and, when it seemed they could have won the debate at Putney, they were undermined by the grandees of the Model Army who “stole the

done in Jefferson’s age. MacPherson’s observation is quite similar to that of Marx, cited in the introduction to this project.

Hill, The World Turned Upside Down: Radical Ideas During the English Revolution, 123.
[constitutional] Levellers Republican clothes” and therefore lost them the support of the peasantry.286

This seems to be more of a strategic error than an actual distinction. For in his discussion of “physical force Levellers” he also includes Liburne. This wing, he says, “was less concerned with constitutional issues, more with economics, with defending the poor against the rich, the common people against great men.”287 This impulse pointed to a much broader concern amongst the population and, in particular, amongst the Army. So, for instance, in “October 1647 soldiers were demanding that no duke, marquis or earl should have more than £2000 a year, and that the income of other classes should be proportionally restricted.”288 These were not just limited to thoughts, either: “Levellers were foremost in inciting the Buckinghamshire anti-enclosure movement.”289 This is sensible as the name “Levellers” referred to the impulse to “level” the hedges and fences that enclosed land as well as the sense that, to quote a Buckinghamshire pamphlet “all men being alike privileged by birth, so all men were to enjoy the creatures alike without property one more than the other.” In other words, social leveling was implied in the leveling of the hedges around property. Since, as Tigar and Levy mention above, the feudal ideology around property and status remained, this political strategy makes a good deal of sense.

Hill asserts that, “Similar ideas were arising simultaneously, that is to say, in more or less sophisticated forms, in various parts of the country.” Thus, when Michael Barone equates all these ideas with support for the commonwealth and the Rump Parliament, and claims that, “these were popular causes with two generations of radical historians in the twentieth century, but not with the mass of the English people in the seventeenth,” he’s obviously less concerned with the specifics

286 Ibid., 122.
287 Ibid., 114.
288 Ibid., 115.
289 Ibid., 117.
than with upholding a different version of history.\textsuperscript{291} This is not to deny that, as James C. Scott has discussed at length, “even in a revolutionary movement, the popular vision of what is at issue may diverge considerably from that of its intelligentsia.”\textsuperscript{290} However, the claim, after the fact, by revisionists, that there was little popular support for the revolution—particularly the violent and or economically radical wings of the revolution—is often promoted by people who would otherwise be unconcerned with the popular consent to the measures they advocate.\textsuperscript{292} In this case, the issue seems to be that Barone and others overlook the “revolution within the revolution” in ways that Scott might contest. Since this critique is often made against Socialist revolutionaries, it seems fitting that what we find here is the more communist revolution within the capitalist one. On the other hand, attributing these terms to this struggle, as Hill does at times, is somewhat anachronistic.

In any case, he calls this wing the physical force Levellers not because of their goals, but because of their observation on the necessary methods. Here, they appear to be not only advocating a different model of society but also observing that, in the words of John Liburne, “there is now no power executed in England but a power of force; a just and moral act done by a

\textsuperscript{290} Michael Barone, \textit{Our First Revolution: The Remarkable British Uprising That Inspired America’s Founding Fathers}, 1st ed. (New York: Crown Publishers, 2007), 14. On the whole, Barone gives a fairly uneven portrayal of this era. He wants to say that the Protestant doctrines were unpopular, yet he finds it somewhat reasonable that there would be state repression of the publication and preaching of these. Worth noting, also, the presence of another September 11—that of 1648 when the petition of the Levellers program was laid out and circulated among the population. It reportedly received 40,000 signatures, which in an era slightly before the internet poll is at least significant. Cf. Baker, ed., \textit{The Levellers: The Putney Debates}, 124, n. 1. Against this, Barone’s main evidence for the unpopularity of these ideas is that Charles II had a lot of support when he returned to the throne. Since the whole account is basically written as a personality study of Charles II and James II, this monarch centered understanding of popularity is apt. On the other hand, since his goal is to show how we should be thankful for the Glorious Revolution for its instantiation of the global capitalist order and the centralized state, I can only hope that my own account proves him half right.


\textsuperscript{292} Recent examples of this that immediately come to mind are the expose of Rigoberta Menchu that David Stoll claimed to prove his theory about violent revolution of the Guevara/Debray variety: namely that in so far as there was ever any popular support it was only garnered by fear of the revolutionaries. The account basically replaces one metanarrative with another. Neil Lazarus discusses similar discourse around Fanon and the FLN in the Algerian war for independence. Other, more recent examples will be discussed in later chapters dealing with Ecuadorian indigenous politics. Lazarus, \textit{Nationalism and Cultural Practice in the Postcolonial World}; David Stoll, \textit{Between Two Armies in the Exil Towns of Guatemala} (New York: Columbia University Press, 1993); David Stoll, \textit{Rigoberta Menchu and the Story of All Poor Guatemalans} (Boulder, Colo.: Westview Press, 1999).
troop of horse being as good as law as now I can see executed by any judge in England.”

Likewise,

The Levellers thought that the state had broken down in the course of the civil war; until it was legitimately refounded a state of nature existed in which the sword was the only remaining authority. [...] If the Agitators had managed to capture control of the Army [before the Putney Debates], a Leveller theory of military dictatorship in the interest of democracy would certainly have emerged: the Leveller repudiation of military violence sprang from their dislike of the purposes for which this violence was used.”

All of this is highly speculative since, even if the Putney Debates had ended with a different outcome, there was still a country outside those walls that would have to be convinced. Hill thought it was the loss of ground to the grandees that killed the project, but he shows how it was reincarnated time and again in different forms throughout this period. Robertson, the more recent author, agrees that “the power of their ideas was to gather momentum” but the loss of the army’s support doomed their implementation. So the ideas and arguments lived on and presented an alternative articulation of liberty and freedom. Yet behind them also lay the question of the relationship between equality, terror, and the law. Locke, the most prominent theorist of this time in this regard, would attempt to answer it.

**Solidifying Locke’s Culture of Property**

Tigar and Levy contend that the bourgeois outlines of the English polity were settled on in the Cromwellian republic. But the groundwork for the settlement had long been prepared by legal theorists like Lord Coke who demanded that there be a single “law of the land.” To do this,

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294 Ibid., 66.
they say the difference between the French and English bourgeois revolution is “one of ideological method” in that the Roman attributes relating to commerce in the latter were cleansed “and referred to only as ‘law merchant,’ while other Roman- or canon-law institutions were eradicated as being conducive either to absolutism or to the denial of fundamental liberties.”295 This affirms their argument that “English law, the ‘common law of England,’ exhibited at that time as it does today a steadfast devotion to continuity, or at least the illusion of continuity.” This was not something accidental or misunderstood: Lord Coke is quoted as saying, “From old fields must come new corn.” The choice of common law as the foundation of the new English Republic, as the Levellers exhibit, was a dicey proposition. Since the claim to historical continuity would likely be more evidently on the side of the more ancient privileges of commons, the rational basis of Locke’s definition of natural law in the actual culture had less purchase.

What we can say is that, by the mid 1600s competition in the market was seen as natural by Hobbes. His understanding of the state was, in effect, as party to help ensure two kinds of safety: safety from external conflict and security of contracts. In the latter, he assumed that everyone would need to be equally protected by the state and, hence, equally subject to market relations. In this, he bypassed the question that had been central to the revolution that broke out within the revolution of the English Civil war.296 At the same time, in presuming the dominance of a mode of production that was in its earliest infancy, his (and especially Locke’s) political philosophy would outline a plan for the state, market, property and ultimately culture of England that was to make the imposition of “natural rights,” and the building of a space and society for them to function, appear as a removal. In other words, this final stage before the liberal disavowal

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296 The question here is over consent, which is about the issue of political obligation; his position on property is therefore moot.
of the state involved the most extensive use of the state apparatus to reshape society according to its nascent model.

C.B. MacPherson’s study of *The Political Theory of Possessive Individualism* is basically a close reading of Hobbes and Locke that looks at the values behind their arguments for the hidden assumptions. Much of the theoretical value—both at the time and since then—of these philosophers has to do with their claims to be making universal pronouncements on the nature of human interaction. On the contrary, MacPherson argues, their observations about the state, civil society, private property, and value, although they appeal to ideas of natural law, have a history and are the creation of a certain kind of society. Hobbes, for instance, claims that the state, the “Leviathan” of *Leviathan*, is necessary because, as he is often quoted, if it weren’t for the state to mediate between people, life would be “nasty, brutish, and short.” Hobbes, like Freud in his *Civilization and It’s Discontents*, supposedly derives this from the idea that the psychology of men makes them always want more power and therefore always willing to take power from others. The claim is that if men (and for Hobbes and Locke it was all about the men) were to have to live the “state of nature” they would be so competitive they would be willing to kill or be killed, ruthlessly and without end, unless there was some strong force in the form of the state to mitigate this.

MacPherson, however, argues, that even Hobbes himself admits that this is not something every person inherently desires. Some people are perfectly content with what they have. Hobbes understanding of humankind is based on his observations of the emergent values and assumptions of “possessive market society” in which “requires the assumption of a model of society which permits and requires the continual invasion of every man by every other [and in which] even the innately moderate man in society must seek more power simply to protect his present level.”

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“possessive market society” “Exchange of commodities through the price-making mechanism of the market permeates the relations between individuals, for in this market all possessions, including men’s energies, are commodities.”

This state of affairs “requires a compulsive framework of law. At the very least, life and property must be secured, contracts must be defined and enforced.”

Based on this, MacPherson argues that Hobbes understanding of the state of nature is, a logical not a historical hypothesis. In other words, it is not based on a historical, pre-civilized man in a state of nature, but is a “logical hypothesis reached by setting aside completely the historically acquired characteristics of men:”

His state of nature is a statement of the behaviour to which men as they now are, men who live in civilized societies and have the desires of civilized men, would be led if all law and contract enforcement [. . .] were removed. To get the state of nature, Hobbes sets aside law, but not the socially acquired behaviour and desires of men.”

In this way, MacPherson, argues, the psychological postulates about human nature are actually based on social postulates, generalized from observations Locke made in his own society.

As a consequence, this upsets Hobbes purpose and the way he’s been read, namely as what Norberto Bobbio calls the “fountainhead” of the natural law tradition. This is because his idea of consent is also based on a logical as opposed to historical hypothesis. Or, more correctly, his argument about political obligation avoids the messy question of consent by saying that the state of nature was so abhorrent, people should “act as if they had transferred their natural rights to a sovereign, which could have been established by covenant [i.e. consent] with each other if they

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298 Ibid., 55.
299 Ibid., 56-57.
300 Ibid., 22.
ever had lived in a state of nature.”

This was meant to be a universal truth, abstracted from history: a logical argument based on essential characteristics of human psychology and society. Saying that it was actually a historically specific argument, as MacPherson does, removes it from the realm of being based on some transhistorical nature.

Hobbes’ argument comes in the middle of the English Civil War. Though he is often seen as providing an unusual understanding of what was necessary at the time, Skinner provides compelling evidence that his command for a state to which all would owe obligation was actually quite popular among the “reading classes:” the only question was why one should be obliged to obey. Since Hobbes had pretensions to creating a scientific system, he hoped to base his theory on something other than religion, a move which many of the dominant ecclesiastical authorities found problematic. Still, Hobbes, who saw himself “beset with those who contend on one side for too great Liberty, and on the other side for too much Authority,” thought that people should simply obey whoever was in charge. The ultimate goal was to show that consent for government was an unnecessary step.

On the other hand, since he assumed that market society was dominant—and as we’ve seen, it was not—the Leviathan that he advocated was actually a model that he was saying should be imposed. In this, since MacPherson is most interested in investigating whether Hobbes is consistent, he makes an accommodation. As insinuated above, it is that despite the argument that political obligation could be derived from people in a state of nature, the theory he presupposes is one that assumes the prevalence of a market society. However, in so far as we allow that this is the society that he was considering, he is consistent in seeing the necessity of having a sovereign in it.

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303 Leviathan was published in English in England, in 1651. MacPherson claims that his basic political view changed little from the time he first published his Elements of Law in 1640 through the multiple reprints of De Cive and Leviathan all the way to 1670. MacPherson, ed., Thomas Hobbes' Leviathan, 13
In this, Hobbes was according to MacPherson, “perhaps a little ahead of his time” but overall correct in the kind of rational obligation that would be required in possessive market society. 306 This would be clearer in the coming centuries, but it was also true at the time: “it is an especially pressing need, requiring a strong sovereign power, when a possessive market society is replacing a customary society, for the customary rights have to be extinguished in favor of contractual rights.” 307

This is more of a refinement of Hobbes for he, like most of the “reading class” Skinner discusses, was clear on his audience. MacPherson is too even-handed with Hobbes. The issue of equality that is so central to Hobbes doctrine—especially the equality of insecurity in the market society he was discussing—is not erroneous because he fails to see that it will generate inequality: he just fails to see that the inequality of “common people” is something he needs to account for in his theory. After all, as he says after giving his account of the reasonableness of the sovereign:

The Common-peoples minds, unlesse they be tainted with dependence on the Potent, or scribbled over with the opinions of their Doctors, are like clean paper, fit to receive whatsoever by Publique Authority shall be imprinted on them. Shall whole Nations be brought to acquiesce in the great Mysteries of the Christian Religion, which are above Reason; and the same Body may be in innumerable places at one and the same time, which is against Reason; and shall not men be able, by their teaching, and preaching, protected by the Law, to make that received, which is so consonant to reason, that any unprejudiced man, needs no more to learn, than to hear it? I conclude therefore, that in the instruction of the people in the Essential Rights (which are the Naturall and Fundamentall Lawes) of Soveraignty, there is no difficulty, (whilst a Soveraign has his Power entire) but what proceeds from his own fault, or from the fault of those whom he

307 Ibid., 96.
trusteth with the administration of the Commonwealth; and consequently, it is his Duty, to cause them to be so instructed; and not onely his Duty, but his Benefit also, and Security, against the danger that may arrive to himselfe in his naturall Person, from Rebellion. 308

In short, Hobbes saw the people most in need of convincing as being those who are Rich or “Potent” within the kingdom: the people’s minds were a “blank slate” and could thus be educated without troubling too much with the reasons. On the other hand, this was only the case if, as MacPherson points out, the common person “can see no alternative to the possessive market society.” In this, Hobbes was also ahead of his time.

As discussed above, for many people the commons were a lived memory. The natural law that Hobbes thought existed outside the state was actually being imposed from within it: contrary to MacPherson’s evenhanded logical analysis, the best way to see Hobbes as consistent is to see him speaking to a certain class. He was wrong, however, in thinking that the “common person” would be so easily swayed by the reasoning he provided for the need for a Leviathan. In this, he begins a long line of political thinkers who believe that the only reason there would be a demotic309 uprising is if the “common person” has had the “blank slate” of their consciousness “scribbled over with the opinions of their Doctors.” Several centuries later, Hayek can only explain the new preponderance of interventionist states as the result of a half century or so of German propaganda; it had nothing to do with the ravages of the free market he praised.310 Writing at roughly the same time, Polanyi saw things differently, seeing that there might be a counter-movement by society in order for the society to protect itself from the material ravages of the pure market relations. He


309 On the one hand, it refers to the “common person” but on the other hand, it is supposed to mean that they are uneducated. I’d argue that, in part, the point is that the common person is educated in a certain way already through their common cultural practices. The issue is whether or not they are educated in the proper culture.

310 He speaks about this extensively in Hayek, *The Road to Serfdom*.
saw that mere words were likely not enough to convince people that their degraded material circumstances were “natural.” He also thought that freedom meant something more than the mere removal of absolutism.

MacPherson says that Hobbes assumption of the private, possessive individual as the prime mover of his social physics is mistaken because the anarchy of this mover (i.e. possessive individuals) would also produce class cohesion amongst the propertied. But in his understanding of the Common People, he was also mistaken. If the “subject of value” in MacPherson’s “possessive individualism” existed in Hobbes age, it meant something very different for different classes. Though there might not have been a stable coherence to the reaction of the common people to this, there was certainly an understanding of what it would mean materially for them. And though, as Anderson points out, it was not the urban bourgeoisie that led the more vigilant attacks on the imposition of this model, the Hill asserts that it was the London Levellers who had the most militant program of trying to avert it.311 Chief amongst these were the group of London printers, like John Libourne, who were also important in crafting the an ideology that, in later years, would be seen as similar to the radical democracy which inspired anti-slavery, anti-colonial, and anti-free market campaigns.312 These ideas, of course, were not what led to the revolt: they are just what helped catalyze some of the calls for agrarian reform and broader democracy that were already circulating.

If there was a lack of bourgeois notions, its most significant absence was in the broader state itself. As Tigar and Levy point out, the ideas of the bourgeois lawyers that were eventually imposed on the whole of British society as the “law of the land” had also originally been borne from a struggle for equality against the feudal hierarchy. But economic inequality soon took its

311 Hill, The World Turned Upside Down: Radical Ideas During the English Revolution.
312 This point is made by Linebaugh and Rediker in speaking about the uses to which the Leveller’s rhetoric has been used. Linebaugh and Rediker, The Many-Headed Hydra.
place, giving rich traders more political power and creating an underclass even in the cities. This understanding of “natural law” and its predictable results, were mostly acceptable to those who crafted the new legal institutions along the lines of common law: as Hill notes, common law was really only for men of property in the eyes of the gentry. By making a *jus gentium* along these lines, a class division was bound to emerge and the need for a State to help mitigate the social shocks was essential.

Hence, in the 1660s, the Restoration government—and Parliament in particular—took Hobbes advice about tamping down on the potential the “common people” being led astray. The Treason Act and the King's Sole Right over the Militia Act 1661 created a central army and reduced the possibility of a revived New Model Army and The Tenures Abolition Act 1660 gave the government a steadier source of income by establishing excise taxes on tea, chocolate, and other commodities. Even if he’d underplayed the possibility that common people would be able to think for themselves, Hobbes had given a sense that it would be the state’s duty to keep that from happening. Since religion was one of the primary ideological instruments (and, as even Hobbes mentions, “whole Nations [can] be brought to acquiesce in the great Mysteries of the Christian Religion”) it was this that was targeted. In addition to the Corporation Act of 1661, which made it mandatory for any elected official at every level of the state take an oath to the Supremacy of the King and the Church of England, restrictions were placed on the movement of non-conformist preachers, as well as people in general, the size of congregations, and the

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NOTE: at this point a town was considered a “corporation.”

314 The Poor Relief Act 1662—which tied peasants to their parish by making them only able to move if they got a certificate from the Church. Adam Smith railed against these in *Wealth of Nations*: [http://www.british-history.ac.uk/report.aspx?compid=47315](http://www.british-history.ac.uk/report.aspx?compid=47315)

315 The Conventicle Act of 1664 which made it illegal for a religion outside the Church of England to have a congregation of more than five people. [http://www.british-history.ac.uk/report.aspx?compid=47537](http://www.british-history.ac.uk/report.aspx?compid=47537)
ability of people to circulate petitions\textsuperscript{316} in the manner used by the Levellers to drum up support for Parliamentary measures. Uniformity Act of 1662 created a common catechism and a steady stream of income for the London printers with the exclusive patent for the “Book of Common Prayer.” And the Licensing of the Press Act of 1662\textsuperscript{317} made sure that this was one of the only religious (and hence non-seditious) texts available in London’s stalls.

To see this latter as merely an act about the freedom of speech, press, or religion—which is roughly how most critics of copyright today do—misses the major reason for granting this power to the Stationers Company. It was to protect the power of the King, the Church and the law, all of which had been restored with the promise of “Security of property as established by Parliament.”\textsuperscript{318} The defense of property and class power was at the root of intellectual property and, though some of the articulations of both institutions have changed, much of this relationship has stayed the same.

It is especially important to realize that, whatever the origins of capitalism, much of what is involved in producing it is in creating a class of people who have nothing to sell but themselves. Though discussions of “primitive accumulation” focus on the wealth that landowners accrued by enclosing land—and compare it to massive accumulations of wealth today—the real mechanism that helps capitalism grow and that distinguishes it from other commerce based economies is the inability of the laboring class to sufficiently provide for themselves: as MacPherson says, they must “see no alternative to the possessive market society.” Aside from the early “labors of appropriation” discussed in the middle of this chapter, the real pressure to make this the dominant mode of society seems to be generated after 1660. This is when the movement that produced the

\textsuperscript{316} Tumultuous Petitioning Act of 1661: provides that no petition or address shall be presented to the king or either house of parliament by more than ten persons; nor shall any one procure above twenty persons to consent or set their hands to any petition for alteration of matters established by law in church or state, unless with the previous order of three justices of the county, or the major part of the grand jury. \url{http://www.constitution.org/sech/sech_114.htm}

\textsuperscript{317} \url{http://www.british-history.ac.uk/report.aspx?compid=47336}

ideology of agricultural improvement, inspired by Bacon’s idea of “natural” history and leading to Locke’s philosophy of property and the state in the Second Treatise, really takes hold. 319

In so far as Capitalism is about the separation of labor from land—and about the consent to enclose the commons—this philosophy is essential. As Neal Wood shows, it was—like the laws according to commerce that bourgeois lawyers produced—the product of a specific location and set of practices. In both cases, the issue is less about whether this law was something useful in the culture where it was produced, than whether it is the appropriate law to govern all human interactions. Here the dialectic of endogenous versus exogenous culture is useful. In this case, however, the borders of culture were far from contiguous with the nation-state. Endogenous cultures of communing had existed for many hundreds of years at the village levels; likewise, there had been several centuries in which the law merchant was able to functionally govern the specifically commercial interactions of people who chose to engage in exchange of one kind or another. One could speculate that it would have been possible for these spaces to remain even if the state began privileging one over the other. Instead, the borders were redrawn and, from the perspective of the communing spaces, the culture of commerce and improvement was imposed. Since both of these ideologies now dominate in western culture—in the form of free-trade and private property—it is difficult to even see them as specific to a certain culture, or to see that culture as anything but universal and natural. In short, it is difficult to see it as a model of society that has been imposed; it is more likely that we see it as a set of Natural Laws that have been in existence from time immemorial. 320 The fact that Locke comes up in the discussion about property—intellectual or otherwise—in this conversation is no accident.

319 Wood, John Locke and Agrarian Capitalism, ch. 3.
320 I don’t mean to romanticize feudalism, merely to discuss it in terms that might be familiar from Raymond Williams, The Country and the City (London: Oxford, 1973).
In roughly the same moment both property and intellectual property (aka copyrights and patents) become dominant in the cultural paradigm of Western Europe: like today, one was in the service of the other and the state was central to both. The Civil War opened up a variety of religious challenges to the Church of England. As Hill points out, the birth of printing made the circulation of religious texts—especially Protestant religious texts—much more widespread. But to see these as only religious misses the point that the authorities at the time understood quite well. Since the language in which people discussed law and the state was run through with references to God and the Church, the former was the ground on which resistance to the latter could be staged. The emergent paradigm was that, instead of the state owning all the land and allowing the landholding classes of the feudal order to squeeze rent out of the peasants that worked on it, the state would protect the private property of the landowners against the newly dispossessed peasants—some of whom were astute enough to understand that this meant the end of their way of life, the end of their ability to produce independently: leaving aside the possibility that they could take advantage of the vistas opening up in the growing English Empire (by becoming servants for an indefinite time, they could possibly take possession of some bit of the "commons" abroad), they understood that this ultimately meant slavery for them—or what they referred to as slavery. The state, as they understood it, was not the opposite of a state of nature, it was the instrument of its imposition: it secured the order in which people could continually invade the territory on which they subsisted, secure it by violence—legal or physical—and retain it as their own.

The radical religious doctrines that were produced at the time interpreted this injustice through the ideology of Christianity. These more democratic, commune-friendly versions of Christianity were in tension with the major Catholic and Protestant versions which thought in terms of a hierarchy and an elect, respectively. It is commonly understood that the strengthening of censorship laws in the 1660s was an attempt to help retain control over the legitimating ideology of the new Leviathan. But this was because the main threat to this—the threat that the
English peasant would again demand a limit to wealth or the opening of enclosures—was often declared in religious terms because this was the dominant legitimating ideology of the time. To see the censorship of the time as some barbaric throwback to a time without religious liberty misses the main point of the legislation: the monopoly of copyright was meant to reduce the possibility of the threat to the monopoly owners of property and the state that protected them. The roots of property and intellectual property are entangled in the emergence of a single, dominant power within a territory, a single law determined by the reified culture of property that applied to everyone within that territory, and the imperial extension of each of these.

Since that time, there have been reversals and retrenchments of each of these ideological and political frameworks, but what we witness today is much more akin to this original moment than the critics of IPR who look back to it benignly might like to admit. Though religion is increasingly invested with a similar role in political rhetoric, the "dogmatic resources" being drawn upon are more in the area of economics (which braces the political framework). That the dominant capitalist class of today looks back to Locke on this makes much sense, but, again, it tells us more about how we should read the current moment critically than about how the emergent culture of maximalist IPR is misusing the residual notions of the early eighteenth century.

John Locke’s Second Treatise of Government was likely written in the early 1680s during the exclusion crisis in which Locke had taken sides with the excluders rather than James II (possibly also being involved in the Rye House Plot to have the heir to the throne killed) and at roughly the same time as Robert Filmer’s Patriarcha was published. He is normally seen as being engaged in a debate with Hobbes. He is seen as dismissing the notion of an absolute power that

321 Laslett has an analysis of this in his intro to the Treatises. He also notes that the First Treatise was likely written much later, probably closer to the Revolution of 1688.

322 It would be interesting to trace the history of this association and see if it has anything to do with the way political philosophy is taught.
Hobbes thought necessary and introducing the outlines of a constitutional monarchy. In so far as he was inspired by Harrington’s demand that there be a separation of powers, this is accurate. But Locke’s real debate was with Robert Filmer. While informed by Locke’s economic philosophy, *The Second Treatise* was meant to be a political doctrine that would overturn Filmer’s. The latter argued that there should be a divine right amongst kings. But the more contentious issue for Locke was that Filmer argued that this divine right defended as the only means for private property to exist. If God gave everyone the earth in common, only one of his “patriarchs” on earth could legitimate its ownership. Only with a patriarch could you have private property. Alternatively, if the king could only be said to govern by consent, then land should only be taken out of the common by consent. In other words, Filmer re-opened the conflict of the Civil War again and challenged the idea of “natural law” that had been introduced. More importantly, he challenged both the emerging constitutional monarchy and the class power it guaranteed, particularly in it continued enclosure of land.

Locke does reproduce some of the same logical mechanisms of Hobbes in this discussion. Whereas Hobbes uses his logical (not historical) hypothesis to defend only the obligation subjects should have to the sovereign, regardless of actual consent taking place, Locke uses a similar mechanism to account for the absence of a moment of consent both for government and for the removal of land from the common. He then makes the former dependent on its defense of the

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323 This also had to do with the separation of powers, which seems fundamental to the whole complex and takes on a different tinge in the USA in the early post-revolutionary period when the problem is seen as being in the legislative power. At the time, it was the legislatures that were breaching “Natural law” by trying to get rid of people’s debts and redistribute property. These roots of the constitution will hopefully come up at another point sometime later in the dissertation.

324 “The taking of their fields, vineyards, and olive trees, if it be by force or fraud or without just recompense to the damage of private persons only, it is not to be defended; but if it be upon the public charge and general consent, it might be justified as necessary at the first erection of a kingdom, for those who will have a king are bound to allow him royal maintenance by providing revenues for the Crown, since it is both for the honour, profit, and safety, too, of the people to have their king glorious, powerful, and abounding in riches.” Robert Filmer, *Patriarcha or the Natural Power of Kings* (1680); available from http://www.constitution.org/eng/patriarcha.htm I’m not sure if this is the only place he says this, but it is one of them.
latter, saying that the purpose of government is to defend property. In this, the undemocratic roots of the Liberal state are laid.

In other words, Locke really doesn’t change much about the way that the political dimension of the equation should work. He, like Hobbes, makes tacit consent the origin of political obligation. As Wood points out, he also appropriates (knowingly or not) one of the arguments of the Cromwellian Republic to say this, namely that people give their consent to the government by using the roads. It is important to note here, that the division between a citizen—who theoretically would be involved in making the laws—and the subject—who would be obliged to obey them either way—is not evident: there are only people who are subject to laws. In other words, there is not a sense of politics involved in the more democratic understanding of Law mentioned above. This is because, instead, it is founded on the notion of “Natural law.” The Natural law in question, at least for the subject, is not all that different from the one that Filmer or even Hobbes proscribes: it doesn’t really matter if they give their consent.

While he also allows for a parliamentary form of government (thus supposedly giving the grounds for democracy in the US), the main distinction with Filmer is that Locke founds his notion of political obligation on property. The ownership of property, in turn, he founded on the notion of Improvement. Basically, he asks why we would ever allow anyone to have a claim to exclusive property in anything. He identifies the quality that separates, for instance, the game that is running free on the common property from the game that someone has hunted and killed, as labor: “Whatsoever he removes out of the State that Nature hath provided and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.” In the beginning, he claims, “All the world was America” by which he means that, in the beginning all land was open, unenclosed, and, more importantly, unimproved. Since then, the

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326 Locke, 288.
land has entered private hands because they had made improvements upon it. This is moral and still in line with Natural Law because there is on the one hand, plenty of other land for other people to improve and, on the other hand, there is a limit on what someone could own. Namely, there is a spoilage limitation: one is only going to improve land and grow food that one could actually consume: if one were to let it go to waste then, indeed, this would contravene the law of nature.

There is a circuitous logic here to Locke’s argument which foretells many of the moves of Liberal theorists to come—and helps to see how Locke’s theory was used to support the Imperial appropriations abroad. Locke, as mentioned, was a part of the movement for agricultural improvement. This meant the consolidation of farms and the application of new scientific farming technologies to increase yields. On the other hand, it also meant employing a large class of unpropertied agricultural laborers. This may seem to be a contradiction to the idea that labor would create ownership in land, but that misses some of the more important caveats to the theory. One, which is barely articulated in the theory itself, is that if one employs laborers, the labor that they use to improve the property belongs to the purchaser of the labor not the laborer himself.

While this requires an unpropertied laborer to begin with, the way Locke deals with the inequality of wealth is to say that the introduction of money changes the way that the waste/spoilage limitation functions. Before the use of money and—importantly—the possibility of trade, if I were to enclose more land than I could possibly use or produce more on that land than I could possibly consume, then it would be against natural law because it would likely spoil and go to waste. However, with the introduction of money, I am permitted to accumulate something that doesn’t spoil in exchange for the extra that I (or my servants, aka tenants and laborers) produce. Finally, to get around the consent issue on the fact of inequity in wealth, Locke again

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327 This will be explored further in chapter four.
argues that we have all given our tacit consent to the current distribution by continuing to use coin money, which is what makes the unequal distribution of land possible.

When I say there is a circular logic here, I mean that Locke was part of a group of people who was advocating land be “improved” which meant, at the time, enclosed and transferred to the private ownership of an improving landlord. The argument that this should be done asked for the state to start intervening—or at least supporting more—in the enclosure of wastes and commons. Though he admitted that there might be places that people had held in common by contract, he argued that any land that wasn’t so held should be converted. But to take his argument full circle, the only way that property would be valid is if that land was being improved. In short, Locke made his ideology of improvement not only a policy program for the intensification of agriculture, but the very foundation of the state. On the other hand, it meant that anyone who wasn’t using land in this way would be wasting it and should legally be dispossessed.

Locke never claimed authorship of his Treatises. They were published anonymously and were heavily debated at the time. The implication of the second treatise at the moment—and ever since—has been to remove the current property distribution from history. The past history was erased and the future history was determined, or as Lukács said, “there is history, but there is no longer any.” The people who owned land are presumed to have acquired this land through their labor. On the other hand, the people who were not using land for the purposes of private, capitalist improvement, could legitimately be dispossessed since they were wasting it. This ideology is clearly related to the expansion of the liberal state through the British Empire and the continuing consolidation of large agrarian holdings within the confines of the newly hewn United Kingdom.
Lionsgate studios, owner of the distribution rights for the 1984 film *Dirty Dancing*, reported its highest grossing quarter ever for the period ending Dec. 30, 2006. It reported revenues of $290.9 million and Net profits of $2 million. In this period, when its lawsuit to defend both the trademark for and the idea that one could trademark the phrase “nobody puts baby in the corner” was pending a hearing, it released the 20th anniversary DVD of *Dirty Dancing*, sponsored musical renditions of the film in Toronto and New York, and commissioned a video game premised on the film.

For many years, scholars in the political economy of media, especially people like Janet Wasko, have pointed out the strategy of major media conglomerates like Disney has been to establish linkages in the companies it owns so that it is able to use channels it already owns to promote other portions of its business. So ABC, which is a Disney property, is a venue that can be used by Disney to highlight other Disney produce—theme parks, movies, etc. The argument was that doing this cut down on the transaction costs: if you want a bunch of free advertising, buy a TV station.

Disney is also well known for among critics of maximalist IPR, is its persistent lobbying to extent copyright—now for going on three quarters of a century past the death of the author (in this case, Walt Disney). By owning these properties, Disney is not only able to control all forms of speech about them, but also control all the (legal) revenue that is made from them. Part of what made it profitable to own this was that Disney also had this vast network of media corporations under its umbrella that would allow them to exploit these properties more fully.

But a new movement is afoot amongst smaller studios that don't own much infrastructure but have, through a different series of consolidations and buyouts—such as the one that Lionsgate used to acquire the rights to *Dirty Dancing*—come to own a significant chunk of our popular

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culture in the form of "libraries" of movies. Of course calling these libraries is a bit of a misnomer. Somewhere there is actually a physical library of these films that is acquired, but the really important thing is that they acquire the copyright to these films and can thus make bank off of not only the distribution, but licensing deals as well.

Into this development, step a variety of independent licensing and marketing firms. These firms have little to do with copyright per se. What they seek to do is to take those copyrighted works and make them into trademarks, thus expanding the kinds of things that the company can charge people for doing with those works. So, in this case, eventually the company will be able to claim that, for instance, the word "inconceivable" which is uttered by the character in the *Princess Bride*, is a trademarked term because it is associated with the copyrighted work that is owned by Fox. It doesn’t seem to matter that there was a book before the movie that used the term. It is the work put into creating the brand identification that will be done by the licensing and marketing firm in Fox's name that will establish this as a right.

However, like the phrase “Nobody puts baby in the corner,” the work done on this phrase was done through an expanded, anarchic social process: people repeating the phrase at parties, making jokes around it in reference to current events, possibly making their own objects with the phrase. This exponentially larger process of appropriation is what actually creates the cultural value around an object like this. However, like the Lockean notion that all value created should flow back to the owner, it assumes a certain class division, a certain division of labor.

Trademark is a thorny legal category, but in this case, the basic trend, in addition to claiming more rights, is to create a new line of goods with this trademark that, just as Disney did before, create synergy. Only this time, the synergy is completely after the fact. Lionsgate had nothing to do with *Dirty Dancing*, but it has approved (and probably asked for) the production of a video game and a Broadway musical using the film. Lionsgate evidently also owns the international distribution rights to *Princess Bride* so one would assume that, though it is currently Fox that is
getting highlighted for the video game of that movie—and the musical version as well—there is a slice of that pie that will also go to Lionsgate. It's a fairly craven strategy in terms of owning our collective popular culture, but it also makes it much clearer that the very broad definition of ownership being inserted into international trade agreements is about much more than simple movie piracy.

Like the promulgation of copyright restriction in the early Tudor regime, it is basically collusion between industry and government to lock up both the cultural and technological means of production and solidify both the social hierarchy and the economic division of labor. That it is done through the political assignment of monopoly economic rights instead of the purely political feudal control is a difficult distinction to maintain—except, of course, if you have the coercive authority of the increasingly powerful state to help you. This use of the state to defend the “economic freedom” of massive property owners has become so commonplace in the Anglo-American sphere that it can effectively be discussed as “natural law” with little need to defend it on historical or even pragmatic terms. Its export to places that don’t share this history is bound to create animosity and pushback, especially when it cuts into one of the key promises of the post-war era: opening economies to western intervention would facilitate technology transfer helping development.

Intellectual property laws, as future chapters will argue more centrally, protects not only the owners of purely cultural products: their protection is also included in trade and bilateral investment agreements in order to insure that the current owners of technological knowledge, product design, and brand identity are able to continue to reap the level of reward they currently enjoy, despite the fact that they must allow the use of these things in order to exploit the valuable labor of the developing world. Whether this is ethical or defensible is not the issue: this chapter has outlined a historical explanation for why this would seem unquestionable and even natural. Critics of IPR should understand, however, that this is the larger function of intellectual property
rights in these treaties: by focusing narrowly on the issues of creative process, they miss a larger, more important pattern. In short, whatever labor was used to produce the cultural value of a film or the use value of a pair of Levis, the contracting corporation is committed to reaping the rewards of that value. And, as in the Lockean compromise with the Hobbesian Leviathan, the best way to ensure this was—and still is—with a strong state apparatus.

The following chapter will outline the resurgence of this Liberal understanding of property in the form of the Law and Economics movement in the US during the late twentieth century. In part, I will discuss this movement in terms of the way it replaces the ideological understanding of natural law that Locke rooted in religion with a similarly ideological understanding of natural law based in a certain tradition of economics. In short, whereas the stakes of the struggle in the Lockean moment were the articulation of different interpretations of natural law, the Law and Economics movement makes its own arguments about economics into a “natural law” of human behavior and interaction. They then insist, simultaneously, that the law itself should move out of the way and allow the pure economic logic they describe to sort out the claims of the participants within a transaction: if it doesn’t, then it will create all sorts of perversions that economics alone would never create; conversely, they insist that this economic logic is so inevitable that, whatever the law does it cannot stop the effects of its logic on the transactions. Law, in other words, is simultaneously omnipotent and impotent.

The reason to look at this movement in relation to IPR is twofold. On the one hand, it represents the modern articulation of the Lockean understanding of property and its relation to the state. The model it advocates the state to impose (and, perversely insists already exists in reality) is that of the “purely economic” order Ellen Wood discusses. Only unlike the moment of Lockean imposition, it is able to articulate this claim with a modern, scientific claim to rational productivity rather than being forced to transubstantiate political economic claims into those of religious ideology. The problem is that, while it wants to base its legitimacy on this pure logic, it has to
contend with the way economics is already incorporated into the modern welfare state: thus, ideologically, it has to rely on the utilitarian claims to greater productivity which, in any other environment, it would denounce because it is an explicit interpenetration of the political with the economic.

On the other hand, Lawrence Lessig is central to this movement—and especially to trying to help it understand the role of culture and social norms to the functioning of the legal side of the discipline. In this endeavor, Lessig forces the political constitution of the law—rather than its basis in upholding the natural laws of economics—into the open. In other words, he undermines the claims to “natural law” that are otherwise reified elements of the culture of property. He does so in order to help the movement more forcefully craft human behavior in the direction of the pure economic logic, but his intervention allows for a discussion about what those norms should actually be.

In both cases, the logic behind the movement is essentially identical to the reified culture of property that this dissertation should be the true target of the balanced critics of IPR. This is because, according to this reified culture, as the chapter above has illustrated, the claims to ownership in productive property, whatever its material status, are basic to the capitalist order in which that property exists. Without criticizing the latter, the former will remain rational according to this dominant logic.
CHAPTER 3: Law, Economics and the Apolitical Culture of Capitalism

Anytime I hear about that school bus disaster up there, I turn into a heat-seeking missile, homing in on a target that I know in my bones is going to be some bungling corrupt state agency or some multinational corporation that’s cost accounted the difference between a ten-cent bolt and a million-dollar out-of-court settlement and has decided to sacrifice a few lives for the difference. They do that, work the bottom line. [. . . .] They’re like clever monkeys, that’s all. They calculate ahead of time what it will cost them to assure safety versus what they’re likely to be forced to settle for damages when the missing bolt sends the bus over a cliff, and they simply choose the cheaper option. And it’s up to people like me [negligence attorneys] to make it cheaper to build the bus with that extra bolt, or add the extra yard of guardrail, or drain the quarry. That’s the only way you can ensure moral responsibility in this society. Make it cheaper.110

The previous chapter outlined the consolidation of English law such that there was a single “law of the land.” In place of the multiple, overlapping, and often competing legal systems, the supreme sovereignty of the state—whether headed by the king with/in or without parliament—was guaranteed. All sides of the conflict in The English Civil War basically accepted the supreme authority of the state. It cemented what I have referred to as the cultural form of the state—the idea of a single authority governed by the “rule of law”—at the C3 level. At question was the degree to which the authority needed to be vetted by the consent of the governed and what kinds of social and political relations that authority would protect. I discussed the main

breakdown of these positions in terms of liberalism and democracy, but at the time, these were not fully formed political philosophies as we know them today. Instead, these positions were often stated using scientific or religious rhetoric. At the time, they succeeded in challenging the dominant authority; but the ensuing hegemonic struggle over the specific articulation of the new authority gave voice to a variety of socially discontented groups and threatened to push the revolution in what I referred to as a far more democratic direction—one which threatened not only the distribution of political authority, but also the distribution of economic resources. I discussed this in terms of the Levellers who, while a variegated movement, were taking the “natural law” mediations (C2) of the time and rearticulating them to more closely represent the culture of an egalitarian society.

The liberal break on this, established in part by Locke’s anonymous pamphlets outlining *Two Treatises of Government*, initiated a crucial iteration of what Chantal Mouffe discusses as “The Democratic Paradox.” Mouffe describes this paradox in relation to the way that liberalism both relies upon and resists democracy: “What cannot be contestable in a liberal democracy is the idea that it is legitimate to establish limits to popular sovereignty in the name of liberty. Hence its paradoxical nature.” By claiming that government was only subject to a democratic revolution when it failed to uphold “the Natural Liberty” of the people, Locke strictly confined what democracy meant. Locke, of course, was not alone in this understanding of “liberty.”

There are several reasons these historical questions are important to the study of the current debate about IPR. First and foremost, following the primary argument of this project, the debate about IPR both reveals and potentially undermines a fundamental agreement regarding what I am calling the cultural efficacy of the reified culture of property. The first chapter gave us a framework for talking about cultural efficacy and the role that law and the state have in creating

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332 Locke, 412.
that. The previous chapter looked at the historical process through which this reified culture of property was instantiated. The present chapter looks at the revitalization of this culture by one of the key proponents of balanced copyright, Lawrence Lessig. Lessig reinforces the reified culture of property through his explicit support for the premises of the contemporary Law and Economics movement. Before Lessig took up the cause of copyright, he was a lukewarm critic of the dominant Law and Economics movement. In fact, many of the observations he makes about the inadequacies of the property system in relation to copyright are borne from an earlier attempt to make the Liberal and even Libertarian premises of this movement more culturally effective.

In short, the Law and Economics movement is a contemporary movement that has taken it upon itself to revive the Lockean understanding of the Liberal state, thus it fits into that historical lineage. In addition to this linear historical connection, however, it is also performing a similar political role as Locke’s ideology of property in the late seventeenth century. As the previous chapter outlined, the argument over the content of Natural Law (and hence the relationship between the citizens, property, and the state) spawned a variety of movements bent on articulating their own understanding of this concept, often with inflections that were far a field from the ideology advocated by Locke. Locke helped to solidify Natural Law as articulated in the Liberal conception of law and the state. Namely, that the state would be there to defend property; any attempt to adjust property distribution would be met with a revolution. Locke, like the dissident movements of the Levellers and Diggers, phrased his defense in the hegemonic language of religion.

Law and Economics movement, as the present chapter illustrates, was similarly motivated to rearticulate the proper relationship between law, economics, and the state. A variety of dissident movements—both inside the US and on a global scale—were questioning the validity of the laissez-faire liberalism of the previous era. In this chapter, I only have space to suggest this historical moment, however most readers will be familiar with its broad outlines—namely, the
movements which helped push Roosevelt’s New Deal in the direction of social democracy. Less familiar is what Barbara Fried calls the “First Law and Economics Movement.” While this movement was likely less instrumental in the changes of the New Deal than the activism on the ground around labor rights, it was part of the prominent Progressive intellectual tradition which helped to justify these new policies. A key strategy of these scholars was, according to Fried, “the choice to co-opt traditional ‘natural rights’ talk to its own political ends.”

The key author she focuses on, Robert Hale, pointedly critiqued the Lockean assumptions of the laissez-faire state, attempting to take it on its own terms. As Fried summarizes, “Hale’s argument wholesale revision of property rights [. . .] is largely internal to the natural rights tradition that it critiques, grounded on the Lockean imperative that people have an exclusive right to that which they have created with their own labor.” During a time of increasing labor militancy, there were significant political implications to this rearticulation of Locke’s argument. While Hale was only one of many scholars working on this issue at the time, the struggle to define natural rights in an alternative fashion was as important as the Levellers refashioning of the concept in the seventeenth century, extending all the way to the President, who tried to articulate a Second Bill of Rights in terms of economic and social equality. Only this time, it was economics rather than religion that formed the most potent cultural narrative. Therefore the reaction against these policies was, likewise, staged largely on the grounds of simply applying economics to the law. Unlike in Locke’s treatise, this movement occurred at the beginning of the retrenchment, rather than the end. It is only in the past two decades that it has become established—and aided in the reconsolidation of the apolitical, liberal definition of the state and the reified culture of property on which it rests.

Ibid., 22.
Ibid., 73.
Unfortunately, this chapter cannot evaluate the entire historical development of this contemporary movement (or the movement which preceded it). Instead, I will look more at the content of the arguments made by this movement—and Lessig’s own appropriation of their assumptions in articulating his defense of balanced IPR. However, a short summary of Law and Economics is necessary to move forward. The primary goal of this chapter is to outline the cultural assumptions and political goals that remain implicit in its arguments, despite its claims to scientific and ethical objectivity.

The law and economics tradition is usually understood in a straightforward manner: it is a method of legal inquiry that applies discoveries of economics to the law. Alternatively, it can also be a method of economic inquiry that investigates the economic effects of legal interventions. So Richard Posner, who is a circuit court judge, one of Lessig’s close colleagues, and one of the movement’s most venerable members, recommends the use of various kinds of cost/benefit analysis in place of questions of ethics or rights in deciding what the law should say. Objectively, the movement says that the law can’t decide on ethics alone, but must consider the way the law, economics, and society all interact to produce some results, which may or may not be in line with the ethical goal in question. Or, rather, that the ethical goals of jurisprudence should be mediated by some social science, which would help predict what the likely effect of the law would be. Cass Sunstein, one of Lessig’s partners in the movement, presents a summary of these claims in “Paradoxes of the Regulatory State.” In his analysis, issues like mandating seatbelt laws, environmental regulations, or, the movement’s favorite, minimum wage laws are all shown to be ineffective in producing the desired effect because of social forces greater than the law. In the terms of the conception of culture laid out in the previous chapters, the Law and Economics...
movement is premised on the idea that the cultural efficacy of law is disrupted by some more fundamental culture. In many cases, however, this more fundamental culture is not investigated or even analyzed. Instead, it is assumed to exist as a logical rather than historical hypothesis. This logical hypothesis says that the structures evident in economic analysis are the result of voluntary interactions of freely choosing, wealth-maximizing rational actors. The historical product of these interactions, if uninhibited by the blunt instrument of state or legal power, can then be read as if a democratic process had filtered the good from the bad, making any monopoly power or inequality of economic resources merely evidence of an actor’s success at meeting the chaotic demands of the rational subject instilled with this fundamental culture.

Because this culture is presumed to be one of *homo economicus*, the only tool that can be used to demonstrate this more fundamental human culture—or, as it is more often understood, “human nature”—is the social science of economics. And, within that field, the only kind of economics suitable for this study is inflected in the direction of seeing the state as illegitimate in all things economic. Accounting for all the particular strains of economic logic that feed into the Law and Economics movement is beyond the scope of the concerns of this project. They include strains of neo-classical, marginalist economics, Milton Friedman’s monetarism, Austrian price theory of Hayek and von Mises, and otherwise Liberal understandings of both the law and the economy. Behind them, as stated above, is a belief that humans make all decisions based on a narrowly defined economic logic of marginal utility and that this economic logic is natural and transhistorical. Moreover, this economic logic is far better than any legal promulgation at sorting the preferences of individuals and discovering what is best for the most people. The actions this economic logic recommends are part of a natural process that is best illustrated by the superior function of the price system in providing information about the economy, and therefore society, as a whole. The price system is another word for the market except that the price itself is seen as an aggregation of all the individual preferences of—and the supply and demand of goods relative to—
the actors in the society. Ideally, this system functions best autonomously, without any intervention from the law or the state. The latter introduce a political element that clouds the accurate economic collating of the market, thus resulting in inefficiencies. In short, the “liberty” of Liberalism—freedom from the state—is then assumed to have a utilitarian economic function—efficiency.

From the perspective which attempts to preserve this economic logic, therefore, the state and the law are, paradoxically, both wholly superfluous and deeply detrimental to society as a whole. Therefore, the goal of the movement, from the direct of the economic argument, was to expose the deep logic of economics functioning below any apparent efficacy of the legal apparatus. As Libertarian legal scholar Richard Epstein summarizes it, “You name the legal field, and I will show you how a few fundamental principles of price theory dictate its implicit economic structure.”

Epstein calls Ronald Coase, who I focus on below, one of the progenitors of this “modern theme of economic imperialism.” By this, he means the academic imperialism of economics, but it could as easily be understood as the ideological underpinnings for the expansion of IPR into other countries, which I’ve mentioned before has been called “a polite form of economic imperialism.” If this is the case, Epstein and Posner are at the forefront of the legal absorption of these economic principles as a new form of “natural law” on which to base the Liberal State. In this, the effect of the law is perversely omnipotent, but only on one subject: the clear definition and rigorous enforcement of property rights. As Harold Demsetz puts it, “The output mix that results when the exchange of property rights is allowed is efficient and the mix is independent of who is assigned ownership (except that different wealth distributions may result in different

341 Oddi, “TRIPS—Natural Rights and a ‘Polite Form of Economic Imperialism’,"
In other words, so long as the state and the law provide a clear signal of who owns what property, the long run effects of the distribution will be the same. Social costs—like environmental degradation—will eventually be absorbed by one or another side of the transaction. Either a factory will continue to pollute, or the community that wants it to stop will pay it to stop polluting. Anytime the state gets involved in telling people what they can do with their property, it produces inefficiencies. The only thing the state, and the law, can do, therefore, is to enforce contracts and protect property rights, as they have been allocated. Therefore, in the language set up in the first chapter, and evolved more in the second, the only thing the formal law of the state can or should do is to legitimize the functional power of property within the market. This is the basic tenet the liberal tradition.

This use of economic ideology to short up the political state reveals the third connection between this contemporary movement and the primitive accumulation of the last chapter. This involves the implicit desire to create subjects which adhere to a certain economic rationality through a certain mode of governance. One of Foucault’s more useful observations on the subject, says that the goal of liberal Governmentality is “a government of all and of each, [. . .] whose concerns would be at once to ‘totalize’ and to ‘individualize.’” Behind this, however, is the assumption of a certain set of social norms—a culture that is relatively stable and predictable in its understanding of rights (especially property rights), justice and obligation. That the latter are rarely apparent in reality—or that they remain highly contentious—is of little consequence. The imposition of this model must assume that all these questions are answered—and that the science it develops has the capacity to both predict and direct behavior at the point it deems it most significant.

Economics thus becomes an ‘approach’ capable in principle of addressing the totality of human behaviour, and, consequently of envisaging a coherent, purely economic method of programming the totality of government action. [. . .] the American neo-liberal *homo economicus* is *manipulable man*, man who is perpetually responsive to modifications in his environment. Economic government here joins hands with behaviourism.\(^{343}\)

In this sense, the ideal subject of “libertarian paternalism” must be created by the state—rather than the state being made by its subjects. This perspective removes the most contentious issues from the table: how are property rights defined? And, from the other direction, how do people react, in actual social formations, to this definition? How deeply embedded this definition and this reaction within the culture? And, more importantly, following the discussion of the last chapter, since this is assumed to be natural, why is there such a central role for the state at all? The answer is that the state is there to impose and enforce this cultural norm. If we admit that there is a political process in constructing the Liberal state, then the next question inevitably becomes: why does that political process stop—and democracy find its limit—at the definition of property rights in their distribution in the status quo? And what does the movement make of, on the one hand, the social movements which contest this definition, and, on the other, the coercive force of the state in imposing it on these diffuse movements? It is only by assuming as settled these rather contentious issues that this discourse can function. As we will see below, Lessig asks some of these questions in his critique, but the most important ones he takes to be given in advance.

These assumptions are not new. If we look back at what I called the “reified culture of property” in the previous chapter, it is no coincidence that these correspond very closely to the assumptions he had to make in order to construct his liberal defense of the state. This chapter asserts that, while Locke’s philosophy might not have been injected directly into our current

ideology of property, the Law and Economics movement attempted to complete the transfer of this reified culture of property from the seventeenth century to today. As one of the most successful academic endeavors of the late twentieth century, it has done a great deal to accomplish this and therefore discussing the reified culture of property today requires looking at this movement.

The issues of value, its production and distribution, is not listed here because it will be treated in the next chapter. It is on the issue of value—and especially the social process of valorization—that I’ve argued balanced copyright critics have the best claim to challenge copyright and, by extension, the reified culture of property behind it. However, in order to do this, they have to be able to criticize both. This chapter, therefore, looks at the Law and Economics movement as one of the crucial intellectual and political influences on the debate over IPR.

Its influence in the mainstream debate about IPR is indubitable. While within the US, the allocation of IPR is understood as being a constitutional issue about balancing incentives to create with freedom of speech, the language of economics dominates the conversation about this legal issue. This is even more the case in the international sphere, where absolute claims to ownership of IPR are more starkly defined and more strictly implemented. The Maximalist position is representative of the Law and Economics position on IPR, as mentioned below in relation to the conservative views of the Progress and Freedom Foundation, for whom Epstein writes on IPR issues.

The Law and Economics movement is especially crucial to understanding the position on copyright held by Lawrence Lessig as he is a preeminent voice in the battle for some form of “balanced copyright.” But before that, as mentioned above, he was central to creating what he termed a “New Chicago School” within the Law and Economics movement. The reference here is in distinction with the “Old Chicago School.” This is understood to be the interrelationship between the University of Chicago’s Liberal- to Libertarian economics department and its
conservative, Law School, which together were at the forefront of the Law and Economics tradition.

As an insurgent within the Chicago School of Law, Lessig (along with Cass Sunstein and others) called for a more explicit understanding of how the legal basis of the dominant economic system were inherently underpinned by an unexamined (or at least underexamined) set of cultural and social norms. Lessig’s evaluation did not question the validity of the cultural and social norms posited by the Old Chicago School, but instead hypothesized that using social and cultural norms to regulate social behavior could be an extra-legal tool for policy makers.

In other words, the cultural efficacy of the system does not function in the way the Law and Economics movement postulates. In so far as the postulates—which are C2 theories of C1 practices—are correct, it is either because other forms of efficacy, present in the practices of C1, beliefs of C2 and institutions of C3, help to generate the predicted behaviors; and/or it is because those state institutions have, at some previous moment, reformed C1 practices, and therefore C2 beliefs, to make them operate in ways that are more like the economic postulates of Law and Economics. In this, these postulates are, at best, a helpful index of human behavior in cultures where its postulates adhere—similar to MacPherson’s assessment of Hobbes in the previous chapter. However, at worst, they are ways of modeling the state according to Posner’s economic imperialism such that individuals are more totally coerced into acting according to the postulates.

In calling for this “New Chicago School” Lessig opts for a middle ground, invoking Foucault’s analysis of similar, nineteenth century projects to “make culture serve power.” While he does so in the context of the potential downside, it is clear that he also intends the reference to the disciplinary practices of the nineteenth century—so often the subject of Cultural

Studies ire—as a model of what might be called stateless social regulation. But far from seeing this as a problem, he sees it as admirably making explicit what many liberal theorists simply assume, namely that the supposedly essential characteristics of the so-called “state of nature” had to be thoroughly inculcated through a variety of regulatory means.

Thus, while he critiques the Law and Economics movement, he basically accepts their understanding of what that culture should look like. His main concern is how to more effectively get there. Here he represents the “Democratic Paradox” from the opposite direction: if it is evident that there is not a general cultural understanding of “liberty” and “property” along liberal lines, how can these be imposed on a society without the anti-democratic authoritarianism liberalism was supposed to contest? A recent answer, given by Cass Sunstein, his former Chicago School of Law colleague, is that “Libertarian Paternalism is Not an Oxymoron.”

The article takes Libertarianism—i.e. the absence of a paternalistic state—as an unquestioned paradigm, and hence the title represents the paradox at hand well. Namely, how do we make people act more like they are supposed to act, i.e. how do we make people act more like libertarians presume them to think and act? Aside from the narrow interest in Sunstein for the purpose of this paper, his perspective may have a dramatic effect on the shape of US regulatory culture as his good friend, Barack Obama, has picked him to be the US regulation czar.

Viewing Lessig’s later arguments about copyright in terms of a “Free Culture” against this backdrop brings the real foundations of his critique into relief. The distinctions he makes between “the physics of piracy of the intangible [and] the physics of piracy of the tangible” serve as the jumping off point of the next chapter, which focuses on the use of the state to secure not only the rights of property against intrusion or dispossession, but also the value of that property. Hence,

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347 Lessig, Free Culture, 64.
the attempt by owners of intellectual property to secure maximalist rights is not a deviation from the historical practice of liberalism, but represents some of its most cherished goals.

Though Lessig does try to produce a rigorous critique of existing conditions of IPR, the conditions he finds unimpeachable are the true source of the injustice he perceives. The supposed democratic content of the “free culture” interactions within that state are significant, but they cannot be read at face value. The necessary continuation of a class divided democracy is especially evident in the very distinction Lessig tries to make between tangible and intangible property, a partition which duplicates the division of labor and its distributonal consequences. This observation leads into the next chapter, which will consider Lessig and other IPR critics’ discussion of the social production of value: under the reified culture of capitalism, this turns into the social division of labor.

This chapter, in short, will first outline a brief history of the liberal understanding of “culture” in order to place the Law and Economics tradition of Lessig in its proper place. This means seeing the rational calculating, property-respecting, labor-performing subject as the product of the process discussed in the previous chapter in terms of the primitive accumulation of early capitalism. I discussed this ideal subject as the product of a particular culture. This final discussion locates the Anglo-American idea of “culture” itself in the philosophies of Locke and Hobbes. The purpose is to see the long-standing belief in this as a normative cultural proscription and to locate the Law and Economics movement within that tradition. The difference is that, within the latter movement, they deny their dominant theory of economics has a cultural basis in the same sense. On the other hand, this also locates the origins of the idea of culture from within a Lockean definition of enculturation, making the Cultural Studies position of seeing culture always as a process equally suspect. While it is beyond the scope of this work to trace fully the articulation of the democratic paradox throughout the history of Anglo-American modernity, a brief overview of pivotal examples should help situate the archaic resources upon which the latest Law and
Economics tradition rests—as well as the “so called primitive accumulation” that it overlooks in any historical accounts.

The passage from Locke to the present Law and Economics tradition is both broken and amplified by what Barbara Fried calls “The First Law and Economics Movement.” This movement, like the contemporary one, used economics to investigate the law, but its economic understandings were drawn from political economy and institutional economics. This first movement argued that the power affected within the specifically capitalist state by the upper class necessitates a coercive imposition of a certain set of cultural values. The fact of this functional inequality ultimately undermines the claim that the average US citizen has anything more than a formal liberty: functionally, they are oppressed. The historical impetus of both movements in the US was drawn from a few pivotal Supreme Court cases, first at the turn of the century, then in Roosevelt’s New Deal. Therefore, situating the current movement requires looking at least briefly at these conditions. The emergence of the current movement is buffered on the one side by a resurgence of libertarian political theory, most notably the publication of Nozick’s *Anarchy, State, and Utopia*; and on the other by the refined theories of post-war libertarian and Public Choice economics in the US.

Following an overview of these points in the field, the chapter will delineate a logical and historical critique of the primary economic tenets that are assumed in making the arguments of the Law and Economics tradition. I do this by engaging with R. H. Coase’s original argument in “The Problem of Social Cost.” I relate this to the more recent work by Deidre McCloskey, who uses the framework developed by Coase to evaluate the enclosures of England from the 17th–19th century. In both cases, I argue, they rely on unstated cultural assumptions about human behavior, taking as natural what is actually historical and cultural. Further, the arguments they make about the law in relation to economics replicate the logic of the democratic paradox inherent in Liberalism, but they try to posit the necessity of this Liberal view of the law as simultaneously
deontological and utilitarian. The ultimate goal, as the conclusion of this chapter makes clear, is to remove the state and the law from politics. By making it apolitical, it removes the possibility of democratic pressure.

In other words, the deontological Liberal view is the best and should be followed as strictly as possible no matter the consequences. This pure theoretical view, which haunts most Law and Economics analyses, is also the clearest reproduction of the reified culture of property, as seen in Locke. Here, as discussed in the previous chapter, the liberal state is removed from politics. However, even in the Lockean understanding the consequences of this deontological stance are inevitably posed as more efficient.

Locke, in other words, also had this utilitarian side. A student of Bacon, he saw enclosing and improving property as not just a political right to be defended against government intervention, but a general social good—using, in this case, the application of science to the improvement of yields. Thus, his political defense focuses on a few key points: we generally give people a right in property which they have improved. The limitation would therefore be that we only have a right to the amount of land that we were able to improve. If we, for instance, produced more than we needed, that would be wasteful. Then again, he says money makes it possible to trade that extra yield for hard currency, which won’t rot with quite the same amount of certainty. Therefore, in so far as we all agree to use money—one of the two attributes Giddens claims are evidence of modernity—*we are also agreeing to the unequal distribution of wealth.*

Locke shores up this defense by giving a response to the so-called sufficiency argument: there is enough land out there for everyone to improve; if people were upset by the above “natural laws” someone claimed to property, they could just take a walk and find a new place to improve. On the other hand, tucked into section 37 of his *Second Treatise on Government*, only

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amended to the third edition, Locke added what Laslett says is an attempt to remove this “sufficiency limitation.” He introduces a unique defense of private property which economic liberals have stressed ever since, Utilitarian overtones be damned. The counterintuitive passage contends,

He who appropriates land to himself by his labour, does not lessen but increases the common stock of mankind. For the provisions serving to the support of human life, produced by one acre of inclosed and cultivated land, are (to speak much within compasse) ten times more, than those which are yielded by an acre of Land, of an equal richness, lyeing waste in common. And therefore, he that incloses Land and has a greater plenty of conveniences of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind.

Or as MacPherson paraphrases, “Private appropriation in this way, actually increases the amount that is left over for others.” In other words, in addition to the political defense, Locke proposes that his economic model is more productive. Within the Law and Economics movement—and the general US discourse on property rights—this presumption remains.

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349 Locke, 294
350 Ibid.
352 Law and Economics trailblazer Richard Epstein, in his trademark article on property, performs the typical trick of extracting Locke’s thought from its historical context and thoroughly misunderstanding the “collective limitations that Locke himself was prepared to place upon his own labor theory of entitlement” Richard Allen Epstein, “Possession as the Root of Title,” Georgia Law Review 13 (1978): 1228 p. 1228. The pressure of this “residual social control” was not just philosophical; it was, as the previous chapter discussed, very widespread and the political action around it fierce. Further, the point he tries to make about Locke founding the ownership of property through labor through his “possession of himself” is both logically incoherent, as Hughes points out in relation to Intellectual Property, and is an additional misunderstanding of the contextual goals of that rhetorical and philosophical strategy. Cf: McNally, “Locke, Levellers and Liberty: Property and Democracy in the Thought of the First Whigs,” By making estates an essential part of persons, Locke offered a solution to [the problem of the Levellers conceptions of common natural rights to property]. Since property derived from the principle of self preservation, since ‘lives, liberties, and estates’ were all interconnected aspects of property—indeed of ‘self-propriety’ to use Overton’s term—the attack on estates was by definition an attack on persons. Locke’s wide definition of property thus delegitimized all leveling notions. Consequently, however much he had started from principles common to the Levellers, the end result of Locke’s analysis was to deradicalize natural rights arguments with respect to the property question. Resistance could thus be legitimized without thereby justifying attacks on property. (37)
provides incentives for the “improvement” of both real and intellectual property. As the following chapter will discuss, this in itself was a novel argument. The system of economic appropriation and production produces more output with the application of different techniques and a different organization of the production process. The focus on efficiency, if nothing else, foretells a different strategy of economic management; and, as mentioned above, the argument about the need for improvement was, at once, an economic innovation and a political justification for enclosure. However in so far as the greater efficiency of the enclosures answers the “sufficiency limitation,” as MacPherson points out, “this assumes, of course, that the increase in the whole product will be distributed to the benefit, or at least not to the loss, of those left without enough land.”

Thus the political arguments about the deontological duty are transposed into utilitarian arguments about the economic efficiency of the Liberal arrangement.

This argument for the efficiency of a Liberal property framework stands in the place of the religiously tinged natural law in Locke. The efficiency of the liberal property regime is premised on a fundamental culture that the state no longer has to enforce. Taking these as given, it leads to two contradictory conclusions: First, it derides the use of the law or the state to affect changes in resource allocation. This is because the use of the law to do so will inevitably cripple the utilitarian efficiency of the price mechanism. Second, and contradictorily, it projects onto previous uses of the law to reallocate resources, a presumption that, whatever the use of the law, the outcome was likely more efficient precisely because the price mechanism is such a fundamental force. The law, therefore, is posited as simultaneously omnipotent and superfluous in relation to the efficiency of the price mechanism in sorting the individual preferences of voluntary, rational actors. On the

It is worth noting that, a parallel development can be found in present day rational choice liberalism in the work of Gary Becker. Here, instead of founding the obligation to the possession-protecting state on a universal self possession, he founds an obligation to the capital-protecting state on the concept of human capital. Gary Stanley Becker, *Human Capital; a Theoretical and Empirical Analysis, with Special Reference to Education* (New York.: National Bureau of Economic Research; distributed by Columbia University Press, 1964).

other hand, it denies the political role of the law and the state in shaping citizens according to those preferences—or subjecting society at large to the narrow dictates of the market. Whatever the intention of this set of methodological protocols and presumptions, the result is to presume that: the status quo distribution of property rights is efficient; the law or the state was unimportant in creating that distribution; and, therefore, the law or the state should not be used to alter that distribution. It would be wrong and inefficient. The decision about what should be done in order to promote growth is already made: the only role for the government is in its administration of these decisions.

Coeval with the rise of this movement to hegemony within the legal field, is Foucault’s discussion of “Governmentality,” a critical perspective similarly evacuated of criticism. Since many of the Cultural Studies evaluation of policy (and cultural policy in particular) have drawn upon this part of Foucault’s oeuvre, its homology with the Law and Economics understanding is particularly relevant. It is a line of inquiry I’ll only gesture towards, but it could be a fruitful analysis, particularly in Lessig’s interest in utilizing Foucault’s disciplinary apparatus in order to create a more Liberal culture.

This chapter will bracket for the moment the question of the international sphere. Since most of the above theories take the nation state as their given object, we will be pretending this entity exists and the dynamics observed are endogenous to that entity. And, since most of these discussions involve the United States as their explicit or assumed object, it will be provincially focused on the development of these cultural and political imperatives within that environment.

As stated above, the Law and Economics movement is founded on a certain set of cultural assumptions, which must be taken for granted from the outset. Lessig doesn’t contest the logic or rationality of these assumptions: he just adjusts them pragmatically, saying they are not natural but the result of social norms that must be implanted. As mentioned above, I will first give the more recent history leading up to the current Law and Economics movement and the battle over what
these norms and assumptions could and should be. I will then turn to these cultural assumptions and the economic theory behind them. I argue that this theory—embodied by Hayek—includes a tacit agreement that they should be coercively implanted, turning finally to a close analysis of Coase and McCloskey. I will then return to Lessig and the way his challenge of maximalist IPR fails precisely because it fails to challenge the reified culture of property on which Law and Economics is founded.

From Locke and *Lochner* to the *West Coast Hotel*, and back: A short pre-history of Law and Economics

As mentioned above the impetus behind the current Law and Economics movement was, in part, a desire to return to the legal framework legitimated in the early part of the 20th by the US Supreme Court—under what is known as the *Lochner* era. The *Lochner* era court compiled a consistent record of ruling against attempts by states to interfere with “the liberty of contract.” This understanding of “liberty” highlights one of the themes running throughout the four economic principles which lay unexamined in my analysis below. This theme is that the transactions measured by the market are voluntary—that is free from coercion. Coercion, in the Liberal tradition, can only come from the state: if it is delivered by the market or economic power

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354 So named because of the case *Lochner v. New York*. In this case, the unanimous passage of legislation at the state level mandating a 10 hour workday and 60 hour workweek in bakeries was ruled unconstitutional. The ruling is famously based on a broad reading of the due process clause of the fourteenth amendment which claimed that it included “freedom of contract.” In other words, the state couldn’t intervene in the supposedly rational, non-coerced contract made between employer and employee without “due process” of law, i.e. it was depriving one or both of them of “life, liberty, or property.” The change, it should be noted, that the fourteenth amendment made was that it allowed the federal government to overrule state laws in this regard. The “due process” clause of the fifth amendment applies only to the federal level; the fourteenth expanded it to the state level.

355 Bernstein, who defends *Lochner* from the contemporary Law and Economics tradition, claims that this understanding of *Lochner* is inaccurate because it wasn’t understood this way at the time. Instead, it was just a wise decision made by a court that was attempting to keep social legislation from altering what was, in Bernstein’s view, the correctly aligned status quo. However, in saying that it was a case which helped to stifle what he calls “class legislation” he basically confirms the characterization of progressives at the time. David E. Bernstein, "Lochner V. New York: A Centennial Retrospective," *Washington University Law Quarterly* 85, no. 5 (2005)
unsupported by the state then it is not coercion, but a force of nature. Hale criticized this notion
at the time saying, “under any coherent definition of coercion, the sphere of private, ‘voluntary’
market relations was indistinguishable from direct exercises of public power.”

The *Lochner* era court set a series of precedents which reinforced the assertion that the
economic transaction in question was assumed to be one of a voluntary contract. While “liberty”
contracts would seem to be separate from property rights, in the case of an economy that
produced more for exchange rather than use, “rights of ownership were determined in the first
instance by bargains between factors of production.” Therefore, from the liberal perspective,
atttempts by the state (in this case the state of New York) to regulate working conditions were not
only an interference with the freedom of contract guaranteed by the due process clauses of the
fifth and fourteenth amendments to constitution, they were also interference with property rights.
In short, if a worker’s labor is his alienable property, and that worker agreed to work for longer
than 60 hours a week, that should be his right. State intervention—such as laws regulating the
length of the working day—interfered with the liberty of contract, and, hence, the freedom of
property. Hale, for one, objected. Following a long line of thinkers, including Marx, he said that
all property was the result of political decisions and the coercive force of the state. Therefore, as
Fried summarizes,

> When the government intervened in private market relations to curb the use of certain
> private bargaining power, it did not inject coercion for the first time into those relations.
> Rather it merely changed the relative distribution of coercive power. Whether in any
given case that redistribution would increase or decrease the aggregate liberty of its citizens
was therefore an empirical not an analytical question, and one that could not be answered
by reference to abstract (constitutional) rights. Thus, concluded Hale, ‘there is no *a priori*
reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty, or even to that special form of it known as free enterprise.”

Ideas like Hale’s, along with those of Progressive public intellectuals like John Dewey, coupled with the Great Depression, massive social upheaval, the threat of an even more militant labor movement at home, and communist pressure abroad to compel FDR to force through a number of measures to help allow the government—at the federal and state level—to regulate business. Chief among his actions was his threat to add additional justices to the Supreme Court if they didn’t rule in favor of certain New Deal legislation; this threat allegedly also resulted in the Supreme Court verdict in *West Coast Hotel Co. v. Parrish*, which allowed for the individual states to intervene in their economic matters and effectively overturned *Lochner*.

In Britain, where R. H. Coase had studied, it also meant, on a grander scale, the institution of various forms of welfare economics—Keynes being the most visible but, on a smaller scale, the welfare economics of Pigou. This is the context which motivated Coase—who adapted many of Hale’s arguments in his own work on joint costs—and by extension the Law and Economics moment to apply the principles of his economic outlook to the framework of the law. However, as outlined below, these principles presumed from the outset that the role of the state was minimal.

Whether in the economic or legal guise Libertarians—particularly in the Austrian vein—support a theory which basically places the most emphasis on the entrepreneur as the hero of the system. It then assumes that any empirical progress is the result of these entrepreneurs. It is a circular logic which, in the process, denies any positive agency to any other actors or the political or social context of action. State funding for research and development; state production of

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358 Ibid., 36.
359 Fried makes this observation several times in ch. 3 of her above cited book.
infrastructure or funding for education or health; social action to help create wider benefits—these are all assumed to be mere hindrances to what could have been a pure, do it yourself job by the entrepreneur. Following from the early arguments about laissez faire and the freedom of contract, this is especially the case in contemporary Liberal and Libertarian writers who argue that sweatshop labor intrinsically creates rising wages and better living standards.

For instance, there is a common idea that trading with countries that have poor labor standards eventually, as Tyler Cowen says it, “raise wages in these countries and also give a long-run boost to labor standards.” Johan Norberg, in his popular documentary titled *Globalization is Good*, makes a similar claim about labor standards in Vietnam. And in his CATO Institute tract *How Progressives Rewrote the Constitution*, Richard Epstein claims that the changes to the law regarding labor standards in the US were unnecessary, that the standards themselves were improving already just as Adam Smith had predicted: “increases in technology and productivity redounded to the benefit of all.” Out of these three randomly selected examples, Norberg is the only one who acknowledges that, in so far as labor standards had increased, it wasn’t a direct result of trade. People in Vietnam had to strike; activists had to create external pressure and solidarity; and Nike, the company in question, made a PR pitch to prove that it had changed its ways. A struggle ensued for the transparency here and in so far as social justice was created, in so far as wages rose and labor standards improved, it was because workers insisted on it. As Oscar Wilde

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361 Richard Allen Epstein, *How Progressives Rewrote the Constitution* (Washington, D.C.: Cato Institute, 2006), 7. Bernstein, above, makes a similar claim—that the market was creating a better environment for most workers—though, perversely, he makes the following set of observations in looking at the *Lochner* case, which involved laws about labor standards in New York bakeries: many bakers had improving standards, good wages and fair hours; therefore the law extending these labor standards to all bakeries was unnecessary—and, he asserts, racially motivated. However, he also observes that the bakeries that did not have these standards were the ones without unions; he objects to the law passed—and therefore approves of Lochner’s striking it down—because the unions had a hand in the attempt to make these state law; however, he then observes that the *Lochner* verdict striking down the law likely made it difficult for unions to improve standards informally later in the future. In other words, the variable that likely had the most effect—unions—in helping improve the standards is simultaneously vilified for trying to make these standards universal and eulogized because its efforts were struck down by the *Lochner* verdict. In its wake, Bernstein remains steadfast in claiming that it was the market that had the most effect on the improvement of standards for the bulk of workers.
said, “Agitators are a set of interfering, meddling people, who come down to some perfectly contented class of the community, and sow the seeds of discontent amongst them. That is the reason why agitators are so absolutely necessary. Without them, in our incomplete state, there would be no advance towards civilisation.”³⁶²

It is a mystery how this would happen otherwise. In some isolated cases, when there didn’t exist what Marx called a “reserve army of unemployed,” it is feasible that there would be such demand for labor that owners would be forced to offer them more attractive packages, but this certainly not the regular course of events and it most certainly was not in the years leading up to the court decisions of 1936-37. In that case, the official legislation may have had little effect on the actual practices of either unions or businesses. It was, in effect, a cultural change that the courts registered as constitutional. In a truly democratic society, the fact that a policy passed through a legislature—whether in New York or Washington state—would have registered this as more than just a set of “activist judges.”³⁶³

In this sense, the atmosphere from which the Law and Economics tradition emerged was largely one in which the culture of capitalism in the United States was being altered fundamentally. It was moving away from the practices and ideals of the classical Liberal state and becoming liberal in the post-war sense of the term—the sense where liberty was ultimately thought of in more functional terms. As the following chapter points out, this was likely the savior of capitalism as a social system and did more to embed the liberal culture of property at a deeper level than the classical liberal state ever could. This involved reorienting the efficacy of the culture from the top level down (C3)—but it was largely a response to pressures from below, rearticulating basic contentions about natural law and citizens rights.

³⁶³ On this point, one of the major criticisms of recent strategies has relied too much on Supreme Court precedent—such as Roe v. Wade—in the absence of a deeper social movement.
Yet here the Law and Economics tradition, from the legal side, puts on the Liberal breaks and argues that this is actually a breach of the freedom of contract: it may have a democratic basis, but is contradicts “liberty.” Epstein is most disciplined in his ability to hew this line. In the above mentioned tract, he cites Adam Smith as the inspiration behind our entire legal system and points to the changes in the New Deal era as guided by a mistaken understanding of both constitutional law (“guaranteeing individual liberty”); and, following the above discussion, the commerce clause of the constitution which included “regulation of economic activity, largely left to the states.”

Obviously his anxiety about the increased power of the executive and the courts was widespread.

When one looks at Roosevelt’s court packing scandal and the subsequent judgment on *West Coast Hotel Co. v. Parrish* only from the top level of history, with the libertarian lens, they seem to be clear miscarriages of justice.

But they can only appear as top down attempts to create some liberal utopia or paradigmatic instances of “judicial activism” if one filters them out of the more general social context. And, more to the point, one can see the market as the sole force in creating greater wages and labor standards if one isolates this hypothetical model from the actual historical circumstances. By this, I mean the sincere and, at the time, frightening collective action by a very militant labor movement. As Mike Davis points out, at the same time FDR issued his orders,

In the year between the summers of 1936 and 1937, the shop committees in auto, rubber, and electrical—along with kindred rank and file movements in maritime—launched a

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364 Epstein, *How Progressives Rewrote the Constitution*, 3-8. These two tenets, which Epstein sees as simply the clear eyed interpretation of the constitution, are analogous to what Fried calls “the twin pillars of laissez-faire constitutionalism in the Lochner-era Court: the right to preserve individual liberty (particularly as embodied in freedom of contract) and private property against government intrusion.” Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*, 15.

365 Ironically enough, it was in giving these organs of power authority to put a check on the democratic forces of the legislature that originally inspired the constitution of the US. See Jackson Turner Main, “Government by the People: The American Revolution and the Democratization of the Legislatures,” *The William and Mary Quarterly* 23, no. 3 (1966).

366 Though, on this case, there is a great deal of contention about this basic historical narrative—i.e. whether the judgment was actually given before Roosevelt announced his intentions to pack the court. The latter seems to be the historical consensus.
sustained offensive that was quite unequalled in American history for its tactical creativity as well as its demonstration of the power of the collective worker in modern industry. By uniting the skilled and unskilled, the native and the foreign-born, these strikes ‘created a solidarity that hitherto eluded American workers.’”

Evidence that this was a concerted, democratic effort, however, would do little to change the balance of Epstein’s interpretation. If it was, indeed, a cultural movement, it should be seen as counter-cultural. This seems unarguable on its face, though Epstein would claim that his interpretation of liberty is the only interpretation of liberty.

In this, although Epstein relies on libertarian economic interpretations, the thrust of his arguments tend to be in the direction of political libertarianism. His critique is largely of “realist” legal scholarship jurisprudence in the 1930s. The balance of this scholarship focused on the way the law actually performed. In some regards, it is the true progenitor to even Coase’s scholarship. However, instead of seeing law as simply governing a given balance of economic interests and forces, Realist scholars pointed to the way judges actually interpreted the law from the bench, thus remaking the world according to economic dictates. As Barbara Fried describes it

[The Realist critique of law] insisted that the sorts of answers that courts were called upon to give could not be deduced mechanically from an abstract jurisprudence of rights, but emerged instead from the unexamined and unarticulated cultural and political assumptions of the judges themselves.

By “cultural” here, Fried here means something similar to the commonplace understanding of “ideological.” Namely, it is reflective of a general worldview. This dovetails with the argument

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368 Leading to the fairly common interpretation that organized labor in the US was part of a Communist plot, a favorite narrative that has been revived in public discourse by Ann Coulter’s recent books and columns praising the wisdom of Joseph McCarthy for seeing the truth of this plot.

369 Hence the title to Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*.

370 Ibid., 12.
I’ve made throughout this project on the particularity of the Liberal culture of property, but incorporates only part of it. They would be the same thing if we take Althusser’s understanding of ideology—which, incidentally, is reminiscent of Raymond Williams own “cultural materialism.”

Ideology existing in material ideological apparatuses, prescribing material practices governed by material ritual, which practices exist in the material actions of a subject acting in all consciousness according to his belief.

In other words, it isn’t just a set of ideas, but an entire C3 framework which governs people’s interactions with one another, helps proscribe their motivations, and explains to them how things should be. This doesn’t mean that there aren’t practices or practical, empirical evidence that contradict this ideology: it just means that this thoroughly interpellated subject will be unable to recognize that they exist. This is coupled with the concept of hegemony to point out that there can be a variety of competing ideologies and practices within a given society, but that there will be a dominant one that is more thoroughly policed and recognized as superior.

As chapter one outlined, Althusser has largely been dismissed in Cultural Studies for being overly deterministic in his understanding of the effects of the economic. Perhaps most controversially at the time, was his assertion that this dominant hegemony on the one hand, functioned to “reproduce the relations of production” i.e. that it was, to paraphrase Althusser in For Marx, determined in the last instance by economic considerations; and, on the other hand, that it was policed by a configuration of repressive and ideological state apparatuses. Though this was based directly on the rather recently translated work of Gramsci—who said basically the same

371 Most often seen as originating in his definition culture in relation to base/superstructure in Williams, Marxism and Literature., but which can also be seen in the essays in Raymond Williams, Culture and Materialism: Selected Essays (London ; New York: Verso, 2005). This influence is also evident in Williams’s the essay on “Base and Superstructure in Cultural Theory,” which appeared in the New Left Review around the same time.
372 Althusser, Lenin and Philosophy, and Other Essays, 168.
thing, but without the Lacanian twist—Althusser’s notion of state apparatuses and economically
determined reproduction was attacked for its Structuralist understanding of culture.\footnote{Hall, "Cultural Studies: Two Paradigms,"}

At roughly the same time that Coase’s understanding of the need for an economic
determination of the law was winding its way through the intellectual mill, as Sidney Blumenthal
amongst others have chronicled, more vigilant, well funded groups (like the CATO institute,
found in 1977; the Heritage Foundation, 1973; and especially the Olin Foundation, which,
though established in 1953, spent a good chunk of its more than $370 million funding Law and
Economics programs at law schools around the country\footnote{http://en.wikipedia.org/wiki/John_M._Olin_Foundation (accessed 9/6/08) Sources are scarce for funding amounts as the Olin Foundation was disbanded in 2005 so official numbers are hard to come by—especially online since Olin website has been removed.} were doing their best to work on
instituting something like the model of law recommended by Epstein and a starker reading of
Coase.\footnote{Sidney Blumenthal, The Rise of the Counter-Establishment: From Conservative Ideology to Political Power, 1st ed. (New
York: Times Books, 1986).} As Blumenthal argues the crowning achievement of the Liberal—or, as Milton Freidman
called it, the neo-liberal (because it returned to the values of classical Liberalism)—retrenchment
was the realignment of the courts towards this Law and Economics tradition: “By naming more
than half of the federal judiciary, Reagan would install on the bench the legal wing of the
Counter-Establishment. In this way he would entrench [Liberal] ideology in what has historically
been a bulwark of conservatism.”\footnote{Ibid., 10.} In other words, while Cultural Studies scholars were
increasingly dismissing the idea that the state and economy could determine culture, Legal Scholars
and Economists were banking on its being able to do so.

Recent work, such as David Harvey’s has focused on the dynamic reversal in the
dominant understanding of economics in the early 1970s.\footnote{David Harvey, A Brief History of Neoliberalism (Oxford ; New York: Oxford University Press, 2005). Also, see Gérard Duménil and Dominique Lévy, Capital Resurgent: Roots of the Neoliberal Revolution, trans. Derek Jeffers (Cambridge: Harvard University Press, 2004). Mark Blyth, Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century (Cambridge, UK: Cambridge UP, 2002).} Certainly this is important, but as
Blumenthal notes above, the legal side is no less significant. In this sense, it was the imposition of a certain definition of economics that has become dominant in US institutions and discourses of policy, property, and law. The previous chapter outlined some empirical evidence of how the law can determine culture. Much like Althusser’s theory focused on how the individual was interpellated into this order, these economic and legal theories argued for a distinct form of micro-foundations. The culturalist critique of Althusser’s supposedly limited understanding of human agency, which highlights the complexity of the individual, is nowhere more pertinent than here. That this ideal human became the foundational premise of a mathematical science—social choice and public choice—of economics which, in turn, became a component of the economically guided legal revolution would be equally pertinent.

In the following sections, I outline the precise content of this culture—and the political nature of its imposition. As in the Locke’s time, a C2 narrative is projected upward into the structure of the state so that it can be imposed on society at large. Like the ideology of “improvement,” this discourse of economics is not merely descriptive, but also normative and prescriptive. To say, as one contemporary celebrant of this tradition does, “whenever we speak of rational behaviour we always mean rational behavior directed primarily to selfish ends,” it is evident that the science of economics on which Law and economics is based does not even pretend to display the full range of choices: only selfish behavior is rational. The fact that some choices, choices, for instance, for collective action for “general welfare,” are ruled as impossible at the outset, magnifies the narrowness of its goals. It also, as mentioned above, points to the paradox inherent in this ideology: though it claims to maximize liberty and freedom, it makes it impossible for democratic pressure to alter the basic economic organization of society. Only one


definition of liberty is possible, only one definition of the state is necessary—and the movement
defends these definitions as both right and economically efficient.

In addition to the New Deal context, Law and Economics critique of concepts such as
“the general welfare” was, arguably, a result of its cold war origins. As S. M. Amadae has recently
argued, contesting Communism was the ultimate goal of designing a mathematical, scientific
defense of the economic necessity of capitalism. From the economic side, therefore, the goal was
to create a rigorous science which would “rationalize” capitalist democracy. Any appearance of a
socialist mentality was to be countered with this scientific defense of the Liberal state. Since it is
pitched as a scientific method for, “creating a just society within the constraints of rationality,” the
only method for doing this is through “the erosion of traditional worldviews” in which the market
mentality does not exist. In other words, for Rational Choice Liberalism (Amadae’s name for the
combination of political and economic theories that were roped together in creating this “natural
science”) to be able to claim full, scientific relevance, it must perform that Baconian elimination of
the spaces where it does not hold sway. As Amadae points out,

overlooked by many economists, however, is the residual concern that even the market
requires a basic level of normative consensus to prevent its succumbing to the ever present
temptation, as seen in the Prisoner’s Dilemma, to resort to theft.\footnote{Ibid., 289.}

Emphasis is put on the goal of, for instance, preserving individual liberty. The latter, in turn, will
be better for everyone: it will create a more just society. In other words, the supposed libertarian
nature must have the guiding hand of the libertarian economist who will design libertarian
institutions and incentives—much along the lines of Hobbes and Locke’s rules for the poor—
which will help to enculturate them properly. It would also mean the elimination of any
“irrational” elements, such as so-called “traditional culture” aka any cultural or social norm which doesn’t fit into this frame. It is a classic policy of destroying a society in order to save it.

This brings the full contradiction of the Liberal defense of the state full circle—from Locke to neo-liberalism. The primary objection of the ideology is that the state shouldn’t be involved in shifting resources or rights in order to promote social justice. As Amadae says of the principles of economist James Buchanan, one of the principal architects of this theoretical legacy, “Buchanan is forced, by both his view of traditional moral consensus and his view upholding free trade and private property, to support the status quo arrangement of society.” In other words, he demands the continuity of the reified culture of property and the current distribution of resources: to do something else would violate the liberal break on the state. At the same time, however, Buchanan’s principal goal in “debunking the delusion that government bureaucracy acts in the best interests of constituents” was to overturn that status quo in order to instate a new moral consensus, to “lift the veil of illusion from wide-eyed, naïve believers in socialism and welfare economics.” In other words, he was for a radically altered status quo which would more clearly reflect what he imagined the status quo arrangement of society should be.

I will now outline briefly what this status quo arrangement looked like in economic theory and how the Law and Economics movement translated these economic principles into a defense of the liberal state. Again, this defense was an attempt to reinstitute the liberal culture of property in its purity at the level of the state: I argue that this was an increasingly successful movement in its redefinition of property and the state, its assumptions presumed to be an accurate representation of reality (at least until the Fall of 2008.) Thus critiquing it is essential to understanding the reified culture of property and Lessig’s place in continuing to support it.

382 Ibid., 152.
383 Ibid., 153-4.
384 I mean this in a seasonal rather than Biblical sense, though I suppose both could be accurate; time will tell.
Following this, I’ll do a close reading of Coase’s work before concluding with a review of Lessig’s lukewarm attempt to correct some of these premises. As mentioned at the start of this chapter, while his correction of these premises helps to alleviate some of the major flaws of the Law and Economics approach, his basic agreement to their conclusions makes him unable to challenge the fundamental culture of property they imply. Therefore the valiant work—discussed in the next chapter—that he has done in providing nuanced descriptions of the social production of meaning and value becomes moot in the face of the paltry distinctions he gives to justify his position.

**Economics and Law in the Culture-less Culture of Capitalism**

*Market sovereignty is not a complement to liberal democracy; it is an alternative to it. Indeed it is an alternative to any kind of politics, as it denies the need for political decisions, which are precisely decisions about common or group interests as distinct from the sum of choices, rational or otherwise, of individuals pursuing private preferences.*

In thinking of the culture of capitalism in relation to the Law and Economics movement, it is helpful to recall some concepts and terminology from the previous chapters, as well as introduce a few new ones. One of the core arguments regarding the conceptualization of culture was that there could be a cultural efficacy that was a function of a cultural model being imposed by the state, the state being an institution with a cultural form that is mutually constituted by its cultural content: a certain legal ideology. Operating within this conceptualization, I discussed three different dialectics: dynamic/determined; formal/functional; and endogenous/exogenous. In the

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previous chapter, I distinguished between two traditions or even tendencies that vie for the dominant articulation of this legal ideology, that of Liberalism and Democracy.

Of the former, I cited Ellen Wood’s description of what we might call a “pure” model of capitalism. She describes this in terms of the separation of the economic from the political. The consequence of this in its pure form is not that the economic sphere is actually separated from the political. The formal policies of the state are used to make the coercive function of the market effective—and to determine the dynamic processes of culture into a framework of commodification and the social division of labor. However, the ideology of natural law makes these policies seem apolitical and any movement or individual who attempts to change them is accused of “politicization.” The pure separation of the economic from the political is therefore only achieved through the cultural: it is only when this separation has been effected completely and any alternative arrangement eliminated, that the complete reification of this culture is possible.

As the Liberal economist von Mises laments of the in his book *Liberalism*, “Nowhere was this program ever completely carried out.” Von Mises, who is one of the few Liberals to discuss this model as a model, opens his defense of Liberalism with the distressed observation that “even in England, which has been called the homeland of liberalism and the model liberal country, the proponents of liberal policies never succeeded in winning all their demands.” His defense of this order is certainly based on an idea that it is good, and even that it is natural, but more than either of these, von Mises contends that it creates more wealth than comparable systems of political economy. This is based on a broad, historical observation that countries that got closest to this model increased their overall wealth at a rapid pace. On the other hand, he argues that “If one wants to know what liberalism is and what it aims at, one cannot simply turn to history for the

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386 Von Mises, *Liberalism*. 

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information and inquire what the liberal politicians stood for and what they accomplished. For liberalism nowhere succeeded in carrying out its program as it had intended.”

While von Mises could never be accused of being a historical materialist, his distinction of Liberalism in its purity and in its implementation corresponds to what Marxist political theorist Nicos Poulantzas might have called the distinction between the pure mode of production as a “formal-abstract” model and the “real-concrete object” of the social formation in which that model is dominant. Outside of this almost rhetorical distinction, the similarity between these two speakers helps to underscore the different projects of Poulantzas and von Mises. Von Mises is interested in looking at the pure theory of liberalism, discussing how it would work according to its own logical hypothesis about the essence of human nature, its direct relation to the productivity and dynamism of the economy and the way that the state and the law, in going beyond the simple reproduction of these relations, stifles and overwhelms this natural process. His appeal to history, therefore, is limited to examples proving the potential results of social formations which took this logical hypothesis of human interaction as the single model of governance and statecraft.

Poulantzas, on the other hand, is interested in both logical and historical hypotheses, the pure theory of liberalism in its abstraction and the historical effects of its application in concrete social formations. He is then interested in synthesizing these into a general theory of the way power functions in capitalism—a conception that would inevitably include class power. Poulantzas is explicitly concerned with the role of the cultural in relation to this model, the relations it should produce ideally, and the actual function of the capitalist state when it is put into motion in a social formation—issues I’ve tried to elaborate with far less skill and nuance above. This project doesn’t require a deep investigation into the complexity of Poulantzas formulations, but he does provide a rigorous framework for discussing the many inflections that power can take, especially that of

economic power—a distinction that von Mises would not make since he sees the power of the economic as solely the product of voluntary actions.

Thus with these we arrive at another distinction in the analysis. In speaking about the reified culture of property, I am referring to a model, in its purity which is then applied and reproduced within a given social formation. However, unlike either von Mises or Poulantzas, I am not trying to discuss that social formation in its entirety: I am discussing the way that the law consecrates a certain cultural dominant which then determines the cultural processes and practices throughout the hierarchy of culture. In relation to property, the reification of this culture takes the shape of formal laws that seem to be beyond politics (hence reified) which try to increase the functional efficacy of property—both as an idea and as a material reality. With this culture in dominance, the social formation as a whole appears as if it is wholly the product of this juridical norm. In relation to IPR, therefore, the dominance of this culture makes the maximalist position seem reasonable—as a logical hypothesis—even if critics can pick away at the distinctions between real and intellectual property or argue for the necessity of the public sphere in a democracy. Leaving this reified culture of property in tact as a pure theory is leaving it there to be articulated into maximalist arguments for IPR. It is like “Natural Law.”

The Law and Economics tradition forms the most recent, explicit, and coherent defense of the Liberalism von Mises proscribed in its purity. While it is, as von Mises was, ostensibly concerned with some level of economic analysis, the economic analysis itself is a product of the assumptions entailed in the pure theory of Liberalism. Thus the series of assumptions that are contained in the pure theory of Liberalism circle back on themselves in the interdisciplinary project of Law and Economics. The unmentioned background of each of these premises is that people have a certain nature and that there is some fundamental social or cultural agreement on the basic rules about property and economic transactions. Because of this fundamental agreement, the state can be relegated to the sidelines. This “unmentioned background” is most obvious in
pure liberal economics like von Mises, or the Libertarian political theory of Robert Nozick. Nozick, throughout his landmark work *Anarchy, State, and Utopia*, cringes at the goal-oriented nature of “general welfare” ideas of utilitarianism, finding that its “too narrow conception of good” is, basically, imposed from on high, violating rights in the pursuit of this goal. But Nozick, in counterpoising his state-free ideal, handily assumes that there is no question about what rights are and through what means they can be legitimately violated or enforced. In other words, he sneaks in his own “narrow conception” of rights—he just makes them indisputable and a-priori.

While a larger project of comparing social interaction to legal rules might be productive, the outlines of the Law and Economics approach have hardened into immutable truths that make economic analysis, according to certain reified cultural characteristics, the only valid method for analyzing social interaction in relation to law. In order, these cultural presumptions look like this:

1) Human action is purposeful, voluntary, and meant to maximize particular ends;

2) Property is the natural, sacrosanct possession of its possessor and was gained through purposeful action;

2a) There is plenty of property out there for those who want it. If nothing else, you possess your labor; it can be sold as property as well.

3) The exchange of property among owners is a voluntary exchange among formal equals and therefore the resultant exchange represents their rational, informed, individual assessment of how it will best, and most efficiently, meet their particular ends.

Cf. especially, ch. 4 on “Prohibition, Risk and Compensation” which is full of statements such as this: “Instead of (or in addition to) attempts to geographically isolate independents [i.e. people that haven’t paid into the private, protective association] one might punish them for their misenforcement of their rights of retaliation, punishment, and the exaction of compensation. An independent would be allowed to proceed to enforce his rights as he sees them and as he sees the facts of his situation; afterwards the members of the protective association would check to see whether he had acted wrongly or overacted.” Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 55. p. 55. In other words, we have to assume that independents will find the protective association with which they are not associated the legitimate judge of their rights. The rights themselves, and the degree to which they can be enforced has some objective existence that is either pre-existing—i.e. natural—or it emerges from what appears to be the rational critical dialogue he expects would be the norm of tribunals held by the hypothetical equivalent of today’s military contractors. If it weren’t political philosophy, it would qualify as science fiction.
4) The market—or the “price system”—represents in aggregate these transactions. Since it presumed to be the product of these rational actors voluntarily exchanging in order to achieve maximum efficiency, the aggregate of these transactions is, therefore, presumed to be efficient.

I say these are cultural presumptions because, following the conception of the previous chapters, they presume the efficacy of the culture they are promoting as natural. It is so deeply effective that every practice that is undertaken at the C1 level is presumed to in one way or another follow this economizing logic. Therefore when reading these practices from above, as von Mises does in his own book on Human Action, one can simply assume that, if an action was taken, it was taken in a purposeful manner and according to the belief structure associated with maximizing one’s wealth. In sociology, this is closest to Parson’s structural functionalism, which was equally convinced of the structure itself being a representative of the aggregation of the beliefs of the actors in the system. Parsons, in turn, was inspired by Weber’s speculations about the “protestant ethic” making US capitalism more successful. The first problem with this cultural presumption (especially at C1) is that it is universal and effective in a transhistorical, transcultural way—and that it is operative outside of the framework that makes the other propositions stick.

This presents at least two problems. Both, however, stem from the same issue mentioned above: the interpenetration of logical and historical hypothesis. On the one hand, it presents a structural folly of these premises. In the list above, 1) is presumed to be the foundation of the entire structure in a direct, linear way. It exists before any of the others as a natural phenomenon. It is from the premise of the individual rational actor that the society governed by the capitalist

390 Talcott Parsons, The Structure of Social Action; a Study in Social Theory with Special Reference to a Group of Recent European Writers, 1st ed. (New York.: McGraw-Hill Book Company, inc., 1937).
market (4) is right and effective and that governance by an active, democratic state is illegitimate and, in Kenneth Arrow’s understanding, impossible. If 1) is reliant on 2) or 3) or even 4) for its motivation, then it is no longer some sort of natural phenomenon, but is a result of the structure itself. Therefore the structure can’t be defended on the basis that it represents in aggregate the natural tendency at 1)—unless it is assumed that the price system at 4) is actually designed expressly to impose 1).

Hayek, in his most oft quoted statement on the price system, avoids the problem of this folly, but only by reinforcing the totalitarian aims of his endeavor. This is the second problem that this set of cultural presumptions suggest: namely, that they defy the Liberal limits placed on the state in that they demand the imposition of an exclusive culture on society. Or, the logical hypothesis that Liberalism is merely the protection of negative rights, is contradicted by the fact that it is really historically involved in the instantiation of a new way of life, a new individual, along the lines of what Isaiah Berlin criticized as a form of positive liberty. The full implications of Hayek’s system sustain this interpretation.

The context of his statement is on the way markets, via the price system, help to transmit important information that would never be accounted for in a system of central planning. In other words, it is a technical economic defense of the Liberal state. As an example, he discusses the way that the price of tin helps to communicate to all the possible buyers and sellers of tin how they should adjust their practices:

The most significant fact about this system is the economy of knowledge with which it operates, or how little the individual participants need to know in order to be able to take

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the right action. In abbreviated form, by a kind of symbol, only the most essential
information is passed on, and passed on only to those concerned. 394

In other words, by only reading the price signal, the individual actor can accordingly adjust his
action towards the “right” action, which is that of economizing and rational efficiency, creating a
“rapid adaptation to changes in the particular circumstances of time and place.” 395 Altogether, “the
whole acts as one market, not because any of its members survey the whole field, but because their
limited individual fields of vision sufficiently overlap so that through many intermediaries the
relevant information is communicated to all.”

The elegance of Hayek’s description of this system has led many to see this as a good
description of the anarchistic interactions that are made possible by the internet. Cass Sunstein,
Lessig’s colleague in the Law and Economics tradition, has written eloquently about how this is an
excellent description of the communication potential of the internet. 396 However, as I said, the
elegance of the description—and his avoidance of the structural folly based on 1)—is based on
Hayek’s desire to see the price mechanism as not only a communication system, but a disciplinary
mechanism. While he is still wrapped up in singing its praises, Hayek speculates as to why it is left
to him to make these eloquent observations. He says that this is because “it is not the product of
human design and [the] people guided by it usually do not know why they are made to do what
they do.” 397

The first argument—that it is not the product of human design—is what makes Hayek
attractive to Law and Economics: it means that human action can be coordinated without the use
of a plan, regulated by the state. However, the second half of his observation assumes a great deal
more about the circumstances of this action. In other words, as stated above, the structure of the

395 Ibid.: 524.
396 Sunstein, Infotopia: How Many Minds Produce Knowledge.
action is presumed to discipline actors in a certain way: “The problem is [. . .] how to dispense with the need of conscious control and how to provide inducements which will make the individuals do the desirable things without anyone having to tell them what to do.” This, in a nutshell, is Cass Sunstein’s desire in promoting “libertarian paternalism.” Left undiscussed, however, is what “right action” or “desirable things” are. It is simply assumed that, by implementing a system based on prices alone—i.e. the market system disembedded from any other cultural norms—will ultimately create what Bourdieu calls “the enforced conversions” to the market modality. Yet the libertarian virtue depends on bracketing this process, seeing, instead, the “extended moral order” to be at once completely natural and the pinnacle of civilization. From this Hayek concludes that we are not only communicating across space, but across time, making the function of tradition supposedly the same thing as that of the free market.

With Hayek, we have effectively jettisoned the notion that these premises are natural. The elegance of his understanding belies the coercive force of the market. However, if this is seen, as Hayek does, as beyond human design, then we can’t argue with the discipline it enforces: it is more like a force of nature. Hayek, therefore, reverses the order of these premises, making 4) primary. As explored in the previous chapter, he (like von Mises) has no qualms about saying the state is necessary. The distinction, therefore, is in the mechanism of its discipline which makes the culture of capitalism effective. Hayek hints at what this would be, but there is not much in the way of an explicit statement.

How is this discipline enacted? How does the market modality take hold? The previous chapter discussed this in terms of the primitive accumulation of the system. Hayek’s statement focuses on premise 4) “the price system” and its effect on 1) the action of the actor, but presumes 2) and 3). In order for the market to be effective as an information communication and

disciplinary mechanism, every possible object of value must be subjected to its valuation. This means that every object must be a commodity, which means that every object must be the alienable property of some individual who is able to calculate its value relative to all other values. Moreover, every individual must be forced to submit to this system in their every productive activity in order to properly calculate the value of their properties and communicate that valuation to other members of the market community. The state, on the other hand, if it was to make sure that this system of discipline must, therefore, make every object of potential value a private, alienable property and make the rights in those properties clear and free of regulation.

This is what Hayek’s model would require in its purity. The price system requires a formal, juridical system which, as Wood says, makes the economic determine all social and cultural practices. The state is used to give all functional power over the society to the force of the market, which then channels all the dynamic processes of culture into the single index of commodity price. These can all be read through the central premises which assume everything—including IPR—to be property.

Clearly this is the reified culture of property taken to an extreme. The state necessary to defend this regime of property and exchange would hardly be “without human design” even if it had no public input in its function—i.e. even if it were completely undemocratic. However, though I’ve presented this as a logical problem of the structural folly of its stacked premises, the process that Hayek’s system necessarily implies is historically accurate. The issue of the cultural content and the cultural context of these presumptions can be left to the historical process of imposing this market mechanism, through the enculturation and primitive accumulation of the previous chapter. When one takes the logical and historical together—the pure model of the price system as presented here, along with its historical imposition in the Anglo American social formation—it is clear that, while the model was “nowhere completely carried out,” in the
contexts where it was partially implemented, all the significant questions about property could be assumed as settled.

Whatever the accuracy of the four economic assumptions above in relation to particular transactions (rather than hypothetical ones), they produce a circular logic, intimated above, when applied to the Law and Economics framework. The propositions of this pure theory of economic action that informs the Law and Economics movement circle back to one another to form a contradictory set of conclusions. In relation to the new concepts developed above, this circular logic most often occurs when the logical hypotheses of the pure theory are presumed to be historical hypotheses—that is, where the presumptions about human action in the pure theory are taken to be explanatory of the historical social formation in question. Alternatively, it occurs when the historical circumstances that make the above propositions function in actual social formations are presumed to be included within the pure, logical structure of those propositions.

Since each of these problems occur within the context of applying economic analysis to the study of law, or considering legal jurisprudence in relation to its economic effect, this circular set of conclusions is usually in relation to these issues. The goal of the movement is to show that Liberalism in law (the purely economic state) is more efficient, and that efficiency is the natural product of human economic interaction, absent the state. Therefore the contradictory set of conclusions this produces are that:

5) All things being equal, the legal interference with private preferences will have no effect on the distribution of resources, which will tend, no matter what, towards efficiency

5a) If a distribution of resources occurred, in spite of legal action, it was efficient.

6) The Law should not try to dictate distributions or uses of property since this will have an adverse effect on efficiency.
The first conclusion makes the state irrelevant to property distribution; the second makes it all powerful. Sunstein describes these in terms of different objections to the “Legal Interference with Private Preferences:” in other words, the attempt to use statutes of the law to shape preferences rather than, as the Liberal ideal would have it, to have the law reflect those preferences through its reliance on the private market. From his legal perspective, these are termed objections from the perspective of futility in the case of 5) and liberty in the case of 6), but in each case, the economic argument above is the fundamental assumption on which each objection relies: He says that

The objection from liberty has it that the government ought not, at least as a general rule, to be in the business of evaluating whether a person's choice will serve his or her interests, or even whether the choice is objectionable, except when the choice causes harm to others. The objection from futility emphasizes that in general, interferences with private preferences will be ineffectual, for those preferences will manifest themselves in responses to regulation that will counteract its intended effects."

It is important to keep in mind that, as in Hayek above, the term “preferences” here refers to the preferences of economic actors. In the ideal world of the Liberal state, these are the only preferences that are valid and the behavioral economics Sunstein attempts to employ, as Foucault says above, is oriented to making more of our preferences conform to and explicable by this logic.

In the meantime, Liberal theorists simply assume that this world exists. The objection from liberty, following Hayek, von Mises, Nozick and Epstein among others, is that the government simply shouldn’t interfere with the “preferences” of economic actors. This is regardless of the consequences or the form of political legitimation on which that government might rest: its sovereignty is reliant on its protecting the preferences of these actors as autonomous and sovereign. From this perspective, the state is an all powerful entity which has the apparatus to

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coerce actors into changing these preferences, or otherwise restricting them from satiating these preferences in so far as they do not harm anyone in process. The state’s omnipotence, therefore, is something to be feared and citizens of the Liberal polity should be leery of allowing the state to take any more power than is necessary. Liberty is precious and can easily be undermined.

From the perspective of futility, however, the state is starkly different. From this perspective, the private preferences of economic actors are so fundamental, so basic, so sovereign and natural, that even the full force of the state’s omnipotent regulatory power can do nothing to alter them. On this count, there is only one thing this apparatus can successfully protect—and on this point it is strikingly successful—that is the legal rules of property and contract, which, remember, are the natural, immutable foundation of the Liberal state (and the reified culture of property.)

In both cases, as indicated in my outline above, these political and legal imperatives, within the Law and Economics tradition, are often discussed in terms of their effect on (or representation of) economic efficiency. Rhetorically, these sit as independent, but strict, categorical imperatives, to be employed at various times depending on the context at hand. In my analysis, this is often used to defend the status quo of property distribution and its legal protection, in so far as that status quo is seen as closely representing the pure theory of Liberalism. Therefore, the status quo is presumed to be efficient in spite of previous state interventions (i.e. primitive accumulation), and this presumed efficiency (as in McCloskey below) suggests that making further interventions would be equally ineffective. However, if further interventions in the distribution or regulation of property seem immanent, the argument shifts to saying that the ineffective state is actually all powerful and its interventions will result in the inefficient allocation of resources. The only way these positions are coherent is from the liberal perspective which says the state and the law should only be used to protect current distributions of resources. The caveat, following the

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dominant ideology of “improvement” is that, if a better allocation would be more efficient, then the resources can be shifted. Liberty, in this regard, is equal to efficiency and vice versa.

Likewise, private preferences are presumed to be autonomous and rational when, as Amadae indicates above, they are oriented towards wealth-maximization, i.e. towards selfish ends. While Sunstein has little to say about the possible history of the primitive accumulation of property in private hands or the coercion this can effect (though he does quote Hale to this effect), he does hint at what we might call the subject oriented effects of that process—the process discussed in the previous chapter in terms of what primitive accumulation forces individuals without property to do. Here he notes that,

Preferences may also depend on legal rules that allocate entitlements and wealth; if so, it is hard to justify, without circularity, legal rules by reference to the preferences that are generated by them. Or consider preferences that can be traced to past deprivations. People may convince themselves that they do not want a good simply because they consider it to be unavailable; if the good were available, it might have a high value to them. In a converse phenomenon, people may overvalue a good, even become obsessed with it, because they have been unable to obtain it in the past.

In other words, people without property adjust their desires because to do otherwise would result in a disappointment. Or, more to the point, they accept their position in the culture of property just as they accept the position of the property owners not so much because that is what they prefer, but because that is what the law requires. The law has allocated entitlements and wealth in a certain way and failure to respect this has consequences that, all things considered, they would not prefer. Or at least, that is what the coercion of the Liberal state is supposed to help them

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400 Ibid.: 1132, n.13; he cites Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38, no. 3 (1923).
recognize. This is ultimately an iteration of Hale’s argument, stripped of its more radical goals: whereas Hale speaks about “intervening in market relations” in order to “counteract the coercive effects of private power” such that “the state could actually enlarge the scope of individual liberty,” Sunstein limits his goal to simply proving that, all things considered, the liberty of the preferences of all parties might still be preserved if there was some modicum of interference. In other words, there is no suggestion that private property is not sovereign, simply that it does take (and has taken) government interference to shape people’s preferences in relation to it, so there might be some way to adjust certain ways that property might be regulated.

Lessig, in his article discussed above and below on what he calls the “New Chicago School” also admits the politics involved in governing the market—or what Hale called “public power delegated by the state through its laws of property and contract.” Lessig, like Sunstein speaks of this only in terms of “regulation,” again showing his reticence to speak about any drastic, non-liberal measures in relation to these statutes. Still, he renews the political to the question of property, speaking about how the law “directly” regulates property and contracts by enforcing them coercively; as well as “indirectly” by enforcing social norms and institutional architectures that reinforce it as a social fact. He says that, therefore, it should be okay to “directly” regulate aspects of society if there is a need to intervene for some larger social good. This tentative approach to talking about the issue of state intervention of any kind reflects the current dominance of the Law and Economics—and Lessig’s basic agreement with its premises, most centrally on the subject of property and the efficiency of the free market.

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402 Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement, 71; Sunstein, "Legal Interference with Private Preferences," 1132. It should be noted that Hale and his associates in this earlier era were not making a strong Marxist argument that “maldistribution of wealth was an inevitable by-product of capitalism” but the notion of positive liberty “required the state to redistribute wealth to ensure to each citizen the minimum necessary for economic and moral autonomy”(43). This last point is notable because, as the following chapter mentions, Lessig himself is quite aware of the Jeffersonian argument—much like this one—that the best kind of population for the democratic nation would consist of yeoman farmers.


It should be no surprise to these humble scholars—and especially Lessig—that this perspective sees intellectual property equally sovereign, advancing the arguments of liberty, efficiency, and the futility of altering the status quo in its defense. For example, when Law and Economics scholars Richard Posner and William Landes set out to investigate the copyright and trademark systems, they presume, from the outset, that these systems, as they have developed, are efficient.405 Elsewhere, when looking at the increased scope and scale of copyright and trademarks—since maximalist IPR is the status quo—they don’t set out to investigate it according to the principles of balance or democracy that critics like Lessig of the maximalist position might; instead, they presume the legal framework and the economic relations inherent in them are efficient.406 These laws have developed in a way that serves the economic structure of incentives for property in a particular way and shifting it at this point—away from the maximalist position—could undermine what “improvement” has occurred: “we show that just as an absence of property rights in tangible property would lead to inefficiencies, so an absence of copyright protection for intangible works may lead to inefficiencies because of congestion externalities and because of impaired incentives to invest in maintaining and exploiting these works.” In other words, the economic efficiency of the maximalist property regime is taken as a given—based largely on the assumptions of the reified culture of property. While elsewhere Posner gives some credence to the fact that the distribution technologies that facilitate the copying threatening these incentives also create economic gains for the producers407, he concludes with an observation informed by the Public Choice variation of Law and Economics. This mandates that we see the development of

law as a result of asymmetries in incentives to engage with policy discussions (rather than inequalities in access to legal resources); Posner speculates that the increase of maximalist IPR is therefore a function of the fact that, between the equal parties vying to work out their efficient ends, the copyists—and by extension the public domain—simply “have less incentive to challenge intellectual property rights in the legislature than the owners of such rights have to defend them.” As in Walter Lippmann’s Liberal manifesto, The Phantom Public, the public interest simply suffers because no one is really all that interested in it. Or, more accurately, its interests are diffuse and depersonalized; except for people like Lawrence Lessig no one is all that concerned about it. The changes, therefore, are not the result of the excessive power of the maximalist copyright lobby; they are the predictable outcome of an asymmetry of “interests.” However, unlike Bernstein’s defense of Lochner because it overturned legislation resulting from asymmetrical (class oriented) interests, Posner uses the same Public Choice arguments to show that the status quo of IPR should remain.

From their perspective, the status quo is presumed to be the product of liberty and efficiency; altering them would be futile. Protecting property through the formal laws with the force of the state is not coercion or the result of political decisions; it is the product of an inherent efficiency to the market’s allocation of private preferences according to strict, scientifically valid economic laws. In so far as that market is also a mechanism which forces others into making decisions—in so far, that is, that it has a functional power guaranteed by the coercive protection of formal laws—this force is justified because, again, it produces efficiency. I will return to this last point—about the distinction between formal and functional power—in looking at McCloskey’s explanation of the process of enclosures. First, I will look at the arguments which inspired her own analysis: those of Law and Economics progenitor R. H. Coase.

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In the specific analyses for which R. H. Coase is best known, he is mostly concerned with analyzing the efficiency of economic outcomes in different legal regimes. As an economist, he takes the four premises above to be the natural order of the world. His early work on “The Firm” presumed most of the ideas that animated Hayek’s discussion in “Uses of Knowledge” above. He assumes, for instance, that the market is the most efficient mechanism for valuing and pricing goods. His question in that case was why there were so many large corporations that had vertically integrated and elected to forego the brilliant insights of the pricing system. His answer, predictably, was that it was more efficient because it cut down on transaction costs.  

Likewise, in the article most closely associated with the Law and Economics approach, he approaches the problem of what he calls “social costs.” If the purpose of “The Firm” was to write a caveat to premise 4) above—which says that, in so far as monopoly businesses forego the market, it is done because it is efficient—Coase’s “Social Cost” article is meant to argue against regulation of any kind by introducing the idea of “joint costs” as a subcategory of premise 3). This would read:

3a) included in this category are aspects of the social and natural world which were previously taken to be “given” and now should be understood as having a particular cost. These also must be included in the transaction costs and, if owners or users wish to continue their practices, they must contract and pay for these uses, according to their value as assessed in the system of prices and individual preferences.

Included in this would be environmental characteristics such as clean water or, perhaps, the so-called “creative commons” of previously created works. In essence the argument of Coase, and by extension of the Law and Economics movement is that the free market functions best without any

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411 Coase, "The Problem of Social Cost,"
regulatory interference. People already inherently contain the rational characteristics to help the market function efficiently: it is the government that distorts this rationality and arbitrarily forces one set of property owners to absorb the totality of social costs.

Coase's argument, in a nutshell, is that "absent transaction costs in private bargaining, legal rules will have no effect on the ultimate allocation of resources." The upshot of this article is that any of the social benefits that would accrue under the state policy (i.e. environmental concerns, etc.) would also appear in the pure market interactions, but that the latter would actually produce a more efficient outcome—and lessen the chance that the regulation will produce a greater harm. He begins with the case of a hypothetical farmer and rancher. The problem to be solved is that the farmer has crops on his property, which the rancher's cattle trample or otherwise destroy. Coase produces two separate scenarios: one in which there is a regulation mandating that the rancher fence his animals and another in which the rancher and farmer, absent any state regulation, simply contract with one another, agreeing to pay one another for the right to either continue ranching or to continue farming. The cost of this payoff—or the cost of fencing—is therefore included in the total accounting of each actor, making their decision about whether they should continue their activity contingent on this calculation of overall economic efficiency. At the end of this thought experiment, Coase demonstrates mathematically that the effect is the same—meaning that the potential regulation of the hypothetical transaction makes no difference to the absolute efficiency of the situation.

The most important side of this hypothetical interaction is where he assumes there is no state regulating these transactions. In this case, there are two alternatives arrangements which might produce a more or less efficient result. On the one hand, farmer pays the rancher to stop or pays to put up a fence. The alternative to this is that the rancher would pay the farmer for the

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damage his cattle have caused or pay to put up the fence. Coase’s exposition of these alternatives details potential prices for each of these elements of these possible arrangements. As mentioned above, his conclusion, upon calculating what the most efficient option would be, is that these costs of these unregulated transactions are almost identical to the costs that would have existed in the case of hypothetical state regulation. Thus the most efficient outcome, as measured solely by the price system, would be produced in either case. State regulation, in other words, is futile.

However, his unregulated outcome seems unlikely, unless we can assume that a) the farmer has a rifle and the rancher doesn’t; and or b) these arrangements would occur within some previously assumed set of social norms. This is what Sunstein and Lessig mean when they call attention to the presence of social norms which might regulate in the absence of law—norms that, more than likely, “are part of a [legal] system that constitutes, and does not simply reflect, the social order.”\textsuperscript{413} In any case, the pure logic of the price system is not the only thing regulating these interactions. Absent some form of force, and even including it, there must be a general understanding—the law of the prairie perhaps—that leads them to come to some reciprocal agreement.

In this unregulated experiment, Coase’s first objective is to demonstrate that, without any state intervention, there is a hypothetical equilibrium price where each party adjusts their activities to these prices ("in perfect competition"): the farmer to adjusts and decides whether it is worth the cost he has to pay to the rancher to keep his farm; or the rancher calculates into his new business the (less likely) payment he makes to the farmer for the damage his cattle cause. As Coase says, "The payments for damage [or in the case of the farmer, the payment to keep the damage from happening] would then become part of the cost of production."\textsuperscript{414}

\textsuperscript{413} Sunstein, “Legal Interference with Private Preferences,” 1136.
If the first objective is to show that state regulation is futile, Coase’s second objective is to argue for a theory of what Legal scholar Duncan Kennedy calls “joint costs.” Kennedy observes that Coase’s innovation is not only the introduction of the market mechanism in place of the legal mechanism: it is also to point out that “if we are worried about how to allocate joint costs, with a view to efficiency, there is no reason to presume that the party we would intuitively identify as ‘active’ should have to pay, and that the intuitively ‘passive’ party should not;” or, as Coase says more succinctly, "in the case of the cattle and the crops, it is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops." In other words, following somewhat from observations made by Hale, we cannot assume that the farmer was passive simply because he was there first, and the rancher active because he appears on the scene later: both are actors engaging in economic activities.

Therefore every party to a transaction should be seen as bearing the costs of continuing their own activity. However, like the price mechanism, or value in general, it is not for Coase to speculate about the mystical process whereby people will arrive at some agreement to pay for an infringement of what they previously regarded as a passive right. In other words, though the farmer was already involved in his industry, the fact that the costs he incurred suddenly increased (i.e. to pay off the rancher for not ruining his crops) should not really be seen as a legal problem involving the abrogation of certain rights, but an economic one stemming from a change in the circumstances of his production. Or,

If we are to attain an optimum allocation of resources, it is therefore desirable that both parties should take the harmful effect (the nuisance) into account in deciding on their course of action. It is one of the beauties of a smoothly operating pricing system that, as

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415 Kennedy, "Law-and-Economics from the Perspective of Critical Legal Studies,
has already been explained, the fall in the value of production due to the harmful effect would be a cost for both parties.

A longer exploration of Coase’s theory would more fully explore the implications of this second objective—which is ultimately essential to the shift in perspective he provides for the Law and Economics movement: in short thinking about joint costs is a wholly novel cultural assumption. It is above and beyond the economic presumptions that must be assumed to be active for his system to operate at efficiency. It is more akin to the system of voluntary payments for protection and presumed rights that operates behind the scenes in Nozick’s *Anarchy, State and Utopia*. In the latter’s ideal of state-free human action, as mentioned above, he handily assumes that there is no question about what rights are and through what means they can be legitimately violated or enforced. The notion of joint costs also sets the ground for Epstein’s argument in *Takings*. The latter is especially pertinent to the overall discussion of property rights in relation to economic value and the state. While it focused on the policy of eminent domain, the upshot of Epstein’s argument is that the government has no right to regulate even environmental standards unless it is prepared to pay businesses that might be hurt by those standards for all potential lost revenue.

Epstein, therefore applies the Lockean argument about property in the extreme—that the owner has the natural right to the property and all potential value created from it—and applies it to conditions of eminent domain and, by extension, environmental regulation. Coase doesn’t go this far, but in presuming the hypothetical payment of these joint costs—or even the negotiation of them according to these terms—he is presuming an entirely novel cultural system. He is

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Ibid.

Richard Allen Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985). The book was a watershed for the Law and Economics tradition. It also became a point of contention in the Senate Judiciary Committee confirmation hearings for Clarence Thomas. Before Anita Hill came into the spotlight, committee chairman Joe Biden’s main concern was with Thomas’ possible agreement with Epstein’s argument along with a more general drift in the latter’s agreement with so-called Natural Law.
presuming that people will ignore even the existing arrangement in the interest of economic efficiency.\footnote{In an interesting comeuppance, these two arguments have converged in one of the more contested Supreme Court cases of the last decade, the case of \textit{Kelo v. New London}. Here, in the interest of efficiency, a private corporation was given the right to condemn individual houses under eminent domain clauses. Libertarian stalwart Walter Block blames Coase and the Law and Economics movement in general for the ruling of this case. Walter Block, "Coase and \textit{Kelo}: Ominous Parallels and Reply to Lott on Rothbard on Coase," \textit{Whittier Law Review} 27, no. 4 (2006).}

This line of reasoning brings up some interesting issues, but none of them do much to back up his basic hypothetical proposition, which serves as a blueprint for what the Law and Economics movement hopes to build. Namely, a society which is so thoroughly in tune with the rationality of the market—the Liberal creed has such total cultural efficacy—that every social interaction (C1) would function according to its logic without any need for the guiding, disciplinary hand of government. Coase therefore presumes this society, where the logic of market efficiency prevails and joint costs are understood by all parties, already exists. In these changed circumstances of market utopia, the government is given no credit for making the market function efficiently: “there is no reason to suppose that the restrictive and zoning regulations, made by a fallible administration subject to political pressures and operating without any competitive check, will necessarily always be those which increase the efficiency with which the economic system operates.”\footnote{Coase, "The Problem of Social Cost," 18.}

If Coase were interested in looking at a historical rather than logical situation in which there was a conflict of interest between farmers and ranchers, he could have looked to Texas, where the enclosure of land with fences was one of the more arresting developments of the late nineteenth century. It involved just the kind of conflict between, on the one hand, the older generation of cowboys and small agricultural holders, many of whom grazed their cattle on the “free grass” and a new class of large landholders, taking advantage of the new invention of barbed wire (patented in
1873) to consolidate and fence large holdings. After a long series of violent confrontations—a great deal of which was caused by the kinds of private security forces Nozick seems to find so endearing—the state legislature voted in 1884 to make fence cutting a felony; for a brief time it was even illegal to have wire cutters on your person in the state capital. As the notice in *The New York Times* read:

Fence-cutting has been made a felony [by the Texas legislature], and the inclosure of the property of small landholders in large pastures is prohibited—a prohibition which will protect one class of fence cutters in their rights and make them law-abiding citizens. The other class of fence-cutters—those moved by a spirit of lawlessness and communism—are turned over to the Governor, who is provided with $50,000 to use in their suppression.

This effectively legalized fencing, which, as in the enclosures of England, was the real change in question. In the days leading up to the passage of the legislation, one observer stated that:

The fence-cutting which had caused so much trouble, he said, grew out of the conflict between the great interest of stock-raising and the lesser one of farming. The old civilization established the doctrine of free grass; the new asserts the rights of individual property.

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421 “Most small land owners had moved to Texas with the "dream" firmly implanted in their minds and plans that Texas would always have free grass and open range. They also felt that they would be able to always ride in any direction without any hindrance. When the settlers with small holdings saw that outside capital was moving into the state and investing in huge tracts of state lands and constructing fences at an alarming rate, they almost panicked. The state tried to pacify them by demanding gates every three miles on the new fences; this was not enough. They began to see that a new era was a threat to their economic system of free grass. The result was that men, who had for years been good neighbors and had helped build Texas, combined with unemployed cowboys, became breakers of the law in destroying every fence they could find.”

http://www.rootsweb.ancestry.com/~txnavarr/business/cattle_industry/free_grass_vs_fences.htm

422 Nozick, *Anarchy, State, and Utopia*. He actually claims that, unless it is only the people who want protection and have paid for it, providing protection to everyone, equally, is a kind of redistribution. Cf. p. 26. He can be forgiven for this kind of class (and race)-biased logic because he wrote these lines well before Public Enemy's “9-1-1 is a joke” was released. Or, more accurately, he can be forgiven for not realizing that there are other vectors of force that ensure his more libertarian logic is actually predominant, even when everyone is paying the taxes for the protection racket in question.


424 “Papers on Rural Topics; Mr. Parsons Attacks Sharply the Bureau of Agriculture,” *The New York Times*, 2 Feb 1884
In other words, the problem of “Social Cost” is much more complicated than a simple, market
based transaction when the basic agreement cannot be reached between the contracting parties,
when the culture one must assume doesn’t function as automatically as a logic problem might
indicate.

Politics reinstalled.

Coase is an economist so it makes sense that he would ask the questions in this fashion. The
problem arises when Coase’s theorem becomes the touchstone for every form of legal intervention
that could have social effects: Coase supposes that the liberal culture of property should become
the only guideline of social interaction.

On the whole, he's right to point out that the involvement of the law and the state often
produces arbitrary judgments in favor of one set of rights over another. Of course, in his case, he
doesn't necessarily take up any situations where there is any prior distinction between the parties:
it's always just one small entrepreneur against another. The court performs the role of sorting one
claim against another and, as Marx put it, "between equal rights, force decides." In this case, the
law appears as an arbitrary sorting mechanism.

Another of his examples in this regard is the famous case of Sturges v. Bridgman. In this
case, a confectioner sets up loud machinery for mixing candy in a room adjacent to the next door
doctor's office. He does this for 8 years without any problem. Then the doctor wants to use this
room to see patients and so finds the machinery a nuisance. He takes the candy man to court and
wins an injunction because the judge, in Coase's interpretation, is basically setting himself up to
make zoning decisions which would have an effect on where economic activities should take
place. On the other hand, Coase claims that, after the fact of the judgment, the pressure of
economic efficiency would eventually undermine this juridical allocation of rights.
Coase's interpretation of this case illustrates the method in question. Here, the culture implicit in the set of economic presumptions above is so deeply ingrained that even a court could not hold back its results: as before, it is futile in undermining the efficiency of liberty. He says that the court, in making their injunction (which, keep in mind, would have legally prevented the candy machine from being used), had not considered that, "it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties."[425] In other words, that, like the hypothetical case of the farmer and the rancher, instead of an injunction the doctor and the candy man would have worked out some payment plan where the disuse of one's room or equipment (respectively) would have been compensated by the other and, in the end, that compensation would have figured into the decisions of each about how they would set up their business: it would become a joint cost.

Of course this isn't what happened: the doctor wanted to use his room and couldn’t reach a compromise with the candy man, hence they went to court. Instead of a mutually agreeable contractual payment figured into the bottom line of each, the court told the candy man to stop making the racket because he was operating in a residence and, in general, that's disturbing. But the rub, as mentioned above, in the Law and Economics understanding of these kinds of social transactions, is that the hypothetical becomes the actual. So even though the court issued the injunction,

With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. It was of course the view of the judges that they were affecting the working of the economic system and in a desirable direction. [. . .] The judges' view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary

market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.\(^{26}\)

In other words, the court wasn't aware that it couldn't effect any social change because the market imperatives would override their attempt at social engineering. These judges were attempting to "rearrange" rights by their judgment, but this is a futile task because the market would always prevail in these cases. That is: they weren't aware that the hypothetical situation that didn't actually happen and wouldn't be in force would overturn the reality of their judgment, which as was earlier stated, in fact made the hypothetical possibility impossible. If this isn't evidence of the incompetence of government, what is?

Of course, in the real world, he is correct that the efficacy of the law is shaky and arbitrary. But it has nothing to do with the analysis he produces. People use loopholes, they pay off police, they bribe their neighbors or intimidate them using their economic or political power to create advantages and "rearrange" rights—this is, evidently, what happened in Texas, where the "great interest of stock-raising" overruled the "civilization" of the "lesser interest" of farming.

The function of the law is an empirical question. There are, in this sense, a variety of ways that power can be used by those who have it: the law is, in truth, only one such way. As a supposedly objective force, in its democratic ideal, the law is supposed to be used for securing rights, thus it could be used by the less powerful party to secure some right in their interest. Contrary to this, Coase says that we shouldn't concern ourselves with this function of the law: it is usually

\(^{26}\) Ibid.: 10.
ineffective anyway and, in the end, likely supports inefficient uses of materials. Thus, even if there is some apparent injustice which might appear to be correctable by some reallocation of rights or resources, it should not be undertaken because it might result in some unforeseen inefficiency. In the end this narrow, economic concern is the only one anyone should worry about. Or,

The economic problem in all cases of harmful effects is how to maximise the value of production. [. . . .] The immediate question faced by the courts is not what shall be done by whom but who has the legal right to do what. It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production. 427

It is a rare pathology that can divine an omnipotent, yet powerless foe, but I suppose many articulations of capitalism in the mouths of the average Marxist could appear as such to the outsider. The ultimate point, for the Law and Economics movement, is that the Law is, on the one hand, unjust when it intervenes in the economy and, on the other hand, ineffective because the market will always overrule it. 428 This highlights the paradox of libertarian economists: on the one hand, they want to present a deontological truth of liberty: the state should not intervene in “private contracts.” This, they say, is simply a-moral. But since they also have to defend their creed to a wider audience, they appeal to this underlying utilitarianism: non-intervention produces efficiency and growth, and that’s good for everyone!

427 Ibid.: 15.
428 As mentioned above, this is along the lines of Cass Sunstein’s “Paradoxes of the Regulatory State” where he argues that altering behavior with the law often renders its effects moot—or even counter to the intended effect. But in most of these cases, the point seems to be that capital has the power, so it is best to serve capital rather than try to stand in its way.
McCloskey’s 1972 article, "The Enclosure of Open Fields: Preface to a Study of Its Impact on the Efficiency of English Agriculture in the Eighteenth Century," is cut from the same cloth as Coase’s. The difference is that McCloskey enacts a reversal of Coase’s argument about legal transaction costs. Her primary hypothesis is that the enclosures didn’t happen earlier simply because the legal regime wasn’t up to snuff. It is an early variation of Hernando de Soto’s argument that the only variable holding back development in the third world is a lack of clear property rights. In this case, McCloskey asserts that, before the mid-nineteenth-century Parliamentary enclosures, the legal regime created a cost that overrode possible efficiency gains. Her assumption—following the logic of Locke and others—is that enclosed fields would have been more efficient; that, as rational calculators, the agriculturalists of the day would have enclosed, but that the need for unanimity of the peasant population under common law prevented it from happening earlier. It’s one of those unfortunate problems with democracy as she points out early on,

A conqueror can achieve by the threat of his sword and a stroke of his pen a result of eliminating inefficiencies of an earlier social arrangement on which a society of laws must spend many years and much expense. Legal constraints on enclosure preserved equity at the cost of making it more expensive than it need have been. This is stated as a simple observation. While quite true on its face, the assumption that the parliamentary enclosure didn’t effectively have this basic coercive character (of conquering) is historically unfounded. As Moore says, “Not all historically significant violence takes the form of revolution. A great deal may occur within the framework of legality that is well along the road to


430 Donald McCloskey, "The Enclosure of Open Fields: Preface to a Study of Its Impact on the Efficiency of English Agriculture in the Eighteenth Century," *Journal of Economic History* 32, no. 1 (1972): 22. Please note, for citation purposes, that, though this article originally appeared under the name “Donald McCloskey,” I refer to the author as “she.” Since the publication of this article, the author has undertaken gender reassignment and now writes under the name “Diedre McClosky.” It seems most respectful to refer to her thus.
Western constitutional democracy. Such were the enclosures that followed the Civil War and continued through the early Victorian era. It is a stark contradiction to discuss the parliamentary enclosures—which would have come from far above and overrode "by majority rule" the "inefficient" opinions of recalcitrant peasants—as if they were enacted on a question of efficiency.

On the other hand, it is also in line with Coase's basic set of assumptions that, in a way, the legal mechanism is unnecessary; that a contract between parties is all that is needed. It's not entirely unusual to find McCloskey using Coase to examine the enclosures. Coase is most famous for his discussion of the efficiency gains of "The Firm"—in other words, the modern, corporate equivalent of the large landowner. The ahistorical, apolitical approach—where it actually doesn't matter if the farmer was there first or if the rancher and he would come to an agreement—is evident in both articles. The case is abstracted from reality along certain lines; then the logic applied in the abstract model is reintroduced to reality as if the forces—in this case, market forces—extant in the abstraction are all that we need to consider. On the other hand, these forces can never be blamed for functionally coercing the peasant off his or her land: the functional power of market forces is beyond politics or ethics. Again, the only disciplinary perspective capable of discerning this in full is some permutation of Law and Economics. Thus, McCloskey brushes aside claims of historians—in this case, the Hammonds, who are most well known for their study of the broader social effects of the enclosures. Her economic perspective suffices, as she explains:

Many students of the enclosure movement have emphasized not the size of the costs and benefits, but their distribution. A remark of E. P. Thompson could serve as a motto for the tradition of Marx and the Hammonds on this matter: "Enclosure (when all the sophistications are allowed for) was a plain enough case of class robbery." This judgment on the equity of enclosure would require no comment in an inquiry into its efficiency.

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432 Coase, "The Nature of the Firm,"
were it not that the incentive to enclose could have been affected, at least theoretically, by
the distribution as well as the size of the costs and benefits. […] As much as enclosure
may have hurt the poor, however, it is doubtful that the hurt was large enough, relative to
the net gain to be achieved by the larger owners of the land, that it influenced their
decision to enclose. This is because the poor were very poor: the value of their land and
other rights was small. In consequence, an equitable procedure, which compensated them
fully for their ancient rights, would have changed the net benefits accruing to those who
had the power to set an enclosure in motion very little. As a first approximation, then, the
issue of equity may be set to one side.433

In other words, it wasn't class robbery because the poor didn't have much, thus taking all their
land wouldn't have helped the enclosing landlords much. If all that mattered was the difference
between efficiency arrangements, this might make sense. However, for the peasant, much more
was at stake (as the previous chapter illustrated). As Moore puts it, “for the ‘surplus’ peasant it
made little difference […] he (sic) was caught in the end between alternatives that meant
degradation and suffering, compared with the traditional life of the village community.”434 Moore
also claims that "it is rather likely, though not absolutely certain, that the wave of parliamentary
enclosures in the eighteenth and early nineteenth centuries merely gave sanction to a process of
eroding peasant property that had been going on for some time."435 In other words, in so far as
McCloskey’s observation is correct, it was because the class robbery had been taking place over a
matter of decades, using brute force and economic coercion. The official enclosures were merely,
as with Locke’s theory of property, the dike of the state placed around the pool of resources
accumulated by the property possessing class.

433 McCloskey, "Enclosure of Open Fields," 29-30. I’ll put to one side the rather complex arguments about this that
involve merchants purchasing property simply to have the title and the political power in parliament.
435 Ibid., 25.
And even if the changes that were made by the legislation were significant, the process of enclosure that McCloskey characterizes as being, merely, an efficiency issue that was solved by the change in Parliamentary procedures certainly overlooks what her preferred system of majority rule (as opposed to the unanimous system under common law) actually meant in practice. While McCloskey finds it a boon for efficiency that the rational calculators of the day finally remove the nuisance of the juridical transaction costs to enclosure, she fails to see that,

It was Parliament that ultimately controlled the process of enclosure. Formally the procedures by which a landlord put through an enclosure by act of Parliament were public and democratic. Actually the big property owners dominated the proceedings from start to finish. Thus the consent of "three-fourths to four-fifths" was required on the spot before Parliament would approve a proposal to enclose. But consent of what? The answer turns out to be property, not people. Suffrages were not counted but weighed. One large proprietor could swamp an entire community of smaller proprietors and cottagers.436

If McCloskey had actually read the Hammonds—which is where Moore gets this fact—instead of simply writing them off as irrelevant in so far as her discussion of efficiency was concerned, then perhaps the abstract calculation here would have had to deal with the messiness of historical facts. But, in the end "the issue of equity may be set to one side." Her analysis seems to turn on the fact that, if there were big greedy landlords, their enclosing would only be rational if there was a lot of land to be got by expropriating the peasants and cottagers in the area. If that's not the case, then this could not be seen as a possible rationale for the enclosures and, therefore, it isn't economically significant. It is, as it were, a lot of work to expropriate all those peasants and cottagers: if the enclosers weren't going to win big, it hardly seems worth the effort.

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436 Ibid., 42.
To come full circle to Coase, this is a perfect use of his theorem, which only employs examples where the parties are relatively equal and the arbitrary force of the law is all that clouds what would be an otherwise rational transaction. Differences in political or economic resources are bracketed at the outset. For McCloskey, instead, the lack of functional economic and political power at this point basically makes the peasant an irrelevant quantity in the calculation. What she fails to mention is that, according to her earlier discussion of common rights, these peasants would have mattered because they would have held up the unanimous vote to enclose. In other words, the peasant only ceased to matter, in her calculus, after the peasant ceased to matter in the calculation of the transaction costs for enclosure. Again, according to her, the efficiency gain through the Parliamentary enclosure, tautologically, would only have occurred if it was efficient. This is a clear example of where the argument for “liberty” seems suspiciously focused on a particular kind of liberty—one which Locke, as a large landowner, might have condoned.

Regardless of how decisions were made before the process of enclosure, McCloskey basically sees it as reasonable to have more Parliamentary enclosures: they lowered the legal transaction costs because they didn't have to deal with all that messy attention to peasant rights. To her, in the end, it doesn't really matter what that Parliamentary process looked like: the conclusion she proposes as a rational explanation for why this massive social undertaking occurred is an ex post facto justification for what even she seems to admit was a system which removed the democratic break on the wheels of development. In the end, the efficiency of enclosure is assumed; the choice is simultaneously assumed to be the product of the entire community—which had accurately predicted the efficiency of them at any given time—and of the people who have the most to gain by limiting this choice to themselves. These are, in economic terms, the same thing. In the market, after all, suffrage is weighed, not counted.

Assuming, for the moment, that this was a significant kind of development.
So the sleight of hand is once again completed: the legal breaks are simultaneously assumed to stop the proper function of the market and to be completely irrelevant to its operation. In the end, all that matters is that we believe it. "If efficient, then rational" is the only proposition offered. And the answer, in the end, is "if it occurred, it must have been efficient." And, as the codes and terms for discovering this scientifically are only available to the privileged few, it is left to that few to help produce the possible alternative interpretations. The Hammonds and E. P. Thompson won’t do. Only a pre-approved, narrowly defined metric utilized by a fellow professional economist will do. She makes a suggestion, at one point, for where one might look for how to prove her assessments correct:

The increase in rent, then, is known in a general way, can often be known in detail for particular villages, and can be used as an estimate (although biased downwards by not including the value of the increased employment of the other, mobile factors of production) of the increase in the value of output resulting from enclosure.

She then hypothesizes factors to be considered in using this index and sets up possible figures, ultimately saying—despite the fact that she had just asserted efficiency was the motivating factor in the enclosures—that it would be difficult to say either way just how efficient they were because it would be hard to create a sample through which it could be compared. This leaves her the space, despite dismissing most other possible hypotheses, to simply say she was clearing the ground for future research. A better use of the metaphor would be that she was enclosing the possible space for analysis and fencing off potential hypotheses.

When a fellow economist, Robert Allen, takes her up on looking at the data, he actually finds that, not only were the enclosures not necessarily more efficient than open fields, but that in

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438 The caveat to this is, of course, when the thing that occurred was some sort of state centralization: then it is both irrational and inefficient and there is no need to examine any evidence either way.
so far as they created gains in rents, it was from the redistribution of income upward from the newly dispossessed peasants and cottagers to the landlords. He does this using the index that McCloskey herself recommends and data compiled by an advocate of enclosure during the period, a man named Arthur Young. Allen’s conclusion (as an economist using the reductive, quantitative methods that McCloskey and Coase would insist upon if anyone wants to speculate on any social consequences of a state policy) is that the results would have surprised Young, who was an influential proponent of the view that enclosure increased efficiency, for they show that in the late eighteenth century, the enclosure of open field arable did not have that effect. Instead, enclosure caused a massive redistribution of income from farmers to landowners.

In other words, that messy brand of humanities scholarship that Thompson and others used actually produced sensible results. They should be pleased Allen bothered to go back and analyze data using a method the contemporary economist would find acceptable, but one wonders why it becomes necessary for the burden of proof to shift so fully so that, not only are the people who question the logic of the neoliberal hypothesis based on their own findings required to disprove that logic on its own terms, but they are required to adopt the methodological tools of the economist as well. This makes sense over all, but then one wonders why she even mentions Thompson and the Hammonds except to show her fellow economists that she's taken the requisite anti-Marxist piss.

The main difference between these two articles in the same tradition is who the law seems to work for. Coase is responding to a perceived bias against business in certain forms of law and welfare policy. In the enclosures, we can basically assume that it was in the direction of “efficiency” of one sort or another.

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This is not to say that enclosure for private use was the only option that could achieve this efficiency gain. As the previous chapter outlined, there were a wide variety of other options. There were alternatives—though they, too, would have relied on some kind of law to enforce the social norms they hoped to achieve. One of the primary movements at the time was the Diggers, led in part by Gerald Winstanley. His goal was to make use of all the new innovations in collective, intensive farming a la Francis Bacon, but to make the rewards equally collective. Originally, he had envisioned an anarchist society where the state would whither away. But "after the collapse of the Digger colony, when Winstanley came to draft a constitution for his new society, he included laws because he realized that, 'offences may arise from the spirit of unreasonable ignorance.'" Though he used laws, the goal was to have "a longer process of education and adaptation" which would create the more general social norms required to police the commons through mere social norms. So, to come full circle, it would take all the assumptions of the Law and Economics tradition save the one about the status quo—or its libertarian ideal—of political economic organization being the most efficient.

The point Coase makes about political corruption in the interests of certain parties is something Libertarians and Marxists would agree upon. However, the former see this as separate from the distribution as it now stands while the latter sees this understanding of government as something which is not unique to this era: it also existed in previous eras, perhaps more so, and the current distribution is in many ways skewed because of this corruption. The answer for the Libertarian is that government opens the door for corruption, working for certain interests and against others: the best thing to do, therefore, is to limit government, take away these tools that make corruption possible and simply accept the status quo distribution. It is hard to see this as very different than the idea that the state would eventually "whither away"—it just relies a very

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different idea of what kind of culture should prevail. For this tradition, it is the liberty of property that should be beyond question. This is so intertwined with our basic human make up that altering it is futile. In short, the question of what the state should do, of what it is for, is again removed from politics. This time the reason for the democratic paradox is a reliance on a certain set of scientific economic theories which are able to understand human interaction so clearly that mere humans should not bother meddling in the arrangements to which they are subjected: and, in so far as they are not subjected to them, the market needs to compel them otherwise.

Up until now the focus I’ve tried to draw out in terms of a particular kind of human behavior has largely been the unexamined basis of the Law and Economics tradition. The major deviation that Lessig has made is in making it explicit. He is most well known for his discussions of copyright and the relationship of law to the internet. But his first breakthrough book on this, CODE, was an expansion of the theory he worked out in an article the year before on what he called “The New Chicago School.” This, in turn, built on a series of articles he penned in the 1990s trying to outline critiquing Law and Economics for overlooking social norms—or the lack of them—in simply asserting the “relatively autonomous and efficient regulations of a market relative to law.” Far from replacing the economic assumptions above or the general arguments of the Law and Economics movement, Lessig simply wants to point out that more is needed to make this happen. There are a variety of other modalities through which regulation happens—what he calls norms, markets, architecture and law—and these should be understood in writing regulations, using, of course, the same “rational choice perspective that would help understand these modalities alternative to law.”

443 Lessig, “The New Chicago School,”
444 The quote is from Ibid.: 674. The other articles are Lessig, “The Regulation of Social Meaning,” ; Lessig, “Social Meaning and Social Norms,”
Law should understand, within these separate domains, its own insignificance and, the old
school implies, should step out of the way. [. . . .] But unlike the old school, the new
school does not see these alternatives as displacing law. Rather, the new school views
them as each subject to law—not perfectly, not completely, and not in any obvious way,
but nonetheless each is itself an object of law’s regulation. [. . . .] law not only regulates
behavior directly, but law also regulates behavior indirectly, by regulating these other
modalities of regulation directly.\textsuperscript{445}

Lessig is certainly correct in the fact that there are alternative regulators, that there is a wider swath
of social and cultural life than that captured by the narrow lens of what he calls the “Old School.”
But in taking on most of the latter’s goals, simply making the means by which they will be
achieved more explicit, he breaks an unwritten rule.

He is wrong, on the other hand, that the Law and Economics tradition says,
equivocally, that “forces outside law regulate, and regulate better than law,” and thus “law
should step aside.”\textsuperscript{446} On the contrary, there is a very deep belief in the need for the law—the
Rule of Law is paramount. The law is just there for a very specific end: enforcing property rights,
“natural rights.” This, of course, requires a great deal of regulation, but for the most part, due to
what Marxists call the separation of the political from the economic, a good deal of that regulation
can take place in the market. As Robert Hale pointed out in the first Law and Economics
movement, this means not just that “factors of production” will be employed most “efficiently”
but that there will be a variety of coercive mechanisms that will compel those without property to
work for those who do. Hale says that, while some people might be uncomfortable calling this
coercive, “this can be explained, I think, by the fact that some of the grosser forms of private
coercion are illegal, and the undoubtedly coercive character of the pressure exerted by the

\textsuperscript{446} Ibid.: 661.
property-owner is disguised.”

This certainly sounds so terribly 19th century that most fashionable cultural theorists would squirm at their utterance: yet this is merely a gentle extension of the principle of liberty that Epstein, writing in the 21st century, still feels compelled to defend.

As mentioned above, in citing the lessons he has learned from the Chicago School, Lessig means to point out something like Cass Sunstein’s “Paradoxes of the Regulatory State.” Here Sunstein refrains from much discussion of any positive case of regulation functioning correctly. He mentions a few isolated cases where it was both effective and reached its goal, stating that “the view that regulation has generally proved unsuccessful is far too crude.” But he ultimately focuses on the overarching assertion that a “large source of regulatory failure in the United States is the use of Soviet-style command and control regulation, which dictates, at the national level, technologies and control strategies for hundreds, thousands, or millions of companies and individuals in a nation that is exceptionally diverse in terms of geography, costs and benefits of regulatory controls, attitudes, and mores.”

Thus despite Sunstein’s critique of the status quo in The Partial Constitution, his commitment to attempting regulation that will not compromise libertarian values—what he calls “Libertarian Paternalism”—hampers any real chance at correcting many of the problems he aims to correct. Or, more accurately, the limits placed on what can actually be defined as a problem and corrected using his behavioral economics make the horizon of change fairly incidental. To allude to his recent popular tome, one can’t, as it were, “Nudge” one’s way to social justice.

Lessig and Sunstein’s adherence to the libertarian underpinnings of the “Old Chicago School,” on the other hand, wins them no friends amongst colleagues in that school. It is likely that part of Epstein’s motivation for How Progressives Rewrote the Constitution was as a response to

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447 Hale, "Coercion and Distribution in a Supposedly Non-Coercive State,"
449 Sunstein, The Partial Constitution; Sunstein and Thaler, "Libertarian Paternalism Is Not an Oxymoron,"
Sunstein’s equivocal book on the New Deal. And it is especially the case in the area of the law that Lessig is now most known for: copyright. In both cases, Lessig and Sunstein renew something like the earlier progressive argument which says that the regulatory arrangements we have today—about property, rights, contracts and so on—are contingent and political: they are not natural and can be altered. Even though their stated goal is to make the liberal premises more culturally effective, the fact that they articulate this constructed nature at all spells the return of the repressed of the Democratic Paradox, which Chantal Mouffe discussed in an earlier set of essays as The Return of the Political. In short, in discussing law in this way, Lessig and Sunstein challenge some of the fundamental assumptions of the Law and Economics movement. However, unlike the previous challenge to Liberal understandings of the state—that of Hale and others at the turn of the century—they explicitly reject any sense that this “political” could challenge what has now become what I’m calling the reified culture of property. In other words, they attempt to reintroduce democracy and antagonism, but do so without lifting the Liberal break on that process. This is especially the case in Lessig’s arguments about IPR—where property in general is sacrosanct. The political, in this sense, is returned only to the decisions about IPR.

For Lessig, the distinction he makes between real and intellectual property is obvious. Further, his suggestions, building on arguments about regulation closely hewing to the Chicago School line, for improving this system assume copyright should exist in some form—just not as broadly or for as long a period of time. For him, as well, there is some distinctive difference between real property and intellectual property. Thus even as he might veer slightly off the path of pure libertarian reason with regard to copyright, it is a change warranted by the material under investigation: “in ordinary language, to call a copyright a ‘property’ right is a bit misleading, for

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The property of copyright is an odd kind of property. Indeed, the very idea of property in any idea or any expression is very odd."

The following chapter will evaluate this claim about the distinctiveness of intellectual property more completely—as well as the more radical observations Lessig makes about how value is created in that property. For now, it is worth noting that, far from challenging the idea of property, Lessig is implicitly affirming it. This is true even of the intangible products held under IPR. Thus he also says,

The law does not give people the right to take content, it is wrong to take that content even if the wrong does no harm. If we have a property system, and that system is properly balanced to the technology of a time, then it is wrong to take property without the permission of a property owner. That is exactly what "property" means."

These are, on the other hand, questions that Lessig leaves up for grabs. In fact, in *Free Culture*, *CODE* and *The Future of Ideas* he questions whether the system is really balanced to the technology of the time. But, again, by opening up these questions in IPR alone, Lessig takes his criticism a step too far for the Law and Economics movement.

Stalwart Liberal judge (and by this I mean what would now be called “conservative” in the US) Charles Fried finds Lessig’s work in the area of IPR interesting, but says of *CODE*, “I quarrel with Lessig’s barely explicit but detectable bias toward public decisionmaking - by which I mean political decisionmaking, as opposed to the disaggregated private decisionmaking of the market - about the design of code for the Internet.” Note that Fried’s preference would be to leave this regulation (of IPR and the internet) up to the market of private preferences, instead of making it political. While Fried says he does not read “Lessig as hostile to the party of liberty, he

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453 Lessig, *Free Culture*, 83.
454 Ibid., 65.
regularly invokes the virtues of democratic (that is, political) control over human interaction.”

This, Fried feels, is evidence of Lessig’s unfortunate influence by “ambivalent moderates” like Sunstein,

But also by the Critical Legal Studies movement and before it by Legal Realists such as Robert Hale and Morris Cohen: [these scholars say] there is no such thing as natural liberty. All choices, including the choice that government not regulate, are political choices establishing different political regimes. Correspondingly, the distinction between the public and the private, on which liberal theory depends, is an illusion.  457

Fried contests this logic and finds Lessig’s unfortunate use of it enough to find much of his argument suspect. In place of this entire body of reasoning, he merely contends that

授予, the rules of private law—contract, tort, and property—are themselves rules of law and therefore public rules, but they represent a relatively stable (or at least slow-moving), natural-seeming, and therefore intuitively graspable (at least in their broad outlines) foundation on which individuals may securely plan their economic and personal lives. 458

In other words, the basic question of the political—even in relation to only intellectual property rights—is not something Fried is interested in considering. The defense of liberty, in this regard, is paramount; even Lessig’s tentative questioning in relation to regulation on the internet and IPR is a bit too much for him to handle.

Part of the reason for this is that, while Lessig bases much of his most radical work on drawing the distinction between laws adhering in cyberspace and intellectual property and the laws of the tangible, real world, Fried is not convinced. On the one hand, he doesn’t believe that cyberspace or the internet really changes all that much in terms of communication; and, on the other hand, he thinks that the basic problems Lessig discusses in relation to IPR are really just

457 Ibid.: 607.
458 Ibid.: 617
questions about property. Lessig may want to distinguish these, but Fried counters, “I would peel the subject all the way back to reveal what it would look like under baseline intuitive concepts of property and contract.” In short, the question that matters to Fried is how these commercial properties relate to what I’ve called the reified culture of property that is the “baseline” of property and contract in the Liberal tradition. Since Lessig fails to provide a coherent challenge to the latter, Fried easily picks off his arguments.

In other words, the basic outlines of the Law and Economics tradition—to which Lessig provides a useful corrective, but not a fundamental challenge—make the protection of property and the freedom from government intervention natural rights. This is especially evident in the criticism Lessig receives from the most active elements of the movement to bolster the Maximalist position against that of balanced copyright. As an example, take the Progress and Freedom Foundation. Vincent Mosco describes the philosophical position of this organization as exemplifying “the myth of the end of politics” in the internet age. Based loosely on the theories of Alvin Toffler, with connections to conservative icons Newt Gingrich and George Gilder, the PFF was co-founded by George Mason University professor Jeffrey Eisenach, “where he has taught a course on the law and economics of the digital revolution.”

The PFF shares Lessig’s enthusiasm for the internet, but sees it as a frontier for the rules of the liberal vision of stateless society to finally be fulfilled. The “end of politics” or, as I’ve been discussing, the disavowal of the political, is achieved through the complete replacement of “old ways of government” such that the very idea of the public is eliminated. In Mosco’s description,

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459 Ibid.: 622.
460 “The PFF helped to promote Newt Gingrich’s national exposure by underwriting a televised talk show which Gingrich co-hosted and by supporting a broadcast college history course which he designed.” Mosco, The Digital Sublime: Myth, Power, and Cyberspace, 107.
461 Doug Henwood gives an account of some of Gilder’s ideas—most of which are quite prescient in terms of what the so called information economy is supposed to entail, at least in terms of the rhetoric it would inspire. He was convinced that the information age would create “the overthrow of matter.” On the other hand, Henwood recalls Gilder’s 1981 book Wealth and Poverty “with its argument that the poor are spoiled by a generous welfare state [. . .] and instead need the spur of their poverty.” Doug Henwood, After the New Economy (New York; London: New Press, 2003), 9.
the PFF’s vision is of a techno-utopia brought about through the “sublime marriage between information technology and capitalism.” Thus the internet, like Hayek’s market of information provides us with the very basis of politics. The public no longer exists as an entity inasmuch as it is a collection of discreet individuals who are serviced. Under the auspices of efficiency, individuals reign triumphant as a corporatist ethic provides a roadmap of social design.\footnote{Ibid., 112.}

Because this vision is based on what Mosco notes is the “privatization of both public space and public interest,” the PFF reacts quite viciously to the notion that there would be any challenge to the sanctity of private property in information in their new liberal playground. This perspective, as the maximalist position on IPR generally, is not simply an ideological framework, it is also a crucial understanding of how business will work in the new “information economy.” Thus, as Mosco notes, “the PFF’s 2003 list of financial supporters finds 33 of the 53 located squarely in the media and information technology industries.”\footnote{Ibid., 108.} This combination of an ideological commitment to the reified culture of property, translated to the online economy, with material support from the content industries contributions produces a criticism of Lessig’s extremely balanced position on copyright (alone) in \textit{Free Culture} which almost defies reason. Written for the PFF by Thomas Snydor, it concludes by saying:

I submit that \textit{FREE CULTURE} is a work that should be rejected by libertarians, conservatives, liberals, or anyone else concerned about reconciling the proven generative power of copyrights and other property rights with the now-obvious generative potential of the Internet. The many challenges inherent in that task \textit{are} real, and grappling with them, \textit{fairly}, is a job too important to be further delayed by collectivist histrionics. \textit{FREE CULTURE} should thus be consigned to Trotsky’s “dustbin of history”—along with

\footnote{Ibid., 112.}\footnote{Ibid., 108.}
PROMISES TO KEEP, KGB-style government surveillance of ordinary citizens, and “bland” communists like Stalin and Krushchev *(sic)*. Lessig, it seems, too openly “demonizes” property owners and advocates using the internet to manage and distribute a government fund based on the popularity of free music—rather than the proper Digital Rights Management proposals which private industry proscribes. For the PFF there is no difference between these kinds of property; Lessig’s interest in crafting regulation as opposed to continuing to pretend regulation doesn’t exist is unacceptable.

Richard Epstein also submitted an argument about intellectual property to the PFF—a revised version of a piece written for the National Association of Manufacturers, who have long shared his ire at the earlier violation of their market sovereignty. Like Snydor’s article, it appears as a PFF document, many of which can be found on the website of the Copyright Alliance. The latter is a public relations arm of the MPAA and RIAA. For Epstein, the question is about the degree to which maximalist protection should exist for IP as opposed to real property. For Epstein, as in real property, his preference is to give the presumed owners complete control. This is because he believes the reified culture of property should exist both on and off line.

The next chapter will consider the distinction between real and intellectual property as it currently exists in the rhetoric of the “balanced copyright” movement. Alongside this, it will look at issues of how value is produced generally and the rather messy issue usually overlooked in the division of labor. The take away from this chapter to that one is that, in a liberal democracy, the kinds of distinctions Lessig and others try to make between real and intellectual property are difficult to sustain. This is because the very notion of property and liberty assume a certain division of labor guaranteed with laws which privilege owners of capital. This is the balance that

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liberal democracy believes in and it is not up for discussion, whether the topic is tangible or intangible property. This observation is made rather succinctly by Barbara Fried.

“Liberty” and “property” were connected in narrow constitutional arguments through the doctrine of liberty of contract. As the dominant form of property rights shifted from possession and use to possession and exchange, an owner’s right to contract for the use or exchange value of her property was acknowledged to be an important part of the total economic value of that property. At the same time, as the courts broke free of their historical conception of property as a tangible thing, they began to view the resulting contract itself as a form of intangible property presumptively entitled to the full-blown protections accorded other forms of property.**

Lessig, perhaps trying to preserve his libertarian credentials, has now declared that he is moving away from issues around copyright and has decided to look at an issue close to the heart of Coase, Epstein, and the rest of the Law and Economics tradition: corruption in government.***

The contemporary Law and Economics movement was a reaction against the appearance of an active US welfare state and a radical set of legal ideas—both of which seemed to be kowtowing to militant pressure from below. The goal of this movement, like Locke at the end of the English Civil War, was to reinstate the Liberal understanding of the state. In Locke’s time, the choice was to use the religious ideology ascendant in his culture; in the second half of the twentieth century, the Law and Economics movement attempted to use what it argued was a scientific understanding of human behavior known as economics. In both cases, these reactionary doctrines were largely successful because they helped to uphold—or in the case of Law and

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Economics, reinstantiate—the functional power of property owners. In short, in both cases, it has been an attempt to impose (or reimpose) a Liberal doctrine of Natural Law which matched the dictates of what I’ve called the reified culture of property.

This chapter has pointed out the way that this ideology of human behavior is based on a faulty set of presumptions; that it relies on the power of the market itself—supported by the coercion of the state—in order to instantiate the ideal subject and its ideal cultural orientation. I then discussed two contradictory arguments about the state that are crucial to the logical system of Law and Economics, though they are illogical in themselves. They say that the state is a powerful threat to liberty, but that it is unable to do anything to adjust the basic premises of the culture it presupposes as characterizing “liberty.” This “natural” liberty—contrary to the historical record discussed in the previous chapter—makes the state’s involvement in rearranging the system futile. I demonstrated these claims by looking at one of the key figures within this movement—R. H. Coase—as well as another key application of his work, in D. McCloskey. The latter not only exemplifies this logic, but also shows how flawed its hypothetical logic is when compared to the historical record.

After demonstrating this, I then moved the discussion back to Lawrence Lessig, who has made some of the same claims and observations, but remains steadfastly committed to the basic outlines of the reified culture of property. However, in reintroducing politics to the law more generally, and in specifically questioning its relevance to IPR, he opens up some conversation on the topic. While it is not enough to really challenge this dominant logic, looking at his discussion about law—in relation to the movement most committed to property in general—helps to open the path for the next chapter. This will look at the false distinction he draws between IPR and property but from another direction. Here the focus will be on the aspect of IPR which Lessig has been quite vocal and eloquent in describing: its illumination of the extended process of social production.
“Belief in a free market in ideas does not have the same roots as belief in the value of free trade in goods. To quote Director again: "The free market as a desirable method of organizing the intellectual life of the community was urged long before it was advocated as a desirable method of organizing its economic life. The advantage of free exchange of ideas was recognized before that of the voluntary exchange of goods and services in competitive markets." In recent years, particularly, I think in America (that is, North America), this view of the peculiar status of the market for ideas has been nourished by a commitment to democracy as exemplified in the political institutions of the United States, for whose efficient working a market in ideas not subject to government regulation is considered essential. This opens a large subject on which I will avoid comment. Suffice it to say that, in practice, the results actually achieved by this particular political system suggest that there is a good deal of "market failure." 469

The argument of this dissertation is that the debate over intellectual property rights (IPR) exposes the underlying reified culture of property that pervades western capitalist societies. In large part the debate around IPR has presumed that the stakes of the debate are only over the way this reified culture is extended to “intangible” products. I contend that it is truly over a longstanding process of commodification, primitive accumulation, and the division of labor into mental and manual capacities which are all different dimensions of this “reified culture of

property.” They are the indispensable characteristics of the political imposition of the “purely economic” state that is necessary to produce subjects adhering to the classic ideal of Liberal culture. IPR appears a conjunctural concern, in relation to digitization and globalization, but these are just catalysts which produce points of conflict over a more fundamental theory of value and property. Therefore the expansion of the scope and scale of IPR is less about IPR than about the continued health of capitalism and the reified culture of property itself. This chapter develops a theoretical framework to extend the work of the previous chapters on the conceptualization and implementation of this culture, historicizes the current conjuncture in terms of the role of the state in imposing it in the current era, and therefore provides a more accurate materialist description of the stakes of this struggle in the domestic, US environment.

The first main argument extends observation of a broad process of social valorization in relation to IPR to the general process of social valorization of property in general. The purpose is to show that the idea of a specialized form of intellectual labor has long been fundamental to the expropriation of the direct producers of all kinds. This process of primitive accumulation is part and parcel of the commodification and social division of labor that are central to the reified culture of property in the present day. The distinction between mental and manual labor is crucial for the continuation of this model thus balanced copyright critics have little hope of challenging the latter while maintaining the former.

Second, and intercalated with the above, is the issue of monopoly capitalism and monopoly control over the distribution of mass culture—as the context from which IPR now springs. The Liberal defense of the reified culture of property in relation to IPR relies on the “natural law” presumption that the state was uninvolved in the process of valorization. The presumption that these products were valorized in the laissez faire “marketplace of ideas,” as in Coase’s quote above, is undermined by the role of state in cementing the market for commodified culture of all kinds. The processes of commodification and primitive accumulation were
contingent on the US government enhancing the functional power of economic actors and
determining the outlines of the consumption patterns in which the privately owned mass media
commodities now making up our common culture would come to dominate. Taken together
these throw into relief the inaccuracy of the Liberal interpretation backing the Maximalist
appropriation of the reified culture of property and the inadequacy of the balanced copyright
movement and currently constituted cultural studies in critiquing it. The following chapter
extends this criticism to the global stage.

Chapter one provided a framework through which I’ve discussed the concept of a reified
culture and the process of instantiating what I’ve called cultural efficacy. The debate about IPR
exposes this reified culture simply by compelling its defenders to spell out why it is valid: it upsets
the cultural efficacy of this set of ideologies. Their defense, which I have called the Maximalist
defense, is thereby exposed in its logical purity. I have characterized this defense as being based on
a Liberal interpretation of Lockean “natural rights.” This defense carefully specifies the role of the
state in relation to the protection of property. In short, the state is said to have had no role in
creating the value of the property or its distribution in society: therefore, the state is only valid in
so far as it refrains from appropriating property or attempting to equalize its allocation. The only
role for the Liberal state is said to be the protection of property.

Chapter two looked at the history of this defense in three important ways. First, it looked
at the cultural assumption of the idea of the jurisdictional monopoly of the state. The idea of the
state having complete control over its territory is joined with the idea that anyone within that
territory is subject to the state. Second, and more novel, the defense of this culturally specific,
jurisdictional monopoly was based on an equally specific set of traditions—Liberalism and
Democracy—which were supposed to secure the efficacy of the state and give guidelines for how
its citizens can (or cannot) give their input and consent. Within this context, the Lockean
conception of property rights provides a Liberal break on the action of Democracy, referred to in
the previous chapter as “the Democratic Paradox.” This defense, as stated above, rests on the argument that Liberalism is founded on a pre-political, natural right to property. In other words, the right to property, and the empirical facts of its distribution, exists before the state.

The third aspect of this history, highlighted in chapter 2, is essential to the exposition of the present chapter. The history of that moment showed that, far from the state being uninvolved, far from the right to property resting on its individual “improvement” by its legal owner, the state was directly involved in imposing what Polanyi called “the liberal creed” on the subject populations. Imperative to this imposition was the expropriation of peasant cottagers and other citizens subject to the central state, but subsisting outside the wage labor economy. I discussed this in terms of primitive accumulation and specified the dual nature of its procedure: it involves not only the accumulation of large tracts of land—the roping off of all productive property—for private owners, it also means removing all means of self subsistence from the remaining population such that they are subject not only to the laws of the state, but to the laws of the wage economy. The state was central to this and used all means of force and coercion to eliminate the resistance that sprung up to this Liberal definition of culture.

In other words, the facts of this history belie the pre-political basis of Liberalism. The origins of Intellectual property rights are found in the struggle against its imposition. Copyright, especially, becomes an important tool for stifling the resistant population’s reinterpretations of the dominant culture. But to see this Early Modern IPR as merely involving freedom of speech is to miss its role in cementing the reified culture of property: it is the latter, after all, that makes today’s IPR seem inviolable. The Lockean argument securing this on the basis of “improvement” was one among several competing models of what English society could look like; the fact that it dominates today is the more consequential outcome.

The current chapter charts a similar path to (and through) the present debate, but it tries to contextualize the debate in three ways: theoretically, historically, and materialistically. Before I
I have said that this debate is between three major positions. Two of these are very public: the Maximalist position, which openly calls for treating IPR as the same as property rights; and the balanced position which asks for IPR to be treated in a more balanced way, but leaves the reified culture of property untouched by drawing a distinction between real and intellectual property. The third position is the one I am constituting through Cultural Studies. I argue that it is insufficiently theorized at the moment and necessitates a reconceptualization of culture for it to be effective.

This last position has been bifurcated into two paradigms for most of its existence. In terms of the present debate, the most productive position has been that of the culturalist position. As chapter one cataloged, this position emphasizes culture as a process of meaningful interactions. The current debate between maximalists and balanced critics hinges on the subject of value. Changes in media production and distribution technology and the emergent cultural practices around that technology have made visible the extended process of social valorization through which the properties in question have attained their valuable cultural efficacy. The process of globalization—the extended spatial organization of production which mirrors the distributed production of digital networks—exposes this further. Practitioners of the culturalist paradigm of Cultural Studies—including scholars like Henry Jenkins—have long provided a rich description of these processes of cultural appropriation among audiences of mass cultural products and subcultural communities.

The long history of these observations by culturalist scholars indicate that the apparent changes to the way the process of culture works are not necessarily due to digitization or globalization, but the technology helps to make these processes visible. Still, while these processes of cultural appropriation have existed beneath the surface for some time, the widely discussed transformation of the relationship between consumers and producers—such that consumers are
now producers, or Prosumers—and the popular promotion of ideas like Web 2.0 and distributed, non-hierarchical relationships among global producers in the “flat world,” amplify these earlier claims and project them as an alternative interpretation of reality—within certain limits, that is.

The backstop to the balanced position inevitably remains a commitment to capitalist social relations in their totality. Even the most eloquent and outspoken champions of this singular space of unprotected social interaction, rest their discussion comfortably on the contemporary cultural belief that “the market is an extraordinary technology for producing and spreading wealth.” The most that this alternative interpretation of reality—and of property—can promise is the second rail which is limited only to intellectual property. In Lessig’s 2008 book *Remix* (cited above in celebration of the market) he calls the interaction between this “sharing economy” and the “commercial economy” a “hybrid economy;” more widely known amongst people on the net is Adam Arvidsson’s notion of Peer to Peer sharing and collaboration as an “ethical economy,” building off his earlier understanding of consumer coproduction of brand values. Even Yochai Benkler’s elegant investigations of the widespread “nonproprietary production in information” and its culture of “nonproprietary motivations, social relations, and organizational forms” both on and off line, explicitly rests his claims on their sharp distinction from “property in wristwatches and automobiles” thus affirming a continued commitment to the reified culture of property. Only a few critics, like Michael Bauwens challenge the dominant market inspired rhetoric infused in descriptions of these processes and speculates that p2p technology and the practices around it create a crisis in the current elaboration of both material and immaterial property. It is this position that is closest to mine in this dissertation, though, as this chapter contends, the

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470 Lessig, *Remix*, 121.
technological transformation is only one catalyst for a more fundamental challenge to this culture of property. Since most other critics are comfortable to rest their critique on the prevailing efficacy of Liberal culture, the goal of this chapter remains challenging this culture as culture.

The Liberal claims in question provide crucial support for maximalist IPR. As I have outlined several times, they are founded on a certain understanding of the way value is created (individually) and therefore should be protected (exclusively, apolitically, by the state). The balanced position is situated by discussing the increased visibility of the processes of valorization which contradict that Lockean understanding. However, in focusing on the novelty of the current conjuncture, critic’s sharp distinction between the expanded process of valorization in intellectual property and that of “real” property presumes that their discoveries about value and the process of valorization only apply to a particular set of cultural forms. Other than that, property should prevail. Material forms are still accurately described by the reified culture of Lockean property.

As primary evidence of this claim, the previous chapter evaluated the Law and Economics movement from which Lessig hails. I argued that this movement was a part of a concerted effort over the last half century to reinstate this reified culture in its purity within the US polity. I argued that this is the dominant contemporary inspiration for the rearticulation of Lockean property in the maximalist position. The debate around IPR eventually devolves into how well the maximalist or balanced position fits with the dominant Liberal economic theory derived from a capitalist friendly inflection of this Lockean model. A supposedly identifiable boundary between real and intellectual property bolsters the commitment to the neo-liberal consensus it relies upon.

Lessig is especially candid about his adherence to this Liberal model in every other respect, thus making its moral authority on matters of IPR difficult to challenge. Since critics have already ceded this ground of debate to this reified culture of property, they have only a marginal space they retain in their struggle for legitimacy. Ultimately, it is likely that they will be overcome by the contradictions inherent in this position and all the hope they had for the revitalization of
culture via Web 2.0 or “Prosumers” will be consolidated into the hierarchical division of labor their anarchic aspirations hoped to overturn."

This conclusion is based on the analysis of this project so far which sees this reified culture of property as a mainstay of capitalist development over the course of its history. The expansion of IPR in this direction is nearly certain if there isn’t a more fundamental challenge to this reified culture of property. On one level, this challenge is mounted by pirates and counterfeiters around the world who refuse to submit to this law; this could be designated as the fourth position in this debate: the position of refusal. However, this challenge is mounted as a complete refusal of any law and thus without any specific target in the larger structure of cultural efficacy. It presents an energy which can certainly be harnessed for the rearticulation of the dominant paradigm of property; however, it could also be harnessed—as it has already—by the maximalist position, whose main proponents (such as the late Jack Valenti of the MPAA) are prone to draw direct connections between piracy and terrorism. This connection presents a rich area of exploration in the history of western capitalism—one which Marcus Rediker has tried to turn on its head by looking at the democratic visions and organizations of actual pirates versus the terror imposed by the legal apparatus of early Trans-Atlantic capitalism. However, it is not a position I will explore here.

Instead, the position I take renews the synthesis in Cultural Studies between the two paradigms of structuralism and culturalism. As I’ve said, the latter has been the most active in recent years so renewing a synthesis between the two requires more of an emphasis on the former. I have tried throughout this project to do this, particularly within my conceptualization of culture

474 Here, I would never suggest that these particular critics would advocate actual anarchy: they are much more responsible than that. They are much more like the anarchist of Siva Vaidhyanathan, The Anarchist in the Library: How the Clash between Freedom and Control Is Hacking the Real World and Crashing the System (New York: Basic Books, 2004), where he points out that, “the sophisticated form of anarchy is hardly enabled by the spread of its irresponsible cartoon versions” (14). Not to say the latter can’t be inspirational as well…cf. McKenzie Wark, A Hacker Manifesto (Cambridge, MA: Harvard University Press, 2004).

in relation to law and the state. On the other hand, the culturalist position is essential to understanding the real, embodied processes of cultural efficacy. These are especially important in the current chapter as they are also the processes which are later understood as producing social meaning and, therefore, value around cultural commodities. However, in addition to this more remarked upon process is the structural determinations which helped to center consumption on commodity consumption. These dual processes are joined in the branded commodities that now circulate as the material underpinnings of IPR; but focusing, as Arvidsson does, on only the immaterial developments misses the analogies that can be drawn to social production in general. 476

As this chapter will demonstrate, several key concepts of Marxian thought on society in relation to the economy are affirmed to one degree or another by those who resist the further commodification of culture through intellectual property rights. Attempts by balanced IPR critics to draw a sharp distinction between “real” and “intellectual” property are sustained by an understanding of the social division of labor which completely ignores labor as such and the global context of production and consumption these arguments rely upon. On the other hand, there is an enlightened kernel in their descriptions of the co-production of meaning and value in the cultural realm (narrowly defined), similar to the early, path-breaking work in Cultural Studies on audiences and subcultures. This provides a useful entry point for discussions of value in general.

The next section will outline this theoretical aspect of the chapter, focusing on three related processes: primitive accumulation, commodification, and the social division of labor. These Marxian concepts are useful for describing the historical development of the commodified culture of the US from whence IPR springs—and its relation to earlier moments when capitalism engaged in these processes. The final section will then demonstrate what understanding these

fundamental processes of capitalism does for understanding the materialist situation of IPR in the current conjuncture.

Against contemporary critiques of intellectual property, this chapter will argue the distinction between real and intellectual property cannot be maintained according to the proposed criteria. Observing that the descriptions they offer of the total social production of meaning and cultural value maps more cohesively onto the myriad of indexes proffered by the Marxian analysis of production in general, this chapter will close by pointing out that the semiotic democracy proposed could easily be expanded to include arguments about the total system of capitalist production; the legitimacy of observations about how meaning is produced in common should help make the tenets of socialist democracy a less radical proposition. In any case, it provides an alternative interpretation to that of the inevitable reaction to even the marginal claims of the movement for balanced copyright: namely that all property, including intellectual property, must be protected.

At issue in the US state protection of IPR, domestically and internationally, is the use of the state apparatus, again, to impose a model of value and property, and culture…and to protect the incumbents and their value. This is not an aberration of capitalist development: this is how it develops and how its promoters intend for it to continue to develop. The final chapter looks at this, as much as possible, on a global scale, in relation to the concept of cultural imperialism.

**Commodification, Marx, and Cultural Studies**

In what he bills as his final book on the topic of IPR, Lessig’s *Remix* centers around the distinction between Read/Only and Read/Write culture, a familiar designation on storage media like CDs indicating whether the user is allowed, basically, to remix or revise the inscribed data. Borrowing heavily from Cultural Studies scholars like Henry Jenkins, Lessig draws on Jenkins
understanding of the emergent “participatory culture” through which technology is allowing people to more easily interact with the media culture around them. The distinction between RO and RW culture begins as a distinction between processes of interaction with culture, rather than, as in my conceptualization, separate levels of the culture itself. It is a distinction between how people approach culture, and therefore a subjective orientation in relation to culture. Jenkins insists that the “participatory culture” that he contrasts with older notions of “passive media spectatorship” is not a product of the “convergence” of media technology itself, but instead is a way of processing media that becomes increasingly necessary with the increased number of distribution and production platforms for what this project would understand as C2. Jenkins says, Convergence occurs within the brains of the individual consumers and through their social interactions with others. Each of us constructs our own personal mythology from the bits and fragments of information extracted from the media flow and transformed into resources through which we make sense of our everyday lives. Because there is more information on any given topic than anyone can store in their head, there is an added incentive for us to talk among ourselves about the media we consume. This conversation creates buzz that is increasingly valued by the media industry. Consumption has become a collective process.

Jenkins description of convergence—like Lessig’s RO/RW—sits in an uneasy tension. It sometimes refers to distinctions between subjective orientations to culture at any level and at others it results from different institutional arrangements of what Jenkins calls “delivery technologies.” Elsewhere, in explaining the role that media plays in our lives, he describes television as “fodder for so-called water cooler conversations,” while noting that “for a growing

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477 Jenkins, Convergence Culture: Where Old and New Media Collide, 3.
number of people, the water cooler has gone digital” through participation in online forums. He says that, for most people, viewing these media is a communal process where we discuss what we see with “friends, family members, and workmates,” but now there are also now online forums which have new forms of social interaction. In other words, the orientation of “convergence” or “participatory culture” is less in the practices themselves, but in their increased visibility through the networks of media convergence.

In other words, the technological link is only marginally significant in terms of the practices in question. These practices are already ingrained in our everyday lives in a concrete way. The dominant culture of commodified media was already the stuff through which we related to others. One could even question whether we speak about TV around the water cooler because it is what we like to watch or if we like to watch—feel compelled to watch, even—because that’s what we talk about around the water cooler. It is hard to see this as “Read/Only” culture until we look at what a “Read/Write” culture would look like. Lessig posits that RO is related only to the kind of culture that circulates as a commodity—enabled by the “birth of technology to capture and spread tokens of culture”—and that RW is a more fundamental kind of creativity that has existed since “the dawn of human culture.” The latter is where there is an active appropriation of the culture in circulation, where people “add to the culture they read by creating and recreating the culture around them.”

In making this distinction, Lessig draws upon the early twentieth century composer John Phillip Sousa, who gave congressional testimony in 1906 asking for stricter copyright protections against makers of phonograph records who were unjustly appropriating the works of composers. While Sousa is an unlikely hero for a book questioning the merits of stronger copyright protection, Lessig finds in Sousa a ready distinction between these two approaches to culture.

478 Ibid., 26.
479 Lessig, Remix, 116.
Sousa protested the use of phonographs because he saw the mass production of “tokens of RO culture” as being detrimental to the practice of culture production at the local level. Lessig accedes that Sousa’s fear was well placed, claiming that, “the twentieth century was the first time in the history of human culture when popular culture had become professionalized, and when the people were taught to defer to the professional.” On the other hand, as Benjamin pointed out, Lessig notes that this mass production “produced extraordinary access to a wide range of culture. Never before had so much been available to so many.”

If we project these positions onto the conceptualization of culture discussed in the first chapter, RO sits rather well at the C2 level. RW, however, is more of a process of culture that, for Lessig, is more fundamental. RW is the culture of the culturalist vein of Cultural Studies. It is most at home in the C1 realm, but the ideal of culture to which Lessig aspires would make the C2 level both readable and writeable. This, he claims, following Sousa, is a process of interacting with culture that was common to “all of humanity from the beginning of human civilization.” If this were so fundamental, what was it that changed? Why were these tokens of culture, exchanged between and amongst communities, no longer both readable and writeable?

The change, according Lessig was primarily one of technology. The tokens were analog and thus perfect copies were difficult; production and distribution systems were expensive and centralized. These were the “natural” limitations of analog technology. The law supported this natural technological limitation with copyright, but “it was the nature of the LP that really limited the consumer’s ability to be anything other than ‘a consumer.’” Digital technology has remade nature: “what was before both impossible and illegal is now just illegal.” Lessig’s goal in the book is to help rewrite “the culture which regulates culture,” i.e. copyright law, as well as our

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480 Ibid., 29, 30.
481 Ibid., 38.

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“norms and expectations around the control of culture.” This, he says, will allow the development of the hybrid economies he sees as so promising.

For the purposes of this chapter, four things stand out: First, the continuity of the processes of RW culture. The processes that Lessig speaks about in relation to RW culture in the digital age are actually very similar to the creative process appropriation through which communities of audience members create have negotiated meanings since they were forced into the “consumer” relationship with RO tokens. Jenkins speaks about this in *Convergence Culture* but he developed the idea of “participatory culture” about almost two decades ago in terms of *Textual Poaching.* This is the C1 level embedding that has long been essential to the efficacy of any cultural mediation. The difference now is that the efficacy is bilateral: consumers are more able to participate at the level of C2—and their participation in the process of embedding is more visible. Arvidsson’s work on brands provides more recent empirical evidence of this, but the process itself has been known by Cultural Studies scholars for some time. Understanding this as a continued, extended process of cultural creation, whatever structure might help determine it, is essential to understanding the development of media, culture, and theories about them in the late twentieth century.

This brings up a second point: the dominant RO culture that has existed in the US for the past 75 years incomplete in that it only allowed for a one way relationship with the content. This was, in part, the point made by the Frankfurt School. Horkheimer and Adorno’s critique of the culture industry was, in part, just this: that it encouraged people to merely consume culture. It wasn’t just that the RO tokens were of crass, commercial quality, but that they removed the sense of possibility in the RW mode of culture. Lessig inadvertently completes the implication of their

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482 Ibid., 275.
critique by explaining what is important about being able to see culture as malleable. Here his point of reference is the Yeoman self-sufficiency Jefferson prized as the ideal citizen:

Yeoman self-sufficiency was a virtue because of what it did to the self. [. . . .] Just as Jefferson romanticized the yeoman farmer working a small plot of land in an economy disciplined by hard work and careful planning, just as Sousa romanticized the amateur musician, I mean to romanticize the yeoman creator. In each case, the skeptic could argue that the product is better produced elsewhere—that large farms are more efficient, or that filters on publishing mean published works are better. But in each case, the skeptic misses something critically important: how the discipline of the yeoman changes him or her as a citizen. [. . . .] Speaking [the RW mode of culture] teaches the speaker even if it just makes noise."

While it is probably true that this is a more demotic version of the cultural process than Adorno would have embraced completely, the essence of the transformative, malleable nature of both culture and the individual subject remains. As the first chapter discussed in relation to this ideal process of culture, versus its administration, the point was that people as well as culture could be changed—and that both could be active subjects in that change.

However, the implications of this malleability of the subject in the middle of the twentieth century seem to escape Lessig’s view. While he laments that “technological nature” didn’t allow for the transformative relationship between RO/RW, C1 and C2, Lessig’s only comment is that this didn’t allow for consumers to be anything but consumers. If the nature of these RO tokens has been remade, and this allows for the new, active consumer to be remade, the implication is that, for the most part the mediated culture of the US polity was what, in chapter one, Adorno called “administered” culture. This is true even if we allow for the possibility—for the necessity,

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"Lessig, Remix, 27, 132."
even—that there was a RW process of embedding the RO tokens, a process of making the C2 effective at the C1 level. The fact is that the structure itself only allowed for a unilateral efficacy on a regular basis. One could argue that there was more of an interaction than I give credit to in the past, or that there is less of one than Lessig, Jenkins or I give credit to now, but, on balance this is the implication of this model. A crucial point in this chapter is that this dominance of RO, C2 culture was the result of political, legal, and economic decisions—not technology.

This brings us to the third thing we can tease out of Lessig’s description. As the conceptualization of culture from chapter 1 argued, and as I’ve elaborated in looking at previous rounds of the imposition of capitalist orientations of culture, its complete imposition is ultimately guided by some political, economic, and legal culture imposed from the top down. Before I move too far into this point we can find in Lessig’s argument, I will briefly insert the Marxian categories that help give a theoretical framework to the further examination of this culture.

In the conjuncture which Lessig is speaking, the components of the C2, which were previously, in his terminology, read only, are also predominantly the wholly owned properties of a handful of major media conglomerates. Lessig’s only explanation for this is that the technology—which he insists was very competitive—of distribution prevented any other relationship. I will be elaborating more on this below, but the Marxian categories that are essential to understanding the culture he is describing are primitive accumulation, commodification, and the social division of labor. Each of these looks at the process of creating private property rights from a different dimension. Primitive accumulation, which I’ve explored most fully in chapter two, is the process of dispossessing those who used a resource, usually in common. On the one side of this relationship, the dispossessor, this means simply accumulating the property—usually in the interest, as Lessig discusses above and McCloskey in chapter three, of creating a more efficient, improved property. On the other side, however, it means transforming that resource into a commodity—
and in the case of an essential resource, making it necessary for those who used that resource in common to approach it only as consumers.

Thus while Marx focuses on the commodity as the result of the production process, commodification has morphed into a widespread form of economic development. This is effectively all that is meant by terms like “privatization,” “capitalization,” and even “financialization.” In its most innocent appeal, this means increasing the presence (and power) of private industry, subjecting more components of people’s everyday existence to the objective valuation processes of the market, and, according to the theory, increasing the efficiency by which they are produced, exchanged, and distributed. In practice, commodification means, on the one hand, subjecting more of people’s means of existence to the rules of the cash economy, thereby decreasing their ability for self provision outside of the labor market and, in the end, increasing their dependence on credit, debt, and, in turn, capital. On the other hand, it means assigning a property right, often removing a resource from common ownership of one kind or another and transferring it to a private individual (or a corporation, which, under U.S. law is virtually the same thing.) Primitive accumulation is the process of applying private property rights seen from the perspective of the dispossessor and the dispossessed; commodification is the same process seen from the perspective of the commodity itself.

If these two are similar perspectives on the process as it takes place, the division of labor is the relationship between these social actors in relation to the appropriated property after the fact. In its simplest formulation, primitive accumulation and commodification create a relationship where those who have legal ownership of property—or effective control or both—make it necessary for those who do not to pay for the use of that property or otherwise work for the property owner in order to gain access. In other words, the extension of the social division of labor is implied in the process of privatization of property. As Marx says of their relationship:
Division of labour and private property are, moreover, identical expressions: in one the same thing is affirmed with reference to activity as is affirmed in the other with reference to the product of the activity. Further, the division of labour implies the contradiction between the interest of the separate individual or the individual family and the communal interest of all individuals who have intercourse with one another. And indeed this communal interest does not exist merely in the imagination, as the ‘general interest,’ but first of all in reality, as the mutual interdependence of the individuals among whom the labour is divided."

The division of labor itself forms the main topic of the next section; for now, I will emphasize the final phrase of his description—where he points to the mutual interdependence of all of the individuals among whom the labor is divided. The three theoretical concepts above—primitive accumulation, commodification, and the division of labor—are important to understanding the process of enclosure that has occurred in the twentieth century, but this last concept—that of the extended process of social valorization—is important from the opposite direction: it is what Jenkins and Lessig are speaking about in the cultural processes that have long existed within the structure of this capitalist order. They apply it only to the properties of the mind, but once we’ve undermined this separation, seeing it as a product of the very division in question, it is easier to see how it can apply to our wider culture—and how the process of intensified commodification in general has kept it so invisible. The increased visibility in one kind of property, and the moral indignation of its enclosure, should help us see the problem more generally. This is a prime example of a space where the reification is incomplete—or where current technology is lagging and social relations have exposed cracks in its façade.

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Unfortunately, like Lessig, most critics of maximalist intellectual property do not necessarily object to the more complete transformation of society along these lines—to, in the words of Lukács, the more complete reification of commodity society: they only object to its extension to a different field of culture. Of course as Lessig himself points out, it has always been there—the extension of commodified culture in general and in the products of specifically RO culture always implied the owner alone had this right, but the functional power these actors enjoyed made the rights themselves less important. To return to Lessig, he doesn’t see the imposition of this commodity culture as a result of top down administration. I’ve argued that Adorno’s description of culture as administration is akin to the imposition of C3 culture from above. In relation to the mediation occurring at the C2 level, between the C1 and C3, Adorno said these RO tokens have “an ontology, a scaffolding of rigidly conservative categories [. . . .] [which] has changed just as little as the profit motive itself since the time it first gained its predominance over culture.”\(^{486}\) In other words, the commodified culture at the C2 level advances a more fundamental culture of commodification—what I would argue is the intensification of the reified culture of property central to this project. Unlike Adorno, Lessig doesn’t see the advancement of commodification or of commodified culture as connected directly to the legal, political and economic culture that is imposed from the top down. On the other hand, he sees no alternative to commodification—and he sees the only reason for its dominance in “culture” as being technological rather than social, political or economic. The hybrid economy he promotes is expressly designed to preserve this as a cultural norm.

This brings me to the final point: Lessig and Jenkins separate culture and politics from each other. Though Lessig and other critics of intellectual property rights are ultimately targeting what he calls the “legal culture,” the latter is only changed by the experts like himself who need to

\(^{486}\) Adorno, “The Culture Industry Reconsidered,” .
re-craft the code. And then it is only to change the code of “the culture regulating culture” by which he means only the law which regulates media production and distribution. There is no sense that either the law from the top—or the cultural process from below—could affect any fundamental change to the legal framework that governs the larger culture. This isn’t, as with the Law and Economics movement more generally, because he thinks it is impossible for this culture to be altered. One of his central critiques of that movement, as the previous chapter explored, was that he sees many of the things they call natural as politically constituted. Lessig’s faith that, in the current era we can reform laws and our own norms and expectations, shows that he believes a more fundamental alteration in property or distribution structures to be possible. However, he expressly limits his interest in transforming culture to the sub-area of the media.

In this, his appeal to the way the process of individual yeomanry of R.W culture allows for the full development of citizens seems to be an empty paean to democratic ideals. If the most fundamental questions, which shape all of our lives, have already been decided, it hardly matters that we can speak freely—particularly if the only goal of that speech is to create value in the sharing economy for the benefit of the commercial economy. Effectively, he is asking for the intensification of the division of labor without formal private property—the pre-history of digital primitive accumulation. The read/write culture, in other words, doesn’t extend to re-writing the overall rules of the culture, particularly those of private property and free enterprise. As this project has argued from the beginning, these rules are the immutable constants in this endlessly shifting culture. The only thing that can be done, as the balance of this chapter demonstrates, is to intensify these.

Jenkins, on the other hand, is more upfront with how he sees this “participatory culture” relating to politics. As he sees it, the cultural innovators he champion are, at best, learning skills that they could apply to political activism. I would argue, along with Bauwens, that it also teaches them to think, on the one hand, of the expanded process of social valorization central to Jenkins
work, of themselves within that process; and on the other, of the way their agency in that process both demonstrates the lacunae of the commodified system they inhabit and their potential agency in transforming that as well.

The chapter so far has demonstrated the two endpoints of the cultural transformation of the twentieth century. Jenkins has provided a description of the expanded process of valorization that existed throughout this, playing a role in audience meaning-making for much of this period and only now encountering a basic transformation. Lessig provided some points of reference within this that, in relation to the conceptualization of culture utilized throughout this project, makes it possible to speak about what this transformation entails. On the one hand, it entails allowing the efficacy of these processes some bilateral purchase. Not only is the process of cultural valorization employed in the basic embedding of RO, C2 tokens in the lived existence of its component subjects, but the transformation of digitization has allowed for some manipulation—discussed in terms of RW—of that mediating cultural level. More importantly, it has made this process visible, a fact which has led the balanced copyright on its quest to resist the maximalist position in the IPR debate. I argue that between these two positions we should actually see the way the balanced position opens up questions about the general production process and property in general—and that unless we investigate this more completely, the maximalists are bound to win.

With this in mind, I will now turn to the subject of the division of labor in relation to the process of what Marx, above, calls “the mutual interdependence of the individuals among whom the labour is divided.” The arguments about IPR hinge on the distinctions made in terms of the social division of labor. Moreover, as the following analysis discusses, the process of commodification central to this chapter is directly related to the primitive accumulation associated with removing intellectual property—ideas—from the direct producers of real property.
Innovation, Production, and Capitalist Property Relations

Social Division of Labor vs. Extended Process of Valorization

As the previous chapters have discussed, the figure associated most closely with the reified culture of property is John Locke. Among other things, the idea of improvement is central to his doctrine of the Liberal state. Improvement, among other things, implies that the yeoman farmer might need to be dispossessed in order to make way for a more efficient, productive, profitable farm. As Marx points out, economically, this is discussed as necessary: the direct producer must be dispossessed in order to allow for a larger, more efficient farm to produce more. This might require employing more laborers who would then be parties to the creation of that increased product, but this does not imply that they should then receive their share of the product. Instead, ideologically, the Lockean defense of private property says that the increased yield is the solely due to the owner: the division of labor between the owner of the property and the worker who creates value using it “denies the mutual interdependence of the individuals among whom the labour is divided.” This is as true of real productive property as it is of intellectual property.

Economists will argue about how profit is produced, how it can be calculated, and other questions that would undoubtedly be useful for challenging the econometric hegemony of the discipline. However the key point of examining, as Marx does in *Capital*, the way that absolute and relative surplus value are extracted in the nineteenth century working day, is not to come up with a simple equation that can be applied to future eras: it is to note that the benefits of modernity continue to flow mainly in one direction.

This observation is not proffered in the interest of promoting equality or engaging in class warfare; it is an observation that takes seriously some of the key insights of what makes capitalist production valuable. As Marx saw it, the key innovation of the capitalist system was that it
brought together previously disparate laborers into a process through which they could collectively produce more. Though he criticized the exploitative relations, he still allowed for the possibility that the same processes of valorization—the same ability of labor to produce more than its value—could be used for the benefit of all who helped produce that value. He, like Jenkins above, saw this value as produced in a social process:

The production of life, both of one’s own labour and of fresh life in procreation, now appears as a double relationship: on the one hand as a natural and on the other as a social relationship. By social we understand the co-operation of several individuals, no matter under what conditions, in what manner and to what end. It follows from this that a certain mode of production, or industrial stage, is always combined with a certain mode of co-operation, or social stage, and this mode of co-operation is itself a “productive force.”

The social process of valorization, in this regard, is not just an economic issue. In effect, the social production of value is something that could happen with a variety of property relations. Or, more accurately, the surplus produced from this improved process of social production could be distributed in a variety of ways. This was not an observation made only by Marx. Even John Stuart Mill, a late nineteenth century Liberal, saw that, once the surplus was produced “mankind, individually or collectively, can do with them as they like.” The division of labor under capitalism had helped to improve the productivity of the average worker, to reduce the amount of work necessary to complete certain tasks, and hence to create, in cooperation with others, more products with less effort.

488 From John Stuart Mill, *Principles of Political Economy*, Great Minds Series (Amherst, NY: Prometheus Books, 2004); cited by Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*.p. 78. Fried says that Mill saw that property and law determined distribution and thus “that the laws governing distribution were distinct from those governing production, and—unlike the latter—were mutable” (77).
But in reifying the notion that some forms of labor were less valuable, that they produced less value within this extended order, the underside of this particular arrangement was that there was little net change for the majority of people employed. Instead of working endlessly for a feudal overseer and paying their dues in kind, they were coerced economically, by the dictates of the market, to sell their labor at a bargain to the people who happened to control the means of production. The injustice of this deal was particularly evident for people who had been able to live outside of this system but, as Chapter 2 catalogued, had been forced by the state to abandon their means of self provision. Justifying this arrangement, therefore, became an important social task, one which, in its practice, only further exasperated the social division in question: by a separation of mental and manual labor. The working class, it was said, was meant to be working: that was the labor they were best suited for. The reason that the owners of the means of production found themselves in their lucky position was that they had the imagination and mental capacity to forge innovative new production methods—and the capital with which to put them into effect. This and the “risk” they take in throwing their capital into production are the justification for the unequal distribution of the productivity gains.

Innovations in production—the knowledge necessary to produce—are assumed to be the product of an innovative class of engineers. This is a long running theme throughout the culture of capitalism—though, as David Noble points out, it is an assumption that has become more pronounced in recent decades. It has exacerbated both the social division of labor and the understanding of “forces of production” as a technological innovation with a teleological gravity that necessitates a certain social organization. This presumption—that this is a special kind of labor, done by an especially talented group of people—may be correct in many cases. However, by presuming it is a historical rather than hypothetical explanation, it tends to cast whatever

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relations exist in a *laissez faire* mold. In short, it presumes the social division of labor is the valid representation of a meritocratic system that simply rewards innovations and innovators based on the amount of “value added” labor they contribute. Likewise, when surveying the field of available cultural objects, the presumption is that they have been vetted by the market: the most successful and culturally powerful must be the best—and the reward for creating such a product should go to its individual, creative producer. This market oriented understanding of tradition, like the idea of the separation of mental and manual labor, are deeply embedded in the reified culture of property central to the ideology of Liberalism. As I have shown repeatedly, returning to one of the primary sources of this ideology provides some insight into the roots of the current belief that there is a division between real and intellectual property; it does so by showing the similarity of the relationship of labor to capital that has been consistently maintained—in part by this very division.

Locke, it has been repeatedly noted, was taken with the Baconian idea of improvement. Yet, according to historian Neal Wood, Locke felt that “Human happiness and well-being owe far more to the experience and labors of the ‘dull ploughman’ and ‘unread gardener’ than to all the learned scholars. Our ‘fair gardens’ and ‘fruitful fields’ are due to these humble workers.”⁴⁹⁰ Despite this apparent praise for the workers and their common agricultural intelligence, the dichotomy here between the careful application of intellect by Locke and the other Baconian improvers versus the brute, unreflective knowledge of the “dull ploughman” remains. Though Locke doesn’t say it, his involvement with the Royal Society’s “Invisible College” implies that he’d agree with one of its “leading lights” his “mentor and friend” Robert Boyle.⁴⁹¹ The latter

⁴⁹¹ Ibid. These descriptors are p. 25.
made it his “grand employment […] to catechise [his] gardner and our ploughmen concerning the fundamentals of their profession.”  

In other words, the people with the best, most longstanding understanding of how agriculture could be improved were not in the social position to understand the issues most important to the model Locke and the improvers proposed: they needed a special class of people above them whose “employment” was to be the collation of this knowledge and the education of the practitioners. That this division of mental and manual labor has become commonplace shouldn’t blind us to the contradictions it contains. The clearest evidence of this contradiction is evident in one of the first efforts of this committee, which, according to Neal Wood,

was to gather as much information as possible on agricultural practices in the various areas of the country. To this end a detailed questionnaire was drafted, probably the work of Robert Boyle, to be sent to experienced farmers throughout England, Scotland, and Ireland. While generally unsuccessful in obtaining replies, the venture was perhaps the first example of the use of a systematic questionnaire for eliciting data of a technical nature.  

In other words, the important knowledge was not possessed by the “natural scientists” themselves. Bacon’s own works were “largely derivative in nature;” where it wasn’t based on previous works, it was basically “a compendium of facts and observations gleaned from a number of popular writers.” Eventually, people like Samuel Hartlib, through various correspondents, were able to collect and publish data about husbandry. Locke conducted his own observations and experiments, collected seed samples and cuttings, and the “Invisible College” encouraged agriculturalists to conduct their own experiments and send the data along.

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492 Ibid.
493 Ibid., 26-27.
494 Ibid., 23.
Lest this process be taken for an early experiment in “Open Source” knowledge aggregation, it should be pointed out that the social property relations led to a very different conclusion. Hartlib, Locke, and most members of the Baconian Natural Science movement advocated enclosure on some level: the compilation of this knowledge—whether gleaned from cottagers, innovations by capitalist landlords, or the product of centuries of experimentation on the commons—could only be fruitfully employed by the specialized class of educated improvers who now owned the material means of production. The workers had done their part in developing these techniques, but the “value added” work of the contemporary intelligencia put them in a position to dictate the future of agriculture. 495

This future did not rely, as Locke supposed, on the atomized of production of “improving” innovators freely putting their private property to work for profit. Certainly the latter played a role. But the source of their profits lay in dispossessing the very laboring class that had helped develop this knowledge, eliminating customary rights for cottagers, destroying the spaces where potential laborers could provide for themselves, and putting them to work on the land now owned by the capitalist improvers. The specifics may not match up in every case, 496 but, as chapter two evaluated from another perspective, the broad strokes of the accumulation of both land and knowledge into the hands of one class over others and the economic, social and political coercion involved in this transformation are obvious. Further, in so far as the new model was productive, it was because of the social process of valorization—both in terms of the great number of landless laborers required for the system to function and the collective knowledge of agriculture that was effectively transferred into private hands. At this time, it is true, the use of intellectual property was unnecessary: but the control over the physical means of production was enough to

495 And, as the previous chapter pointed out, culture and agriculture are coeval as concepts.
496 There may, for instance, be cottagers who were able to stay on their land or enclosers who had come up with some of these techniques themselves.
guarantee the reproduction of the social division of labor. Today, organizations like Grain fight against what appears to be a similar dispossession using patent and other intellectual property laws imposed through trade agreements. Indigenous people, likewise, often find the intellectual property rights captured through practices like bio-piracy to be inconsequential except in so far as their traditional rights to the land are otherwise threatened. As one indigenous leader in Ecuador said of the unauthorized patenting of a key traditional herb, “I am only concerned if we lose our land—and have to buy it from this company.”

To be explicit, this is the full meaning of “primitive accumulation.” The accumulation is not just about the fact that land was concentrated into a few hands. As Michael Perelman points out, Adam Smith’s understanding of how this came about follows elegantly from Locke’s labor theory of property. Intertwined with both is that Protestant Ethic that Weber finds the compelling reason for the success of Anglo-American capitalism. Further, it all gels well with the paradoxical Libertarian ethics discussed in the previous chapter. The accumulation of property into a few hands may be unfortunate and we may not like it, but in a free society, where people can do as they please, there are simply some who are more motivated than others, who work harder, who live more frugally, and who thereby accumulate more. The hypothetical history is replaced for the actual one and, were one to point out that these current owners gained their booty through state coercion rather than a glorious flowering of freedom, the underlying utilitarian argument overrides all objections: this organization of society is more productive, therefore even the dispossessed are better off.

497 Their mission statement: “GRAIN is an international non-governmental organisation (NGO) which promotes the sustainable management and use of agricultural biodiversity based on people's control over genetic resources and local knowledge.” GRAIN, About Us (2006 [cited Nov. 12 2008]); available from http://grain.org/about/
In this context the social process of valorization becomes ever more urgent. The visibility of this process shows that the productivity is not the sole result of the labors of these owners. It depended explicitly on a multitude of others, working for them, compelled by a commodity economy and an ever more totalizing state. Therefore, as a social process, primitive accumulation doesn’t really mean the actual accumulation of the land itself or the productive knowledge: it means the separation of workers from their means of production. As observers from Marx to Karl Polanyi to the present day economist Michael Perelman have illustrated this was not a natural process. The “habituation of the laborer” to these new conditions was an imperative that only the guarantees of private property in the means of production could instill.

The origins of Fordist production, likewise, show a similar pattern of both dispossession and the primitive accumulation of knowledge. Harry Braverman’s *Labor and Monopoly Capital* illustrates this point extensively. Here Locke and the Baconian improvers are replaced by Fredrick Winslow Taylor and the scientific management movement. In US lore, the latter is credited with single-handedly developing a more productive factory system. Supposedly expanding upon Adam Smith’s pin factory allegory, Taylor was able to subdivide the labor process so that it occurred faster and more efficiently. Hagiographies make him the source of innovations in the industrial labor process and give him credit for the increased productivity of modern industry.

Whatever the effects of his efforts on the improved output of the factory system, Braverman makes it clear that this was not due to scientific or technological prowess on his part. More importantly, his primary goal was always to increase management’s control over labor. This was only possible by wresting control of the labor process from the workers: “Workers who are controlled only by general orders and discipline are not adequately controlled, because they retain
their grip on the actual processes of labor.”

Taylor’s realization was that, though the workers could be made to work in the factory—though the class relations were clearly arranged so that there existed laborers who would work for the owners of the means of production—in the completion of these complex tasks, the workers still had an advantage over the owner because only they understood how the work could be done. In an era of wildcat strikes, work stoppages, and militant labor solidarity, this was a dangerous proposition. It was inarguable that the worker was a source of value: but that gave them, collectively, a political force as well. The difficulty of training a worker, of getting them to the point where they could be productively employed militated against their easy replacement in the production line in the case of a strike. Thus the science of management was intended to increase the division of labor incrementally until the power of production—in the form of knowledge over the labor process—became complete.

Note again that, the social process of valorization is incontrovertible: the workers are necessary for production to occur. They are, as in the capitalist agricultural improvement, the essential force of the more productive production process. Likewise, when Braverman quotes from Taylor’s own memoirs, it is clear that he realized they possessed the essential knowledge that made even the machine industry function properly. As Taylor, in his proselytizing scientific management, describes its predecessor:

In the best of the ordinary types of management, the managers recognize frankly that the…workmen, included in the twenty or thirty trades, who are under them, possess the mass of traditional knowledge, a large part of which is not in the possession of management. The management, of course, includes foremen and superintendents, who themselves have been first-class workers at their trades. And yet these foremen and superintendents know, better than anyone else, that their own knowledge and personal

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skill falls far short of the combined knowledge and dexterity of all the workmen under them. The most experienced managers frankly place before their workmen the problem of doing the work in the best and most economical way. They recognize the task before them as that of inducing each workman to use his best endeavors, his hardest work, all his traditional knowledge, his skill, his ingenuity, and his good-will—in a word, his “initiative,” so as to yield the largest possible return to his employer.\footnote{Ibid., 101. Apologies for the masculine domination in the quote: it is \textit{sic}.}

Taylor overcame this problem by the close study of the techniques each of these workers used to save time in the application of their labor. This led to further separating the conception of the work from its execution—the division, in other words, of mental from manual labor. Even Taylor understood this to be a process of removing the traditional knowledge of the craft workers from their control and placing it solely in the hands of the management. Again, in Taylor’s own words: “The managers assume…the burden of gathering together all of the traditional knowledge which in the past had been possessed by the workmen and then classifying, tabulating, and reducing this knowledge to rules laws and formulae.”\footnote{Ibid., 113.} Work would be subdivided into minute tasks which would prevent any one worker to not work efficiently as a cog in this machine. Using piece rates and wage fluctuations as a tool to motivate the workers to accept this condition of work, Taylor was able to increasingly place the work process into the control of the management. As Braverman points out, this is only possible in a social labor process. This social process of valorization allows the purchaser of labor to “divorce conception from execution.” “This dehumanization of the labor process, in which workers are reduced almost to the level of labor in its animal form, while purposeless and unthinkable in the case of the self-organized and self-motivated social labor of a community of producers, becomes crucial for the management of purchased labor.”
The point here, as in the accumulation of agricultural data in the era of Locke is that "systemization often means, at least at the outset, the gathering of knowledge which *workers already possess.*" The idea that there is a strict division between the mental and manual labor is an artificial division that can only be maintained after the traditional knowledge has been extracted from the dispossessed worker. And, also as in the era of Locke, this new, common pool of technical, traditional knowledge is not the property of the workers. However, this is no longer because laborers are assumed to be ignorant or a debased species, as they were in the late feudal studies of the Natural Scientists. This would, after all, undermine the idea that scientific management needed to study laborers in order to control them. Still, the Lockean understanding of the labor theory of property is maintained. Braverman quotes Taylor, speaking to a US House of Representatives Committee, saying that, though the workman has the knowledge, he cannot afford *not* to work long enough to develop a science of management. Consequently, those who can afford to do this become the rightful owners of the knowledge they are able to gather. The implications are clear to Braverman and they bear directly upon the argument about primitive accumulation above:

Taylor here argues that the systematic study of work and the fruits of this study belong to management for the same reason that machines, factory buildings, etc., belong to them; that is, because it costs labor time to conduct such a study, and only the possessors of capital can afford labor time. The possessors of labor time cannot afford to do anything but sell it for their means of subsistence. It is true that this is the rule of capitalist relations of production, and Taylor’s use of the argument in this case shows with great clarity where the sway of capital leads: Not only is capital the property of the capital, but *labor itself becomes part of capital.* Not only do workers lost control over their instruments of production, but they must now lose control over their labor and

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503 Ibid., 15.
the manner of its performance. This control now falls to those who can “afford” to study it in order to know it better than the workers themselves know their own life activity.504

Thus, alongside the more complete socialization of the creation of value, the separation of mental from manual labor—the origin of the assumption of division of labor that is fundamental to most intellectual property scholars—lays the groundwork for the very forms of control that they rail against. Braverman points out that this is effectively the dispossession of trade secrets and, in an era before the widespread use of patents, it is a progenitor of the practices Lessig decries in Free Culture.505

These illustrations of primitive accumulation are analogous to one of the more prominent memes of the mainstream critics of maximalist Intellectual Property rights: that the current holders of copyright properties often built their products on the cultural commons they later try to lock down through maximalist rights. One of Lessig’s favorite anecdotes from Free Culture—which he also features in many of his power point presentations around the time he was working on the book in question—discusses Walt Disney’s original “invention” of Mickey Mouse as well as most of Disney’s early movie length cartoons. All of these were based, in one way or another, on folk music and communal fairy tales. The key here is that “culture always builds on the past.” Yet once culture was appropriated under a particular set of social property relations, once it is turned into a commodity under capitalist production relations, this earlier process of social valorization—and any process afterwards—is effectively negated. Future appropriations like Disney’s, from either the common culture that existed before he commodified it or the cultural commons that he

504 Ibid., 116.
505 Here, especially, the anecdote about the RCA employee who inadvertently invented the FM radio and thereby threatened the devalorization of the AM infrastructure RCA had built (especially the receivers it had helped distribute to the public.) RCA then used patent claims to keep the invention from ever seeing the light of day. Harvey’s note on technological change and how it is ultimately bad for capitalism (because competition forces the devalorization of sunk capital before it can be amortized) is also important. Cf. David Harvey, Limits to Capital (New York, NY: Verso, 2006), esp. Ch. 4, p. 122-26.
helped produce through his appropriation, were closed off to future creators. As in the enclosure of land and the separation in the factory, these relations became reified and bound by law.

In the cultural sphere, the difference is that the controls aren’t currently in place to solidify these relations completely: the initial distribution can be undermined by new production and new distribution outside of the supposedly legal frameworks of value. But the distinction between real and intellectual property here is more historical and cultural than ontological. Yes the current technology prevents the complete locking down of nominally immaterial culture; but, likewise, until the invention of barbed wire, it was difficult to fence in the prairie in Texas. The subsequent legalization of the practice of fencing—and the criminalization of fence cutting—is not all that different than the DMCA restrictions on the distribution of the crack for DVD encoding: the mere possession of wire cutters was, for a time, enough to charge you with intent to rustle the contents of the enclosed area; likewise, under the DMCA, the possession of the illegal code to crack DVDs is interpreted as evidence of intent to pirate. That legal control of the material distribution of property is currently hampered by lack of adequate enforcement techniques shouldn’t give us the illusion that it represents a serious ontological difference. It is true that the contents of the DVD and the enclosed prairie are quite different in terms of the joint consumption properties of nonrivalrous goods. As critics of IPR as far back as Thomas Jefferson point out, the distribution or derivative production of an intangible product leaves the original intact. But this misunderstands what is actually being bought and sold in the culture industry.

506 Henry D. McCallum and Frances T. McCallum, The Wire That Fenced the West (Oklahoma City, OK: University of Oklahoma Press, 1965). The patent for barbed wire was issued in 1874 and its widespread use was greatly responsible for the “transformation of the cattle kingdom from a free range to one of enclosed pastures.”
Commodification and the Cultural Production of Intellectual Property

As a way of connecting this discussion of commodification and the division of labor with the observations of the balanced IPR critics in relation to the social process of production, I will use the figure of Dallas Smythe. Here, I argue that Dallas Smythe’s understanding of the Audience Commodity is necessary even if it is inadequate. He exposes some of the most vital facets of the emergent culture of the social order of post-war capitalism. By attempting to discuss the broader labor process of production for the value of cultural goods, he is able to illuminate—in some cases unintentionally—the link between this extended process of cultural production and the social processes that help to create cultural efficacy. These are now the commodities produced by audiences for the owners of the means of cultural production.

His incomplete conceptualization points to the way that a strictly empirical distinction of real and intellectual property overlooks their material similarity. However, to see the relevance of the points he was making, it is important to read Smythe in the context in which he was writing: he was a Marxist critic of communications networks under monopoly capitalism. Most Cultural Studies critics of this system had focused on the products distributed through these communications networks, as mentioned in the sections on cultural studies, in a narrow Structuralist or culturalist fashion. In effect, Smythe argued that both of these were true. It is best summed up by Eileen Meehan, who uses Smythe to talk about the value produced by fans of popular cultural products: “Our enculturation, [...] generates direct and indirect revenues for media corporations.”

Though the social production of meaning is important—particularly as it is picked up by Lessig, Coombe, and Litman below—Smythe retains an essential link with the Marxist thematic:

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the importance of the social division of labor within this production process. Because he cannot see the way that value created in this process will be appropriated, he can’t fully conceive of the property relations that anchor it except in terms of the system of monopoly capital he sees around him. In retrospect, we are able to see the system in its totality and to engage more fully these various iterations of Marxist understandings of cultural production.

Smythe’s most famous concept is that of the Audience Commodity. The latter referred to the fact that commercial TV was not actually in the business of producing content for audiences: its primary business was in selling audiences to advertisers. Therefore its primary commodity was that of the audience. The audience, in this way, worked for the networks by watching the commercials in exchange for the “free lunch” of the content between the commercials. It was their labor that produced value for networks.

Smythe is very focused on the material and social processes that are part of the active appropriation of these products—as he would put it, the way that the audience works for the advertisers and advertiser driven networks. In this, he goes a long way towards connecting the work of cultural appropriation to other kinds of labor. And in the context he was writing, it made some sense to shift the focus from the content to the structural realities of monopoly capitalist accumulation and the role that advertising explicitly played in generating a general commodity culture. Most observers at the time would have agreed that the very definition of monopoly capitalism contradicts the Liberal ethos of Lockean property: the state played an active role in both implanting the commodified culture and to preventing the devalorization of fixed capital.

Since the system he analyzes was undeveloped when other theorists had discussed it, and in transition by the time Smythe was writing, it was not possible for him to elaborate his theory fully. Likewise, since the commercial media in the U.S. market (like the Stationers of Tudor

England) began as government sanctioned monopolies, the contours of their political economic
development are different than those of other industries. Smythe saw portions of this
contradiction, but couldn’t quite articulate it in relation to the other monopoly industries that
dominated more through economic heft, webs of patents, and subversions of the democratic
process rather than outright politically guaranteed property in a market share. In contrast, US
commercial broadcaster were given a monopoly market and invited to figure out what to do with
it. Smythe, in his attempt at Marxist orthodoxy, conflates all industries with the same efficacy
(and method of value extraction) in the process of commodification, and all forms of social
production with abstract labor; he insightfully notices a wider set of cultural practices taking place,
but then tries to reduce them to the same homology as all other forms of valorization.

In the process of elaborating his theory, he effectively destroys much of the Marxist
relationship between use, exchange, and value, when what he really could be doing would be
bolstering his claim through them. Both Smythe and Bill Livant rightly point out that there was
something unique in the way commercial media functioned in their contemporary society—
something which Jean Baudrillard looked at from the opposite direction in his consideration of the
political economy of the sign—whereby the commodities through which we fulfill our needs

become fetishized brand images. In this, however, they are wrong to see branding itself as the cause. As chapter two briefly explored, branding is actually more linked with the expansion of distribution and communications networks, broadly defined—a point that Smythe does make in relation to revolutions in transportation and improvements in mass media technology. But Smythe doesn’t follow this theme long enough.

In fact, while he begins by critiquing the dominant paradigm of Marxian economic analysis, he ends up with this argument very close to where he began: Baran and Sweezy’s sections in *Monopoly Capital*, where they discuss the sales effort and the necessity, under monopoly conditions, to manage demand. The caveat that he makes is that the media are themselves industries so we should look at what they produce. He makes a good point, but it is less the problem of labor per se than an issue of the commodification of leisure, desire, and other, more general cultural practices that had previously existed outside the cash marketplace. Here Smythe makes a clearer (though tangential) set of revelations about how the efficacy of this culture depends on a great deal of other work we do—and on what could be seen as another process of primitive accumulation. Advertisers, after all, benefit from the processes of enculturation that encourage us to fulfill our needs with their commodities—just as broadcast networks benefit from our fulfilling our needs for entertainment with their cultural commodities. On this topic, Smythe is much clearer and it is in the latter that we find the most pertinent analogy to earlier revolutions in production and commodification. It also connects him with the more memorable strain of media and cultural criticism with which Cultural Studies was initially aligned.

The latter are the product of a certain cultural moment. To take an emblematic object, Guy Debord’s *Society of the Spectacle* is a problematic text in that it harkens back to an original, face to face culture (that which was “directly lived”) which, most likely, is as fantastic as the TV family

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of the 1950s. However, his hyperbole does throw into relief the expansion of the process of commodification into arenas that had previously seemed less open to them. The mode of cultural production and interaction changed significantly with what Benjamin called “The Age of Mechanical Reproduction.” The anxieties about mass cultural objects animate much of the early Frankfurt School on a theoretical and aesthetic level; they also form one of the pivots of Richard Hoggart’s *Uses of Literacy*, where the anxieties are deeply felt by communities themselves who were overwhelmed by what seemed to be exogenous cultural production.

In this mid-century conjuncture, in other words, there was a wholesale transformation in the processes of commodification and social valorization—and, dialectically, the valorization of social and cultural processes—that Smythe and the above theorists were trying to address. As discussed above, this was a process of commodification. At this degree of development, this is not satisfied through direct barter, but through the participation in the cash economy. This means, for most people, that they cannot provide for themselves: they must work for someone else, receive wages, and purchase commodities necessary for life with that money.

Commodification, in other words, is the growth of the number of socially essential life processes for which we must pay, for which we cannot provide for ourselves. How “socially essential life processes” is defined, of course is equally relative. As Marx points out regularly in the early pages of *Capital: Volume I*, for a commodity to have exchange value it must have use value. Smythe and many of the critics of advertising supported consumption find the latter reprehensible.

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516 I bracket for the moment the contradictions of money as a medium of exchange.
for two somewhat contradictory reasons. On the one hand, they point to the way advertising “creates” needs. As all of these theories are elaborated, either implicitly or explicitly, on a model of monopoly, corporate capitalism, this demand management is necessary to maintain the process of valorization and accumulation. On the other hand, it seems that branded manufacturers intercede in otherwise uncontrollable processes, commodifying already existing needs and practices—making, for instance, the social process of meaning-making and cultural valorization a saleable commodity. Entertainment, community interaction, the material of water cooler conversations: the raw matter from which these are produced slowly become the properties of large corporation, the source of our common national culture, and for which we must pay—through money or audience “labor”—for access. These tensions run through the critical cultural approach to communication and they map the basic tensions of Cultural Studies—that of the two paradigms: Structuralist vs. Culturalist—mentioned in the early pages of this chapter.

Smythe was not engaged enough in these theoretical debates, but he nevertheless touches on both. From the culturalist side, in his longer explanation of what he means by the work of the audience, he explains that it is the work consumers do from childhood—learning how to buy commodities to satisfy their needs—that allows the smooth functioning of advertising as demand management. However, as an economist (somewhat akin to the Structuralist paradigm) he was far more interested in the economic consequences of this transition—both objectively and for Marxist theory. In his assessment, the theoretical difficulty is that

In "their" time which is sold to advertisers workers (a) perform essential marketing functions for the producers of consumers' goods, and (b) work at the production and reproduction of labour power. This joint process, as shall be noted, embodies a principal contradiction. If this analytical sketch is valid, serious problems for Marxist theory emerge.

Among them is the apparent fact that while the superstructure is not ordinarily thought of as being itself engaged in infrastructural productive activity, the mass media of communications are simultaneously in the superstructure and engaged indispensably in the last stage of infrastructural production where demand is produced and satisfied by purchases of consumer goods. 518

The idea that the superstructure could be productive in the same way as the infrastructure defied easy explanation in Marxist terms. Smythe, though not entirely clear on how he would rewrite this model, saw something very different in the social formation as it currently existed. The use of commodities to satisfy needs, the political effects of the psychology promoted through advertising, the regular cultural processes into which this new system was injected: all of these pointed to something more intensive occurring. The infrastructure was interpenetrating the superstructure and vice versa:

The work which audience members do for advertisers takes place in a household context where familial, individual and other associative needs must be dealt with. I explained how the twin of the household matrix was that at the job where the ideological lessons are built into the job descriptions, promotions possibilities, and incentive wage arrangements.” 519

In saying this, he sees the economic effects of the power of media in culture in the same way that Habermas sees the political effects of the power of the economic model on culture. In his The Structural Transformation of the Public Sphere, the latter concludes that the major change is the transformation “From a Culture-Debating to a Culture Consuming Public:”

So-called leisure behavior, once it had become part of the cycle of production and consumption, was already apolitical, if for no other reason than its incapacity to constitute

518 Smythe, "Communications: Blindspots of Western Marxism," 3.
a world emancipated from the immediate constraints of survival needs. When leisure was nothing but a complement to time spent on the job, it could be no more than a different arena for the pursuit of private business affairs that were not transformed into public communication between private people. To be sure, the individuated satisfaction of needs might be achieved in a public fashion, namely, in the company of many others; but a public sphere itself did not emerge from such a situation. When the laws of the market governing the sphere of commodity exchange and of social labor also pervaded the sphere reserved for private people as a public, rational-critical debate had a tendency to be replaced by consumption, and the web of public communication unraveled into acts of individuated reception, however uniform in mode.

The mistake that Smythe made was by assuming that the consumption of branded commodities was the unique transformation of this moment—that the issue of leisure time spent learning about branded commodities was separate from the “free lunch” portion of consuming media. From a long, historical view, we can now see the significance of both. Not only were the needs being met by commodities, not only was demand management creating new needs and attaching new desires to the commodities that could fill them: a whole new set of social processes above and below this, also attached to the cultural efficacy of demand management, were being commodified.

The flipside of this, which I don’t have space to explore fully, is the direct action of the state in the economy and the cultural effects of this. This follows from the analysis of the Liberal state in the previous two chapters. The liberal model of the state is based on protecting the value

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520 Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society, 160-61.
521 The other side of this issue, from the Austrian perspective, would say that the choices that we make in the marketplace continue to guide producers—rather than their being demand management of any kind in the monopoly capital system. Though the critics above wouldn’t agree with this assessment, they are similarly perplexed by the problem of state capitalism, they just believe that, instead of the market acting as an information gathering, aggregating, and distribution, mechanism, it simply tells people what they “need” and how that need can be satisfied.
of property and therefore backing the functional power of economic heft with the coercive apparatus of the state. In short, the culture of property is made effective the more it becomes reified as the only possible framework for interaction—that is, as more and more aspects of the social formation are subjected to the process of commodification and private ownership. The Liberal ideology of the economy—as in the works of Hayek and von Mises—is precisely that this market will provide the discipline needed to encourage adherence to the overall model. The full C3 implementation of the Liberal state would make everything a potential property—and compel the valuation of everything through the market mechanism in order to provide for the most efficient distribution of resources. The elegance of this instrument and the purity of its force makes it seem a simple solution to the supposedly messy realities of politics and governance.

The post-war solution to this, however, did not entirely dissolve the market mechanism or the reified culture of property. In fact it attempted to render its most problematic attributes moot in order to salvage it as a sustainable model—attempting to solve problems credit liquidity, frictional unemployment, labor/capital conflicts, and imbalances in income, consumption patterns and the periodic devalorization of fixed capital. This required, however, a return to the political. Again, a full accounting of this is beyond the scope of this project. For now, I will only mention the role that the state played in helping to encourage commodity consumption.

In this case, what we find is not just that there is a superstructural aspect to the reproduction of the infrastructure, but that the economy, in this case, was employed in an ideological way. The political force of this ideological use of the economy was what Gramsci found to be the genius of “American Fordism.” Aglietta, a French Regulationist economist, observes that there was certainly an increase in what Lukács would have called reification in that,

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322 Antonio Gramsci, Quintin Hoare, and Geoffrey Nowell-Smith, *Selections from the Prison Notebooks of Antonio Gramsci*, [1st ed. (New York: International Publishers, 1972)]. Obviously it isn’t the only thing he finds amazing about it, but as a political theorist, this is part of what he sees as important.
“the time devoted to consumption witness an increasing density in individual uses of commodities and a notable impoverishment of non-commodity interpersonal relations.”

However, as true as many of the theories of the increased role of advertising in consumption—Aglietta looking expressly to Baudrillard as an important progenitor of these observations—he cautions that, “It cannot be stressed too greatly that the role of the image in consumption, which many sociologists have made into a fundamental explanatory principle of capitalist development, is strictly subordinate to the material and social conditions we have discussed.”

Many of the material and social conditions wrapped up in the change in the working conditions and consumption patterns of the wage earning classes are identified by critics of monopoly capitalism at the time, but the mechanisms of efficacy are largely assumed to be narrowly concerned with the “spectacular” aspects of the changes.

In effect, the post-war state did what the liberal state could not. Just as the Tudor and Stuart regimes helped, in the words of Moore, to slow the pace of the enclosures, post-war Fordism helped to ease more and more citizens into commodity consumption. By providing cheap, federally subsidized or sponsored loans, guaranteeing wage security through collective bargaining and social security, encouraging home ownership and the purchase of large appliances, the US government helped to create an ambient cultural sphere in which all of the production and consumption Smythe discusses takes place. This general process of created what Aglietta calls, a new mode of life for the wage earning class by establishing a logic that operates in the totality of time and space occupied or traversed by its individuals in daily life.”

In short, while these were economic transformations, they also had an ideological component. They made it possible for the average citizen to feel safe in their further reliance on commodities.

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526 Ibid., 71-72.
In this, it is a soft form of primitive accumulation, but it has many of the same effects: there was a continued support of the capitalist process of accumulation (though under altered, monopoly conditions) but it also helped to remove other options of satisfying needs outside of the market/property nexus. This time, however, it wasn’t necessarily compelled by the market. Instead, it necessitated the process of establishing cultural efficacy in all its complexity.

The habitus necessitated by this new regime of accumulation had to be supported by definite social and cultural norms that were reestablished alongside or on top of existing ones. Using the Bourdieuan term “habitus” here is apt. Alain Lipietz, another Regulationist economist, describes the “mode of regulation” that a “regime of accumulation” requires using just this term, elaborating it as “norms, habits, laws and regulating networks which ensure the unity of processes and which guarantee that its agents conform more or less to the schema of reproduction in their day-to-day behaviour and struggles.”

The “Mode of regulation” is, therefore, “the set of internalized rules and social procedures which incorporate social elements into individual behaviour.” This socialization process cannot occur from the top down alone and must be integrated into the microlevel interactions of individuals within the social formation. The discipline of administrative communication studies, as discussed below, well understood the need to have cultural valorization of these new rules—including the new rules about which aspects of life and labor should be commodified and/or incorporated into the process of commodification by necessitating commodified inputs, including, and especially, women’s housework.

Within these changed circumstances—brought about through the state/corporate implantation of a model of culture—Smythe and others observed that previous forms of leisure entertainment—as Habermas points out, sometimes connected to political and civic action—were being overtaken by mass forms of communication. On a practical level, as explored more below,

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Footnotes:

528 Ibid., 15.
this was injected into the already vibrant local forms of communication and culture—associations with a community, with a network of interaction with those nearby and, in the case of the national media, with an “imagined community” that now demanded interaction, even if only superficially, through the mediums of commercial broadcasting. This sociological process of individuated, interpersonal interaction with mass produced cultural products certainly had its ideological and political dimensions: Smythe loses the focus on these in trying to isolate its economic dimension.

While the metaphor of the audience commodity doesn’t necessarily get Smythe there, his focus on labor in general helps him provide a welcome contrast to what he calls “idealist” notions of how ideological apparatuses work. As an economist, he sees something different occurring in the process of valorization: he can’t quite put his finger on it, but he knows it is there. Informed by the discussion above about the instantiation of the habitus of the social consumption norm we can see the general economic environment he was considering. What Smythe detected was the parallel processes of cultural validation/valorization that were necessary for this new system to function and take hold. In other words, in order for the system that was imposed from the C3 level to have cultural efficacy, it required the labor and efforts—the labors of appropriation—throughout the cultural hierarchy in order to instantiate it into everyday life. In short, what Smythe—and the combined paradigms of the Culturalist and Structuralist wings of Cultural Studies—experience and try to articulate is the complex process whereby, on the one hand, this mode of production, altered in its purity, is politically installed in the social formation; and, on the

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530 Likewise in looking at the individual.
other, the only way it is effective is if it engages the participation and captures the energy of the collective cultural and communal process of meaning making.

At the time, this was simply a matter of noting that, along with the variety of negotiated meanings produced throughout the cultural circuit; along with the ideological role these intended meanings played in their support of the revised capitalist order; along with these, to paraphrase Meehan above, our enculturation produced value. This was more of an empty complaint at the time; now, with the increasing importance of IPR, it is evident what this primitive accumulation has done. Many commentators now note that the control of this common culture is in the hands of a few media corporations; but before it drifted into their possession, before we “worked” as audience members on its materials, we ceased to participate in our own cultural rituals at the local level. As Lessig laments in the early part of this chapter, we became a nation of consumers. This returns us to the discussion at the beginning of this section about what intellectual property owners actually claim to be their property.

The fact that we now have a term—intellectual property—to cover both the copyrighted materials of commercial television and the trademarked products of their advertisers could alert us to a homologous process in which both were involved: a similar course of cultural valorization was necessary even as both sets of products were given apparently complete control over the material means of production. In both cases, what eventually occurred was the complete commodification not only of consumption in terms of use values necessary for life, but also of the process of cultural meaning making. From the producer side, what this meant was that the satisfaction of these needs, for the average consumer, would increasingly be met with the purchase of one of their commodities. But for this to happen, there needed to be a general social and cultural appropriation of these as the objects of what Lessig would call RO culture. The latter was essential for the integration of branded commodities into everyday life; as mass mediated products—throughout the flow of commercial media—became cultural commonplaces in themselves, social and political factors led
to these becoming instruments of meaning themselves, thus valuable as social and cultural signifiers far beyond the contributions of their owners.¹¹¹

An empirical discussion of a cultural product protected by intellectual property rights would point out that there is something distinctive about what we call intellectual property. Patents, copyrights, trademarks all have what is referred to as a non-rivalrous quality. In the words of Lawrence Lessig, discussing the difference between music piracy and shoplifting, “when you take a book from Barnes & Noble, it has one less book to sell. By contrast, when you take an MP3 from a computer network, there is not one less CD that can be sold. The physics of piracy of the intangible are different from the physics of piracy of the tangible.”¹¹²

However, this focuses too closely on the empirical qualities of the object rather than the materialist understanding of it as property. By this I mean the way the ownership patterns determine certain capitalist social relations. In this case, what is owned is not a particular object—obviously the intangible, non-rivalrous good can be re-worked, redistributed, remixed, etc. without harming the original. Derivative uses may theoretically do nothing to destroy the non-rivalrous quality of the cultural token—more copies could still be made—but it might destroy the affective capital that has become attached to it—or prematurely harvest it, destroying the “cool” it might have before it can really flower. In other words, derivative uses can either degrade the cultural value—capitalized in the form of the perceived value of a corporate stock of copyrighted libraries—or it can pilfer the profits perceived to be owned solely by the title holder. Thus, what is owned is the semiotic connection between the sign of the property—its signifier—and the mental image created in the minds of the viewers—it's signified. In short, the claim is not on the empirical property itself, but on the section of our collective consciousness devoted to that

¹¹¹ On a basic level, branded marketers understand this even more today: though the claim is that there is a certain elasticity in terms of people’s choices amongst these products, more often brand loyalty for fairly interchangeable goods like toothpaste, dish soap, soda, and what passes for beer in the USA is established early on and only altered grudgingly. ¹¹² Lessig, Free Culture, 64.
trademark, copyright, or patented idea—and its possible material revenues. This is an explicit claim in trademark law, where owners must prove that this association is active—that the mark has what I will call *cultural efficacy*. By this I refer to a given range of references and meanings which inspire memories, emotions, and personal and interpersonal identification within a certain cultural inside. Increasingly, the cultural inside is global in scale, but the contours of its transcultural appropriation will be very different.

The property of intellectual property is a semiotic one. This is not just a claim to ownership of the signifier, but of the complete process of signification which results in the sign. As Vološinov points out “Signs can arise only on *interindividual territory.*” It is only in the social process of communication that the signifier of the branded, copyrighted work, or even patented product acquires its full valorization as a commodity. To put another way, there are anthropologically given human processes in which we all engage.\(^{533}\) The bulk of the previous section has been on the way new schemes were introduced to aid in the intensification of commodification of most all consumption—from life necessities to forms of entertainment and art. The move to commodify these basic processes is unique in human history and has long been one of the preoccupations of Cultural Studies. The latter often began from the more superficial changes and tried to read economic processes back into them.\(^{534}\) Though this might have been inadequate from an economic perspective, it made a great deal of sense culturally—quite a bit when one factors in the way the results of these cultural processes are now claimed as economic capital. The meaning of language and social practices not only directs our activities, it affects our

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\(^{534}\) Murdock and Golding criticized Western Marxists—all the way back to Adorno—for this. “Instead of starting from a concrete analysis of economic relations and the ways in which they structure both the processes and results of cultural production, they start by analysing the form and content of cultural artifacts and then working backwards to describe their economic base” cf: Graham Murdock and Peter Golding, "Capitalism, Communication and Class Relations," in *Mass Communication and Society*, ed. James Curran, Michael Gurevitch, and Janet Woollacott (London: Sage Publications, 1977), 17.
understanding of the world. As Vološinov argues, “The individual consciousness is a social-ideological fact.”535 By this he means that all the inner speech that we have, all our personal reflections, will be refracted through the social language of signs536 we share with others:

Consciousness takes shape and being in the material signs created by an organized group in the process of its social intercourse. The individual consciousness is nurtured on signs; it derives its growth from them; it reflects their logic and laws. The logic of consciousness is the logic of ideological communication of the semiotic interaction of a social group.537

This is to say, that, in so far as the value of an intellectual property is based mostly in its meaning, in its semiotic attachments, it is—and can only be—valorized in a social process. This is not only because the social value that it accretes is due to countless people picking up that meaning and using it. When one looks closely at the cultural products that have the most staying power, that, as marketer Alex Wipperfürth says below, “stick,” which have cultural efficacy, they most often must use the cultural materials already available, i.e. previously created meanings and references.538 As Vološinov puts it, “No cultural sign, once taken in and given meaning, remains in isolation: it becomes part of the unity of the verbally constituted consciousness.”539

When an intellectual property owner claims title to the sign value that they are given legal rights over, they aren’t claiming ownership of the material in question: it could obviously be reused, remixed and so on, nearly infinitely, without technically degrading the original material.

536 The issue of, for instance, thinking in images or the figural richness of dreams, is also influenced by this: images we see in popular culture or remember from our past are recycled to some degree, though, the imagination is much more powerful than this: a Frueadian reading might say that, in so far as the consciousness is structured by these, it is through the social superego: this doesn’t preclude the possibility of the eruptions of the Id.
537 Voloshinov, Matejka, and Titunik, Marxism and the Philosophy of Language, 13.
538 In their study of why US movies and Television shows are dominant, Hoskins, et. al. points out that it is possible to recoup most production costs within the domestic market because it is so enormous; exports, therefore, can be priced lower (almost to the point of “dumping”). But they rationalize the latter—particularly in non-Anglophone, non-Western/Northern countries—because the language and references do not have as much a purchase on those audiences. They term this difference in value the “Cultural Discount.” Hoskins, McFadgen, and Finn, Global Television and Film: An Introduction to the Economics of the Business.
539 Voloshinov, Matejka, and Titunik, Marxism and the Philosophy of Language, 15.
Their ownership is over the little section of the individual and collective consciousness that contains those references, that has cemented the relationship between their signifier and all the positive, emotionally charged, signifieds attached to it. This inevitably includes a wide variety of things the producer never intended, but the force of nostalgia works in their favor. Childhood memories that might have never occurred; social interactions that happened mostly in the mediated sphere of TV: all given the sepia-toned warmth of tradition and safety or the clever perceptiveness of camp. These visions, populated by the properties in question, are ultimately owned by the same clique of corporate individuals who were given control over the technology that made the national community possible in real time.

This is not to say that the original authors had no agency, just that there is no way these properties would have acquired the associated values were it not for the social valorization in question. If anything, an entire generation (two or even three now) had the bulk of its creative energy channeled into these endeavors. Enormous intellectual effort was committed to reinforcing and controlling these associations: in some cases, through propaganda alone, but often using the law itself. As critics of the use of intellectual property rights to stifle free speech point out (though not in these terms) the ownership is over the specific signification as they have articulated it and/or as it benefits them. It becomes less important if, for instance, people have a different interpretation of a film than if they have a certain opinion about Colgate Toothpaste: in either case, the goal is that you pay for them both, as many times as possible. There is a continuum in which IPR ownership is over the ethereal semiotic qualities orbiting this section of the consciousness versus its instantiation in an actual medium. For analytical purposes, taking the three major forms intellectual property, this continuum would run from trademarks to copyrights to patents.

The first, trademark, even in its legal definition, deals mostly with the cultural associations of their product. Even here, on the other hand, the particular articulations and enunciations are important—for instance the trademark owner must prove that their registered marks and phrases
are understood by consumers as referring to their specific product, but not so closely associated
with the general commodity in question that the mark itself becomes synonymous with the
product (e.g. “Xerox,” “Kleenex,” or, more recently “Google.”) It must ensure, in Barthesian
terms, that the mark remains connotative rather than denotative. Patents obviously have the most
material basis, but, as the preceding sections on agriculture and industrial labor illustrate, they are
no less a part of the social process of valorization.

Copyrights, however, are given the most long-lasting protection. Trademarks can only be
registered for ten years at a time, renewable only if the mark is still used in commerce and actively
recognized;\textsuperscript{540} patents can be for up to twenty years.\textsuperscript{541} But copyrights last for the full life of the
author—plus 70 years. This makes them a valuable form of commodified culture, which
synergistic telecommunications corporations are discovering new ways to turn into streams of
revenue.

The process of extending copyright terms is an attempt to apply the rules of the welfare
state—where the state helped the corporation prevent the devalorization of its fixed capital
investment—to the \textit{ex post facto} capitalization of corporate libraries of copyrighted works. It has
little to do with inspiring the creative arts and sciences and more to do with securing the global
monopoly of media industries. In this case, their previous monopoly was often only effective in
that it was prohibitively expensive to create distribution networks of the scale necessary for
broadcast of TV/Radio and replication of films for theatres. Other times this effective monopoly
was assisted by state licenses. In any case, the challenge of changing means of distribution—meant,
originally to help preserve their bottom line by making distribution cheaper—has undermined
their effective monopoly altogether, making state supported monopoly the sole means of securing
their profitability.

\textsuperscript{540} US Code, Title 15, § 1058, 1062 (c) \url{http://www4.law.cornell.edu/uscode/15/usc_sec_15_00001058----000-.html}
\textsuperscript{541} US Code, Title 35, § 154, \url{http://www4.law.cornell.edu/uscode/uscode35/usc_sec_35_00000154----000-.html}
Smythe was interested in looking at the way that the media industry functioned as an industry: what did it sell? In effect it sold the audience attention that it was able to garner from its “free lunch” of TV shows, movies, etc. The contradiction is that these cultural products simultaneously undermined and relied upon previous systems of meaning and processes of valuation. I’ve already pointed to the way this meshed with the Audience studies portion of Cultural Studies; but the more Structuralist interpretations are also given renewed purchase through this interpretation.

If we look, for instance, at the way a value and meaning are accreted to a cultural product, then it is clear that the strictly ideological reading of the cultural text is insufficient. Audience studies work was able to note that there would be widely varying interpretations of a particular text; uses and gratifications noted that there were a variety of purposes people might use media products to fulfill—entertainment, information, companionship, etc.—and therefore the ideological angle would be buffered by the purpose it was meant to serve for the user.  

However, this is not to say that there is not an ideological encoding that is undertaken at the point of production—and that this doesn’t, in fact, rely upon the local production of meaning. Stuart Hall’s “Encoding/Decoding” article makes a very coherent argument for the structural necessity of a dominant hegemonic message: because mass communication must be understood (and, since it is usually advertiser driven, accepted) by the widest possible audience, it must “encode” its message in what it presumes to be the most acceptable form of cultural commonplaces. In terms of advertisers, we could also add that, as certain segments have been sliced up, these can be more targeted by the producers of the “free lunch.” However, Hall does not stop here: he points to the fact that, in the audience response, we must each take a position in reference to this dominant hegemonic message: most people must take a negotiated position with

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the message. This, in general, means that most people have to do some sort of internal, ideological work in order to square the message they hear through the mass media with their own material position in the social order. This is one component of the work that viewers must do in order to make these meanings work for them. This interpretation also ties Hall’s structural discussion of ideology back into the culturalist arguments about the production of meaning.

The work necessary for these cultural products to continue to circulate in wider culture, to accumulate greater value, is even more dynamic and widespread. Another way to put this is that, sometimes the best efforts at marketing and generating popularity around a cultural object produce almost no result; likewise, sometimes products—cultural or otherwise—that receive little or no marketing become wildly successful, far beyond the expectations of their producers. Hollywood studios spend hundreds of millions of dollars each year, often with only a vague sense of which products will become popular. Legends of overpriced duds (Waterworld) and bargain-priced sleeper hits (Juno) show the gamble in which it is engaged. The necessary process of creating a valuable cultural object is still mysterious: it is only with the aid of what Paul Smith calls the “tributary media” and the structural fact of its continued dominance that it is able to remain profitable. The best way to assure profitability is to own all the possible products for cultural creation, all the possible channels through which mass mediated products are distributed, and to encourage a set of viewing practices within the culture that chooses this activity over others—perhaps even those not satisfied through a commodity at all.

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Stuart Hall, “Encoding/Decoding,” in *Culture, Media, Language: Working Papers in Cultural Studies, 1972-1979*, ed. Stuart Hall, et al. (London: Hutchinson, 1980). This also recalls Walter Lippmann’s early 20th century reading of Chicago School social psychology in *Public Opinion* where he discusses the issue of “the world outside” squaring with “the pictures in your head.” He is, here, explicitly referencing the problem of relying on news organizations, susceptible to propaganda, for both the instantiation of these frameworks and the delivery of a picture of the world outside that would gel with it. As Hall says in other places, and Gitlin points out, the role of the news media was always much more directly propagandistic in this regard. Walter Lippmann, *Public Opinion* (New York: Harcourt Brace and Company, 1922).

Smith refers here to the wider media discussion over a certain cultural product—in this case the discourse framing Clint Eastwood movies through newspaper, magazine, and televised reviews and discussions of his films upon their release. Cf: Paul Smith, *Clint Eastwood: A Cultural Production* (Minneapolis: University of Minnesota Press, 1993).
This process is evident in Malcolm Gladwell’s discussion of the re-popularization of Hush Puppies in *The Tipping Point* and the more recent phenomenon of the Crocs gardening shoe are such examples. In both cases, the product itself was simply appropriated by a population, given a new meaning and made fashionable in a way never anticipated by the producers. The only advice that books such as Gladwell’s can provide to businesses is that, instead of making products and marketing them to people, they should instead own as much IP as possible so that whatever suddenly becomes popular will be a source of income, no matter who is producing or consuming it. Examples such as these have even led marketers to declare that traditional marketing is dead. Alex Wipperfürth’s book *Brand Hijack: Marketing Without Marketing* presents what it presumes to be an innovative “engagement with the marketplace:” “Brand hijacking is about allowing consumers (and other stakeholders) to shape brand meaning and endorse the brand to others. It’s a way to establish true loyalty, as opposed to mere retention.” He contends that, “In order for a brand to stick, for it to have a real impact on our culture, it better collaborate with its users.” In its most extreme version, the brand will get hijacked “to the point of total control by the market [. . .] when this happens, the brand essentially becomes public property: it’s defined and led by its user community.”

Wipperfürth speaks here about the process of social valorization through which a cultural product gains its meaning, through which it is able to “stick, to have a real impact on our culture.” I term this condition *cultural efficacy*. In the larger conceptualization of culture I’ve proffered throughout this project, this has a more general meaning—as a process which instantiates a general cultural narrative. But the latter process is homologous to the more specific process of negotiated appropriation that is necessary for a mass cultural object to create effects within a culture.

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546 Ibid., 17. In case there is any confusion, he doesn’t really mean it is public property: he means “public” property, like the inside of a shopping mall.
While Wipperfürth claims that the social appropriation he terms “Brand Hijack” is new, one could argue that it has been an essential element of branding—and of the use of commodities in general—from the very beginning. After all, they correspond to the conclusions of Katz and Lazarsfeld’s *Personal Influence*, one of the most pivotal works in administrative communications research—published 50 years before Wipperfürth’s book. They concluded that a consumer’s faith in a product—particularly a new product—was largely the result of recommendations by influential community members, rather than the direct effect of marketing. What Wipperfürth finds, on the other hand, is largely in relation to already existing cultural products—Pabst Blue Ribbon Beer and Doc Martins, for instance—that get recoded as cool or interesting by what early cultural studies scholars, like Jenkins above, might have called “cultural poaching.”

He finds many examples of this process, which is homologous to the process of appropriation and bricolage cultural studies scholars like Dick Hebdige noted in their ethnographies of subcultures. These studies, along with the introduction of post-Structuralist ideas like those of Laclau and Mouffe, led many cultural studies scholars to deny the efficacy of the ideological effect of the media: if there was a dominant ideology, the interesting thing to study was how it was rearticulated through the circuit of culture. As discussed below, Hall’s articulation of ideology in “Encoding/Decoding” did much to bridge these perceptions. Or it should have.

This same framework of analysis inspires many of the critics of Intellectual Property rights in one way or another. For instance, Rochelle Dreyfuss writing in the *Notre Dame Law Review* considers how the law should deal with the fact that trademarks have become “products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them.”

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547 Elihu Katz, Paul Felix Lazarsfeld, and Columbia University. Bureau of Applied Social Research., *Personal Influence; the Part Played by People in the Flow of Mass Communications* (Glencoe, Ill.; Free Press, 1955). This was meant to counter the earlier paradigm of propaganda research, but as Gitlin points out, it mainly confirms the earlier field’s conclusions, particularly in relation to news and world events: here the mass media message has a nearly direct effect over 50% of the time. Todd Gitlin, “Media Sociology: The Dominant Paradigm,” *Theory and Society* 6, no. 2 (1979).

548 Jenkins, *Textual Poachers: Television Fans & Participatory Culture*.

549 Hebdige, *Subculture: The Meaning of Style*. 

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The value she discusses here is not something that is produced by the trademark holder, but it can still be of benefit to them in terms of the public perception (and profitability) of their product.

As discussed in chapter two, she separates what she calls the signaling function of the trademark from what she calls the “expressive genericity” with which its ideogram is encumbered in its wider cultural circulation. This Barthes analytical distinction between the form of the myth in relation to the mere language object of meaning. “The meaning loses its value, but keeps its life, from which the form of the myth will draw its nourishment.” Only, in this case, it is what Dreyfuss calls the “surplus value” of the trademark, this excess meaning which creates a value beyond its signaling function, which is providing that nourishment. In other words, this value that is produced socially and culturally is increasingly seen as the legal property of the owner of that mark: “Surplus value must go somewhere. Since trademark owners created the value through their investments, it is they who should garner whatever rewards are available.”

Notice the similarity to this defense of appropriation to that of the appropriation of cultural values and practices by Taylor in early 20th century factories and Locke in late seventeenth century farms. As this chapter has argued extensively, to say that the trademark owners were alone in producing this value is a falsification, a reification of the social process of valorization through commodification in general.

Jessica Litman echoes this argument, inspired instead by poststructuralist arguments of Barthes and Foucault when she discusses “Copyright as Myth” in The University of Pittsburgh Law Review. Here she discusses not only the mutual production of meaning between readers and authors—as discussed in terms of the “Death of the Author”—but the inadvertently infringement

that may be produced when authors are subconsciously inspired by other works of art. As in Lawrence Lessig’s power point, mentioned above, “Culture always builds on the past.”

The problem for these scholars, these critics of Intellectual Property rights is that, as Rosemary Coombe, another vagabond lawyer laments,

The signs, symbols, and texts that academic practitioners of cultural studies take seriously as resources for cultural politics are legally defined as properties in which authors are bestowed privileges to preclude reproductions or imitations by others on the basis of their creation under rubrics of originality and distinction. Cultural forms thus become signs with exchange value enabled and maintained by powers to prohibit uses by others.”

On the one hand, this illuminates one of the unpleasant realities of the cultural ecology in which we live, one which those academic practitioners of cultural studies have long sought to deny by focusing on the bricolage and creative appropriation of popular culture that Coombe sees as dominating the actual everyday practices of the average Toronto consumer: namely, that the raw materials of the culture common to them were largely someone else’s property. This brings us full circle to Smythe.

Smythe famously critiqued all the “Western Marxists”—which included Hall, Adorno, and many others in the Cultural Studies lineage—for focusing too much on these products as carriers of explicit ideological messages. Though he was looking through a slightly different window than Dreyfuss, Litman, Lessig and Coombe when he discussed the audience commodity and the labor we all performed for the advertisers at the behest of the commercial media, his larger point remains intact:

The Audience/Market formation of people is an aspect of a lifelong process of learning about, and coping with, commodities [ . . . ] People’s preparation over time—their

552 Litman, "Copyright as Myth,"
553 Coombe, Cultural Life of Intellectual Properties, 59.
readiness to recognize and internalize a “need” for the commodity being offered is always a basic and indispensable motive for their motion to serve in a specific audience.\textsuperscript{554}

We might add to this that though the lifelong process of learning to fulfill our needs by consuming commodities—and new needs and new commodities beyond that—the complete colonization of that cultural lifeworld by these commodities (or their trademarks) created an atmosphere where it was inevitable that surplus meaning, created in their multiple points of production and consumption in what Richard Johnson called the Circuit of Culture would be appropriated by the nominal owners—even as the cultural process of valorization continues to produce the “surplus value” Dreyfuss identifies.\textsuperscript{555}

In noticing these various interpretive activities, in the “surplus” meaning generated through the continuation of creative cultural appropriation even in these significantly altered circumstances, culturalist scholars like Jenkins were able illuminate a process that Dallas Smythe was only able to dimly recognize at the time—the consequences of which only become completely evident in the current moment, when technological changes have undermined the complete corporate control of the distribution of mass cultural products. The hegemonic dominance of a certain model of mass media—commercial, for profit, privately funded and owned content distributed through government licensed, monopoly channels—made necessary this immense labor in order to make generic content culturally effective.

The work done on this, however, and the social fact of this cultural efficacy, no longer belonged to the producers themselves. As described in the chapter above, the primitive accumulation and social valorization that make possible the profitable production and circulation of all other capitalist commodities—which, as Marx points out, require a juridical framework in

\textsuperscript{554} Smythe, Dependency Road: Communications, Capitalism, Consciousness and Canada, 267.

\textsuperscript{555} Richard Johnson, ”What Is Cultural Studies Anyway?,“ Social Text, no. 6 (1987).
which they are, ultimately, someone’s private property—is again evident in the process through which “Intellectual Property” becomes valuable. Monopoly media conglomerates hold private title on the properties that now circulate within the culture as culture. It was because of their unquestionable, government sanctioned monopoly on the mass media environment and the hegemonic model of private ownership of content that these common cultural materials are now privately owned—even as they were socially valorized.

Critics of maximalist intellectual property rights largely accept the reification of this process of commodification except as it applies to so-called cultural products. It is hard not to make this distinction in common parlance, but in truth the process of commodification is always a cultural product. By accepting this hegemony in one area of social existence, balanced copyright critics find themselves in contradiction when they try to sanction another area of existence to which this does not apply. Lessig, in his distinction between RW and RO focuses only on what might be called the problems of C2 and C1. The larger questions of Culture at the C3—of the culture of commodification and private property more generally—are left to one side. Likewise, he and other balanced critics basically ignore the process of primitive accumulation that is inherent in the division of labor between the value created by mental and manual work. As this chapter has shown in relation to Locke’s own measures of “improvement” and Braverman’s account of Taylorism, this separation has long been an excuse for the expropriation of the mass of workers in favor of the ability to control both the ideas and the means of production.

Lessig and other balanced IPR scholars see the injustice of the appropriation of cultural property precisely in relation to the fact that it there is a much broader process of production through which that property is valorized. The protection of these claims to property by the state therefore seems an incorrect use of these resources. As this dissertation has argued, this conflict, while ostensibly over IPR, is really over the culture of property more generally. Thus the issue these critics discover is really that they find the state to be protecting a group of monopoly
rentiers. However, instead of seeing the increasing protection of all forms of property, as part of a general trend towards the liberalization of the state, they single out this one kind, claiming it is so distinct it must be cared for delicately.

This takes us back to the previous chapter on Law and Economics and Hale’s critique of private property at the turn of the 20th century. In effect, Hale and Lessig are pointing to the same kind of problem. Yet Hale sees the production of all kinds of value as having the same quality as balanced IPR critics do IPR. In both cases the critique is of the unjustified appropriation of value by the juridical owner of the property. This is and was based on a Lockean notion of natural rights. Hale and other critics at the turn of the last century reappropriated this argument based on what Barbara Fried calls “Rent Theory Lockeanism.” Like Lessig and critics of balanced IPR, this theory “insists on a more exacting separation of the individual and social components in the creation of wealth.”

This theory basically says that Locke’s theory of property rights is only meant to reimburse the owner/worker for their sacrifice—to help them recoup their costs in effort or capital; any more than this, and they were simply making money off certain circumstances: namely the circumstance in which they owned the productive property in question and were therefore able to exact a higher proportion of its rewards from the people who worked for them or bought from them. This is true whether the workers are far flung agricultural innovators, trade-polished workers on the shop floor, or creative Prosumers activating the potential of Web 2.0. Rent theory Lockeanism claimed, therefore,

Individuals have a moral right only to that portion of income that compensated them for costs of production: any unearned surplus above that amount was the moral property of the community, which it could appropriate and redistribute as it chose [ . . . ] Surplus

value was the fortuitous result of the market, in which demand exceeded available supply at constant costs. As a result, surplus value represented (as Henry George said of land rents) ‘a value created by the whole community.’ If anyone had a right to surplus value, the progressives argued, it was not any particular factor [i.e. not owners or workers in particular], but rather society at large, to do with as it saw fit to further the common good. 557

Aside from the obvious correlation of the “value created by the whole community” this theory helps to tackle the thorny issue of incentives which always lay in the background of liberal arguments about property in general and IPR in particular. Namely, that owners and innovators can be rewarded for their work, but after that point the surplus should be redistributed—or, in the case of IPR, the work should enter the public domain. This is not all that different than Lessig’s proposals in Free Culture except that it applies to all productive property.

I think it is absolutely necessary to see the problem in this light. Seeing the issue of IPR as one of commodification and the culture of property in general helps to illuminate the continuum on which these sit. As this chapter has pointed out, the argument that there is a distinction that should be held between mental and manual labor is arbitrary in many ways. In the end, the facts are that mental labor needs physical resources to function and manual labor always begins with a mental conception. The division between them which balanced IPR proponents support is not just between kinds of workers, but between society at large and a rentier class that has appropriated the collective ideas of society in order to profit from them.

In the end, this is what support—even the simple, strategic support of the balanced IPR movement—of the reified culture of property entails. The maximalist position—which is increasingly reflected in US and global public policy—reflects the relationship of productive

557 Ibid., 74-5, 27.
property to capital, labor and the state that is essential to this reified culture of property. As at the
turn of the century, the point isn’t whether a property is tangible or intangible: these empirical
qualities are just streaks on the materialist agar. The point is that the Liberal state is dedicated to
protecting the value of productive property in the interests of its owners. As the PFF
demonstrated at the end of the last chapter, the very changed circumstances that make the
extended process of valorization visible again in relation to IPR are also the justification for
increased protection. This is to say that the presumption of organizations like the PFF and their
corporate donors is that digitization foretells the advance to an “information economy” and
therefore the stakes of the game have changed.

IPR used to be a bulwark against tangible competition—whether in the copyright of LPs
Lessig mentions or the webs of patents securing monopoly control of industry discussed at length
by David Noble; now it is the material basis of intangible capitalism. While I would argue we
have every reason to regard the idea of a “weightless economy” with extreme skepticism—as
Doug Henwood, Christopher May, and James Boyle all do in some respect—the fact is that this is
the current model of culture being imposed.353 Pushing back against this means resisting not only
the imposition of the narrow problem of IPR, but also against the social division of labor and the
reified culture of property which this latest push for Maximalist property hopes to recreate in the
global, digital era.

The difference on an international scale is that the reification of commodification is
incomplete in many nation-states therefore international policy had to work not only to push the
increased commodification of intellectual property rights on other cultures, but the intensification
of commodification in general. If the former push created anxieties for domestic critics of IPR in

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353 Boyle, Shamans, Software, & Spleens; Henwood, After the New Economy; Christopher May, The Information Society: A
the US, it should come as no surprise that the latter has created a reaction of much more monumental proportions on a world scale.

The role of what some call “The Globalization of corporate media hegemony” is as central to the international story as it is to the domestic one. This ultimately entails a much more conflicted argument over “cultural imperialism” which has suffered from many of the same criticisms as the Structuralist paradigm. However, since the critiques most often involve observations similar to those of the culturalist paradigm, many of the same syntheses arrived at in this chapter apply. The difference, as in the more general imperial policies of globalization, is that the contradictions of content and context are thrown into far greater relief in the process of transnational transculturation; likewise, the injustice of the appropriation of endogenous (and indigenous) cultural forms and content by multinational corporations is far easier to recognize. In this, just as the study of our own cultural history teaches us much about our cultural present, the study of present alternatives gives us some notion of the alternatives for considering our cultural future. The latter will be the subject of the final chapter.
CHAPTER 5: The Properties of Hegemonic Culture, or Cultural Imperialism, Redux

“The GATT talks are there to remind us that American films and television fall under base and superstructure alike, as it were; they are economics fully as much as they are culture, and indeed, along with agribusiness and weapons, the principle economic export of the United States—an enormous source of sheer profit and income [. . . ] Meanwhile the accompanying politics of copyright, patent, and intellectual property indissociable from the same international politics reminds us sharply that the sought after freedom of ideas is important because the ideas are private property and designed to be sold in great and profitable quantities.”

The major premise of this dissertation is that the expansion of intellectual property rights is best understood as an attempt to suture a juridical patch over the more fundamental rupture in property rights and the international division of labor that they presume to reinforce. In previous chapters, I’ve outlined what I see as the fundamental reason of this imposition—the rationality of what I’ve called the “culture of property” as it operates within the dominant, hegemonic ideology of western and especially Anglo-American culture. Charting a path through the development and instantiation of this culture, I’ve attempted to show how it is able to have what I’m calling cultural efficacy within US society, despite the apparently dynamic changes that have occurred in that country and its relationship with the world over the last half century. I have argued that most

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critics of intellectual property rights fail to see this as the underlying context of their object, instead presuming this to be a natural state of affairs, referring to history only as a utopian corrective to this novel imposition of politically and economically motivated legislation.

The reification of this culture of property, in other words, often prevents critics from seeing this more fundamental reason for the imposition of Intellectual Property Rights. Perhaps even more problematically, they pose their criticism of Intellectual Property Rights by taking the reified culture of property to be beyond question. The problem as they see it is not with the fundamental cultural assumptions—stretched throughout the levels of culture at the top (C3) and bottom (C1)—but in the unique characteristics of the material to which property rights are being applied—the materials which would normally be a part of the “free flow” of cultural mediation and dialogue at C2. This criticism sidesteps the process discussed in chapter four whereby these materials, along with all other materials satiating needs at the level of C1, became commodified. Distributed by monopoly corporations, alongside soap and soda, these materials of the ambient culture were always the property of someone. As they were valorized by the process of social interaction—similar to that of the symbolic interactionism of the early Chicago School—they became valuable in just the same way that fixed capital or machine equipment would have been in an earlier age, listed as assets on the company balance sheet.

In these terms, it is a distraction to focus too much on the distinctive qualities of intellectual properties as opposed to other forms of industrial or otherwise socially produced and productive property. In liberal economics and political theory, they share the two most important qualities. Firstly, the value in the property is produced socially—either directly, through the employment of multiple persons in the actual production process, or indirectly through the social division of labor—even though the surplus flows back to the individual owner. In the liberal paradigm, the fact of this valorization justifies individual ownership and, dialectically, the *ex-post facto* ownership supposedly creates the incentive for the valorization. Secondly, this form of
property justifies the state, which is there solely to protect this understanding of property rights and their relationship to the production of value.

While globalization can be said to mean many things, in this chapter, I argue that it is most effectively viewed—at least in its neo-liberal guise—as an attempt to universalize this understanding of property, value, and the state throughout the world. As critics like David Harvey, looking at Neoliberalism more generally, have observed, this is what “leaving development up to the market” means in its deep logic: submitting more aspects of natural, social, and cultural life to the dictates of commodification, privatization and market exchange. Globalization, in this sense, is primarily the globalization of private property. Apologists for this imposition argue that the legal structure of the nation state, the reified content of the culture of property, and the capitalist understanding of value are essential to development, modernity, progress and a variety of other western notions. From this perspective, Intellectual Property Rights are simply another channel through which these processes of social valorization can be captured by private individuals—and through which this process of accumulation can be protected by the disciplinary functions of the state.

This opens up an old set of debates within Cultural Studies, Communication Studies, and Political theory about the role of transnational media in the projection of cultural norms from one society into another. Discussed under the catchall term “cultural imperialism” this forms the background to this conversation in two ways. First, and most basically, the producers and distributors of materials often discussed under the term “cultural imperialism”—US movies, TV, radio, and other mediated forms of entertainment—are also the most visible claimants for the expansion of the scope and scale of intellectual property rights. The first section of this chapter will look at the various arguments about “cultural imperialism” in relation to the conception of culture developed throughout this dissertation. Ultimately, the discussion of cultural imperialism must be conceived in relation to the process of culture occurring on multiple levels, with
fragmentary and overlapping forces of formal and functional power determining the dynamics of exogenous cultures so that they more closely adhere to the endogenous ideal of total protection of Intellectual Property Rights.

This endogenous, Northern ideal of IPR is, as the rest of this dissertation has argued, more closely related to the history of property rights. Its necessary imposition on a global scale throws into relief a second connection with the discourse of cultural imperialism: the connection of Intellectual Property Rights with the dominant models of development and modernity. Thus ideas about the “information society” or “post industrial society” in the north make global IPR protection necessary to cement the position of the current capitalist agents and locations in the hierarchy of the international division of labor. This imposition aims to foreclose any possibility of endogenously derived culture of property. Thus whatever variance or vitality exists in the levels of culture at C1 or even C2, the stakes of cultural imperialism are most clearly in the C3 level. So long as capitalist, commodified, privatized property relations are successfully implanted—and the resistance to it successfully incorporated or destroyed—the intended project is a success.

This connects the relationship between this intention, its tools—with mediated culture making up only a small component of the whole—and its results and the alternative possibilities. As the dissertation so far has argued, though globalization and digitization are, in part, consequences of the expansion of this culture of property, the same expansion now has the potential to undermine the definition of value and distribution that anchors that culture to the dominant political economic framework of the capitalist nation-state, causing a central crisis in its legitimacy. This chapter will extend the observations about digitization from Chapter four and to the process of globalization, looking first at their mutually constitutive relationship: globalization is often seen as mostly the consequence of the expansion of communication networks, facilitating greater sharing. This chapter contends that, while these are related, the connection is more political: First, communication technologies—and their products and institutional arrangements—
spread around the globe with what Raymond Williams long ago termed as an intention. The intention was to spread the functional power of the US political and economic “World Order.” Whether we look at Luce’s promise of an “America Century” or the specific activities of the media-military-foreign policy establishment discussed in Schiller’s work below, this intention was clear. Thus the dominant presence of US cultural products in the global public sphere is no accident of history: even if the ideological effect of this presence was never as easy to interpret, like the ambient culture within the US explored in chapter four, it is not a simple coincidence that the common products of global culture tend to be the privately owned properties of transnational media corporations. The realization of this intended expansion of communications networks—and the content, ideologies, and meanings in which they trafficked—runs parallel to an expansion of commodity based socio-economic relations on a global scale.

The following sections of this chapter will focus on the critique of what John Tomlinson problematizes as “the cultural imperialism thesis.” In exploring this critique—made coherently and with some frequency by Tomlinson—I position the latter in relation to the criticisms of mass culture made by the Frankfurt School. Tomlinson and other critics like Omar Lizardo and Tyler Cowen posit a similar understanding of how “the media” is presumed to function in relation to the broader social formation. However, as I argue below, these critics fail to understand the fundamental critique being made or to position these critiques in relation to their own historical and cultural context. Though we don’t necessarily have to take the entirety of the Frankfurt School or the “Cultural Imperialism Thesis” as valid, it is important to understand the connection between a cultural avant garde and its potential for demonstrating, motivating, and legitimating alternative political economic arrangements. The latter is especially true of the Frankfurt School. Schiller, on the other hand, is much more in tune with the understanding of culture in relation to

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560 Williams, *Television: Technology and Cultural Form.*
political and economic development in the post colonial world. Like the Frankfurt School, he may oversell his argument, but in the context of anti-colonial struggle and the Cold War, his understanding of culture in relation to politics seems apt.

As mentioned above, critics of the cultural imperialism thesis—like critics of intellectual property rights—begin with an underdeveloped conceptualization of culture. Despite their best efforts, they tend to focus solely on the efficacy of these networks as a delivery system of unadulterated, but narrowly defined, “American culture.” The narrow focus of the critique of cultural imperialism as a shallow form of ideological proffering ignores the imperial imposition of something much deeper. That “something deeper” is the second political connection between digital communications and globalization. This is the formal arrangements that have made globalization (facilitated by advanced communication networks) possible—especially multi- and bilateral trade and investment agreements. These have always included provisions on Intellectual Property, but now have more restrictive language. While these arrangements both help and utilize Communications networks, they are more widespread. Here the novel new arrangements for digital communications are both a synecdoche and justification for larger changes in the global political economy and the emergent model of relations between international markets, transnational corporations, national states and local civil society. Tomlinson is somewhat aware of this, but his underdeveloped conceptualization of culture leaves him—and other critics—unable to provide more than the most perfunctory understanding of the relationship between culture, politics, and agency.

While I don’t have the space to survey every telecommunications system or treaty regime on the planet, in an era when globalization is seen as a force of nature, I hope highlighting it as a constructed intentional project—a political process that many recent commentators have highlighted as political—will help open the door for a critical appraisal of its role in extending the reach of the reified culture of property in question. More importantly, I intend to address the
inane claim that any resistance to this culture of property must be seen as either an effect of capitalist oriented modernity or evidence that its imperial reach is little more than the benign extension of progress or development. Taken together, these point back to the overall argument of the dissertation as a whole: the anxiety over intellectual property is really an anxiety over the future of this reified culture of property. I will cap this off with a brief exploration of some overt challenges to its superiority. Questions such as what kind of state, what kind of economy, what kind of property regime a culture should have seem abstract and cloying until they are connected with the concrete struggles over them to this day.

The Political Efficacy of Culture

Throughout this dissertation, I’ve made use of several distinctions in relation to the concept of culture and its relationship to political economy. In short, I have presented a dialectical understanding wherein culture is used to informally justify a political economic structure and, in turn, that structure helps legitimate a certain set of cultural norms—norms which serve the purposes of that structure. Culture may do other things as well, but in so far as culture itself is both determined and determining, it is through the combination of functional and formal features of the state and the economy. In fact, as the overall structure shifts from one of the direct political control over the economy, to an economy that is nominally free from—and therefore immune to—political intervention, it increases the work that must be done by the unspoken norms and intractable aims of capitalist culture. Likewise, there is a shift of direct disciplinary power from the institutions of the state to the institution of the market.

This conceptualization begins as an abstract framework which, theoretically, could be applied to any social formation understood as “culture.” But, admittedly, as I put meat on these bones and make the abstract more concrete, the framework becomes more particular to a certain
conception of how culture works. This includes aesthetic presumptions about the influence of environmental or social factors on the production of art or music—the influence of C1 on C2—as well as more political presumptions about the way that the mediation (through C2) of cultural practices (C1) and meta-cultural institutions (C3) such as law, the state and the dominant economic arrangements. The latter conception forms one of the basic presumptions of the role of communication in culture and culture in the social formation. It could be argued that, even if we can analytically separate these levels in any given society, culture does not always function in this way: I would agree. However, this understanding of culture is pivotal to the democratic underpinnings of liberal capitalism: the idea that there was discussion and mediation through a certain medium of culture which helped to cement and legitimate the laws and social relations that, thereafter, determined future practices throughout all levels of the culture. To the extent that we consider culture a process, we consider that process as related to the process of political and economic development in a given society,

As mentioned in the introduction, and in several other places throughout this project, accounting for, on the one hand, the process of mediation between dispersed populations in some central public sphere—be it the coffeehouses of 17th century England or the mainstream, national media today—is essential to the democratic process that is presumed to underpin the promulgation and legitimacy of the Law in the modern nation state. Through a mutually interaction of the levels, practices (C1) were related to mediating narratives (C2) and mediating narratives (C2) to the formal and functional laws (C3) that regulated both mediations (C2) and practices (C1). While it is an idealized memory of this process, the modern ideal purports that, in so far as this process was open and democratic, the regulating laws were supposedly as malleable as the practices and mediations below; the laws were therefore open to revision in so far as they no longer supported the practices of life in a way that was satisfactory to the majority (or in the liberal vision, an enlightened minority.)
The rise of broadcast media and administrative communications research was coeval in western capitalist societies with the birth of modern public relations (what Habermas calls the “refeudalization” of the public sphere) and the discovery of the utility of the mediating level of culture to embed the laws of the state (or the products of the monopoly capitalist economy) into concrete, meaningful cultural practices. As the more concrete discussion of cultural efficacy in chapter four illustrates, this was never a “hypodermic” process, and both the administrators and critics came to realize always premised on a “Two-step flow” of communication from the mediated culture to the bearers of local social capital.

Still, as it became more universal, as the industrial process of commodity production became more widespread, it reduced the extent of the necessary embedding: this culture was so widely accepted that it needed fewer active ideological interventions.

This is understood as “reification” and the early critics of this process in the domestic sphere—especially the Frankfurt School—were quick to point out the way that this undermined the ideal process of culture mentioned above—and described at some length in chapter one. This was only partially a theoretical intervention. Adorno had worked briefly with the scholars instituting the administrative communication model and, whatever its success, he rightly understood its implications as an intention: culture in this context increasingly meant the same thing as administration. The goals of public relations, administrative communications, and the

564 Cf. Chapter four of this project for a longer explication of this process.
polling apparatus of the nascent welfare state were precisely to incorporate the complex cultural whole into a model of the monopoly-corporate-industrial-military institutions: this is the first point to remember when reading critics of the Frankfurt School. Their pessimism wasn’t just an abstract anguish at the loss of “Lyric Poetry in Society;” it was the impending approach of what Martin Luther King later called a “spiritual death.”

In Adorno’s own terms, “the equalization of the tensions felt today between the culture and its objective conditions threatens culture with spiritual death by freezing. [. . . .] The more easily consciousness adjusts to integral reality, the more it is discouraged from going beyond that which is there once and for all.” In relation to the conceptualization of Culture proffered in this project, the absent tension is between: on the one hand, the cultural efficacy that unites the practices, narratives and determining laws and social relations into a reified vertical column of legitimate meanings, relations and regulations, cited here as the “objective conditions;” and, on the other hand, the idea of a progressive cultural avant garde. The latter, is described elsewhere by Adorno as “Culture in the true sense,” which, “Did not simply accommodate itself to human beings; but it always simultaneously raised a protest against the petrified relations under which they lived, thereby honouring them.” The political role of culture, in other words, was to allow for a reimagining of society as a whole. More importantly, this historical vision of the avant garde, “was

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565 “Five years ago [JFK] said, ‘Those who make peaceful revolution impossible will make violent revolution inevitable.’ Increasingly, by choice or by accident, this is the role our nation has taken, the role of those who make peaceful revolution impossible by refusing to give up the privileges and the pleasures that come from the immense profits of overseas investments. I am convinced that if we are to get on the right side of the world revolution, we as a nation must undergo a radical revolution of values. [We must rapidly begin] the shift from a thing-oriented society to a person-oriented society. When machines and computers, profit motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism, and militarism are incapable of being conquered. [. . . .] A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death.” Martin Luther King Jr., "Beyond Vietnam: A Time to Break Silence," at Clergy and Laity Concerned, Riverside Church, New York City, NY, April 4, 1967.


not limited to art, but always referred to political radicalism as well." In other words, the alternative mediation (C2) of the *avante garde*, of “culture in the true sense,” was not necessarily some elite form of autonomous art—though, admittedly, this is often where Adorno saw the greatest potential. It was the possibility of undermining the efficacy of the dominant culture, reinvigorating the tensions it equalized, and introducing the possibility of an alternative way of life.

From a Marxist perspective, this is a problematically idealist understanding of the role of culture in relation to the political economic infrastructure. If I were to transpose the orthodox framework of base and superstructure onto my conceptualization, the most likely approach would be to bend it in half, so that C1 and C3 were to meet in the base and C2 would bow into the superstructure. However, since I’ve said a key determinant of the culture at each level is the juridical structure of the law and the state, and the latter is often projected into the superstructure, there is no easy way to translate these frameworks into each other. Likewise, I’ve also separated elements that would tend to be commingled in the base of orthodox theory—the relations of production which I’ve divided into the everyday practices and relations of C1 and the macro relations that help to determine these at C3. In any case, to give an independent specialized efficacy to agents acting at the C2 level seems to repeat the error Marx attributed to the Young Hegelians: to attempt to change the phrases describing the world rather than world itself.

Perry Anderson famously diagnosed this position as resulting, on the one hand, from “Western Marxists” lack of experience in political organizing per se—unlike the previous generation which included Lukács, Gramsci and Lenin, all of whom engaged in direct political action rather than indirect cultural critique. On the other hand, he also noted that, for the most part, it seemed that the horizon of possibilities for changing the world had narrowed: both the so

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569 This is a paraphrase of Marx’s *The German Ideology*.
called first and second world had opted for a form of state capitalism which would ultimately leave little room for autonomous cultural creation in its fullest, most effective sense. So, in effect, the focus on the possibility of a cultural lever overturning the infrastructure was informed by the historical perspective which saw the infrastructure co-opting the contradictions of the forces and relations of production and eliminating the traditional strategy of orthodox Marxism. In this, they had a fuller understanding of culture than critics usually allow, that involved far more than the C2 alone, connecting with the more coherent unity of culture in its totality.

Adorno—and many of his fellow Frankfurt School travelers—lamented what the latter called the “cultural Bolshevist atrocity” of the instrumental use of culture in the Soviet Bloc, yet his greatest ire was reserved for the “administrative culture” of the United States, which, as mentioned above, he had seen first hand. Here, we do well to read between the lines of the idealism of the Frankfurt School—and compare it with the proposed political efficacy of the cultural (C2) in the ideal of enlightened society above. Taken together, it is clearer why these would inform the discourse of cultural imperialism in the international context. Further, it helps to highlight the fuller conception of culture that these theorists were using—both in terms of what they were critiquing and what levels they proposed—and the homology of this to anti-imperial struggles for national cultural sovereignty. From here, we can evaluate the mainstream critique of this.

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373 As Frederic Jameson describes it: “Thus the total organization of the economy ends up by alienating the very language and thoughts of its human population, and by dispelling the last remnant of the older autonomous subject or ego; advertising, market research, psychological testing and a host of other sophisticated techniques of mystification now complete a thorough *planification* of the public and encourage the illusion of a new lifestyle while disguising the disappearance of subjectivity and private life in the old sense.” Frederic Jameson, *Marxism and Form; Twentieth-Century Dialectical Theories of Literature* (Princeton, N.J.: Princeton University Press, 1972), 36.
An economistic interpretation of the base-superstructure model leaves an important consideration out of the historical process of capitalist development: the model of the state and political economy that, though it was imposed by people with material power and institutional weight, was also informed by ideas and ideals. In short, culture played a role in mediating the relations between local practices and the meta-culture of laws and economic structures—though, as chapter two pointed out, these ideologies were given the full backing of the coercive force of the state. As Karl Polanyi put it succinctly, “the free market had to be planned.”

With the post-war settlement between labor, capital, and government in the US welfare state, the dominant idea appeared to be that monopoly capitalism would go on forever. As chapter four touches on, this was not an isolated imposition at the level of the mediated cultural (C2) “spectacle” but involved altering the entirety of what Regulationist Economists called the “Mode of Regulation.” This involved not only the alteration of the political terrain of labor struggles and an expansion of the social wage provided by the state, but also the reorientation of the system of finance towards funding initiatives that were beneficial for the overall expansion production and consumption through commodities and consumer durables like houses, cars, and refrigerators. As Andreas Huyssen put it, in his characterization of the most pessimistic positions of Adorno, “20th century capitalism has ‘reunified’ economy and culture by subsuming culture under the economic, by reorganizing the body of cultural meanings and symbolic significations to fit the logic of the commodity.”

Although he never presented it as a strategy per se, Adorno’s retained his faith in a form of “autonomous art.” This would be an artist or artistic work that effected it mediation outside the dominant column of cultural efficacy operating at every level of the culture. Using lyric poetry as an example, he speculated that,

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574 Polanyi, *The Great Transformation.*
Its detachment from naked existence becomes a measure of the world’s falsity and meanness. Protesting against these conditions the poem proclaims the dream of a world in which things would be different. The idiosyncrasy of poetic thought, opposing the overpowering force of material things, is a form of reaction against the reification of the world, against the rule of the waters of commerce over people which has been spreading since the beginning of the modern era—which, since the Industrial Revolution, has established itself as the ruling force of life. 

It is important to note the different levels of culture on which this “detached” culture would operate—and its mode of operation. First of all, its detachment would be a critical, rather than epistemological, detachment: it was to be a product of the culture which also transcended the culture. If we map this onto the conceptualization, it is true that this work would be a form of mediation (C2) but its political efficacy would be advanced in exposing the contradictions and reification of the culture at all levels. The protest raised by the poem wasn’t against other mediating cultural works, but against the objective circumstances of which they were a reflection and reinforcement. Likewise, Adorno’s point was not merely to chide popular or mass culture per se: it was, on the one hand, to express disgust at the seemingly absolute loss of a public space of cultural mediation; and, on the other, to wonder if even the existence of that space could hope to have any effect in altering the stifling reification of the dominant culture. The latter, at the time, seemed to have muted any possibility of an alternative to, “the rule of the waters of commerce.”

In other words, though it was expressed in terms that make Adorno (and, often, by extension, the Frankfurt School) seem stuffy and elitist to some readers, the critique of culture was not only directed at the components of C2; instead it was focused on culture in its totality and speculating that alternative mediations might open up the possibility of alternative totalities.

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Ultimately, the cultural (C2) was presumed to have the opposite political effect to that which administrative communications research was engineering it to have. As mentioned above, this Frankfurt School presumption is also central to the dominant understanding of the enlightened polity wherein the laws, state, and to an extent the organization of the economy and social relations are the product of some deliberation and mediation between different groups. Here they further rejected the notion that any cultural conversation would have to remain at the level of C1 or C2—that the dominant, liberal framework of property, the state, and the economy had been decided in advance and now the only question was how to administer it. In other words, to return to the conversation begun in chapter one, the problem wasn’t the precise form which culture in its totality had taken but that the notion of “culture as a process” no longer adhered. There could be a process—as with Lessig’s R/W-C2 culture in chapter four—but the political effect of this process is limited to fine tuning the current apparatus of the state and economy. The fact that the media qua culture was limited by its own commodification was secondary to the fact that commodification and capitalism were unchallengeable.

Though these observations were made during the ascendancy of state capitalism, the closure they point to in terms of the discourse remains true of economics and international relations—or at least did until 2008. The discourse changed, but the closure of the C3 remained the same. From this context, there is an analogous relation of Adorno and the Frankfurt School’s understanding of autonomous art to the more broadly conceived concept of “autonomous culture” or “autonomous national development.” The latter are the ideal opposites of the concept of “cultural imperialism.” It is to this that I will turn.
Cultural Imperialism: Equivocal Discourse or Critical Paradigm

First a short reminder of why this discussion is relevant to the question of Intellectual Property Rights in relation to this dissertation. To start from the largest point, this section will explore the question of cultural imperialism. Though I haven’t noted it explicitly, the argument I am making about the imposition of Intellectual Property Rights throughout the world is that it is a form of cultural imperialism. I have discussed this as an exogenous cultural imposition, but the political economic dynamics of the relations between the sender and receiver make it reasonable to discuss it as a form of imperialism, even if a more polite one. To say that it is cultural opens up another set of arguments that has been central to this dissertation, namely that the configuration of the state and the law in relation to the capitalist economy is largely the product of a western conception of property and value. To make this argument, I need to relate it my own conception of culture, but it frames the larger atmosphere in which intellectual property rights operate—and the larger argument of this chapter. This argument is that the seemingly sudden anxiety over intellectual property rights is really the consequence of a larger crisis in the culture of property as it has been extended by globalization and digitization. This is a contemporary elaboration of the deeper version of the cultural imperialism I discuss below in relation to Tomlinson and Giddens’ understanding of globalization as the expansion of capitalist modernity.

I find this deep version of cultural imperialism more convincing than shallower versions, but even the latter have a relation to the issue of intellectual property rights. The shallow version, which Tomlinson dubs as “Media Imperialism” focuses merely on the superficial dominance of US cultural products. In terms of both the quantity of products, the ownership of infrastructure, and their wide geographic orbit, as Tomlinson says, “No one really disputes the dominant presence of

Oddi, “TRIPS—Natural Rights and a ‘Polite Form of Economic Imperialism’,“
Western multinational, and particularly American, media in the world: what is doubted is the
cultural implications of this presence." This section will discuss both sides of this claim, but, to
assume the first half is true, in a basic, material way, this translates into a much greater proportion
of the intellectual property in the world being owned by US multinationals than anyone else.

This numerical fact is easily dismissed by those who fully refute the Cultural Imperialism
argument. This is because the prevailing logic of free-market capitalism sees the immense
distribution of these products as the result of either the universal appeal of American cultural
products that the results from the insightful production of these owners, or a simple structural
effect of the US having an enormous domestic market, making international markets easier to
exploit with lower returns. On the other hand, the numerical fact alone, as Tomlinson implies,
is not evidence of imperialism per se. He discusses this as a superficial, functionalist understanding
of media qua cultural imperialism which takes the institutional and numerical superiority as
“simply an assertion of the manipulative and ideological power of the media.” I agree that this
alone is not enough to understand the mediation between this level of culture and those above and
below it. However, while he is able to cherry pick some of these functionalist arguments from

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579 Cf. Discussions in chapter two and four about the process of valorization through the total process of consumption
that is ignored by arguments like that of former MPAA president Jack Valenti, cited in Miller et al., *Global Hollywood 2*, 1.

It is a fact, blessedly confirmed, that the American movie is affectionately received by audiences of all races,
cultures and creeds on all continents; amid turmoil and stress as well as hope and promise. This isn’t
happenstance it is the confluence of the creative reach, storytelling skill, decision making by top studio
executives and interlocking exertions of distribution and marketing artisans.

580 Cf. Hoskins, McFadgen, and Finn, *Global Television and Film: An Introduction to the Economics of the Business*. Hoskins,
et. al. argue that the dominance of US film and TV is a structural effect of there being a large domestic market where
producers can recoup investment costs, making international markets mere gravy. Alternatively, other national film
markets suffer from being less universal AND having smaller markets, creating what Hoskins, et. al. call a “cultural
discount” which is the proportion of the value of an endogenously produced film or TV program that is subtracted
when it is sold to an exogenous cultural market. In other words, because there isn’t an inundation of French or
Canadian films on the world market, there isn’t a self-referential culture in that market that makes those products legible,
thereby degrading their value and ensuring their marginalization within that market. Dominance breeds dominance in a
culture.

within what he calls “the discourse of cultural imperialism” I would argue that he misses the historical argument for the theoretical trees.

On the one hand, the fact that these properties have traveled so far and wide is largely the result of a long-standing effort by Northern media conglomerates to dominate the informational commons, first technologically, through the use of distribution or production technology and content dumping, and now through complete control over the content itself. In relation to the film industry, as Miller, et. al. point out, far from being a laissez faire enterprise, there was significant US government involvement in promoting filmic endeavors of US corporations abroad—in some cases directly funding the construction of theatres—and the film industry is given significant subsidies and tax benefits precisely because it is seen as an essential tool of ideological diplomacy.582

This latter point is the overriding concern of Herbert Schiller—a key critic of cultural imperialism—in his 1969 work Mass Communications and American Empire. Among other things, Schiller cataloged the actual relationships between the corporate heads of US TV and radio, the US military, and the US State Department, amongst others.583 The issue he pointed to is not so much their success in this ideological enterprise as in their stated intention to carry it out; to use any available means to increase the functional power of US oriented models of culture, from top to bottom. In other words, the theory of using US cultural products as ideological props for the power of the US military or multinational corporations was not cooked up in the minds of people trafficking in “the discourse of Cultural Imperialism;” it was an institutional project spawned at the highest levels of government.

We can, of course, speculate that this enterprise is unsuccessful in raw terms, as Tomlinson does by citing the audience studies approaches finding direct ideological effects impossible to

582 Miller et al., Global Hollywood 2.
583 Schiller, Mass Communications and American Empire.
measure. Still, as a political strategy, it remains. During the first days of US war with Afghanistan, wind-up radios were distributed (alongside cluster bombs) that were hardwired to transmit only the local, US-sponsored Voice of America programming. Shortly before the start of the second US onslaught of Iraq, the same office of the US government that runs Voice of America, the Broadcasting Board of Governors, scurried to close the propaganda gap with the media arm of Al-Qaeda and the perceived bias of Qatar-based Al Jazeera, by setting up an Arab language satellite network, Al Hurra—a phrase meaning “The Free One.” And, of course, the propaganda initiative of Radio and TV Marti to, “broadcast accurate and objective news and information on issues of interest to the people of Cuba” continues despite the fact that the Cuban government seems able to jam the signal for all but a small number of listeners. The Cuban government claims this transmission into their territory violates international law, yet Raymond Williams, following on Schiller’s work, mentions a number of other cases kind of “pirate” broadcasting of TV signals in the early days of TV. Like the US government funding of cinema construction mentioned above, these were public private partnerships, but the content was that of the US multinationals. In other words, the distribution of these products was assisted by the US government with the hopes that it would have the effect of “winning hearts and minds.”

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584 Jonathan Duffy, "Clockwork Warfare," BBC News Online, Oct. 10, 2001, [cited Mar. 10, 2009], http://news.bbc.co.uk/2/low/uk_news/1589318.stm The former director of Voice Of America prepared the US media for this discovery in a New York Times editorial published the day before bombs (and radios) started falling from the sky, implying that there was a novel pool of consumer demand Voice of America was meeting in Afghanistan. Noting that it was among the top five countries in terms of VOA listenership and that 80 percent of men in the country had listened to the programming at least once a week, he argued that, “Voice of America wins listeners because it is not propaganda—because people around the world know they can count on it for fair and balanced coverage when their own news outlets are often slanted to protect the governments in power.”


587 Williams, Television: Technology and Cultural Form, 42.
Though admittedly most of these are examples of direct, government propaganda, it is difficult to see the difference in the strategy of ideological warfare. And, again, one of the key discoveries Schiller makes is the alliances between military, government, and corporate broadcasting during the early days of the Cold War. That they weren’t successful in the ideological effort is questionable. As International Relations scholar Bertrand Badie points out, The United States has incontestably constructed its ‘neo-imperialist’ power by seeking successfully to master [cultural, economic, and communication] inflows. [. . . .] The domination of American press agencies, of television programs made in the United States, of trends in music, clothing, and cooking are far from being without effect, though one should not underestimate the importance of the selective and critical receptivity of communication inflow. [. . . .] No matter how important these reactions and the resulting variations are, they do not diminish the importance of the inflow.588

The management of the “ambient cultural context” by proxy is a messy endeavor, but the key point about attempting to control “the inflow” is undeniable. This is often overlooked by accounts looking at the so-called “Cultural Imperialism thesis,” i.e. accounts that begin by trying to dismiss it: this direct collusion between state, government, and private, multinational corporations must be dealt with. To reiterate, there may have been a functionalist argument about the utility of cultural products in directly transplanting positive ideas about the US, US corporations, or US style capitalism; critics of this shallow version of US Cultural Imperialism may have made arguments like this. But many of them, like Schiller, noted the correlation between, on the one hand, this numerical supremacy over distribution and content and, on the other hand, the active strategy of the US government to use this distribution network as a political strategy to

promote this US culture, narrowly defined. In this context, the shallow arguments about cultural imperialism don’t seem quite as contradictory.

If we see this on solely political terms, the outcome is questionable, and obviously mediated in a variety of ways. Recent polls, for instance, show that, while world opinion may be turned against the US Government itself—especially in its foreign policy—US entertainment products are more popular than ever. This could be chalked up to some “universal appeal” of US cultural products or, as in the domestic market saturation, it could simply be that there is a lot of work done by viewers in order to accommodate the content to the viewer. Tomlinson rightly speculates that the negotiation done by “Third World” viewers often in with groups of people, “may be even more significant when the program in question is the product of an alien culture and, thus, potentially more difficult to decode,” such as when they are viewing US programming.

As chapter four discussed in the domestic context, the agency of the audience which makes the precise political effect of the ideological content ambiguous also draws our attention to the work done by audiences in order to fit their own outlook with the vision of the mass produced product on the screen. Here the observations of astute cultural theorists like Jesús Martín-Barbero on the intricacies of “mediation” of transnational media content at the local level explicitly mirror the audience studies work of cultural studies in the domestic sphere. Martín-Barbero pushes back against this “top-down” understanding and highlights, “the resistances and the varied ways people appropriate media content according to manner of use.” However, this contention, which means one thing in the context of seeing the “cultural agency” of subaltern

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populations, takes on an entirely different meaning when it becomes an apology for neo-liberal globalization itself, which is how I ultimately interpret Tomlinson: more on that in a moment.

First I want to make a final point about the simple saturation of the telecommunication systems with US cultural products in relation to IPR. Obviously there is something complex involved in the ideological effect of this objective situation: I will attempt to discuss this shortly in terms of the transmission (as opposed to the simple communication) of culture. However, the work of media critics looking at this functional communications monopoly in a functionalist way over the past forty odd years cannot be dismissed outright. There was an explicit strategy by very powerful players to use the media in an imperialistic—or at least propagandistic—fashion. That it might be mediated by very powerful forces at the local cultural level is, in this case, beside the point—or, more importantly, it makes it all the more problematic. For, like the government supported monopoly of TV and radio in the US, this international US government support for the products of US multinational media corporations made it possible for those same corporations to have a level of saturation that virtually guaranteed an eventual audience for its products. As Tomlinson himself admits, we cannot discount, “the significance of the power of Western media simply to distribute their images. One reason why Chaplin’s humor can plausibly be seen as universal is that it is universally present.” This universal presence, whatever its functional effect, was sponsored by people who intended it to support the continuity of the “American Century.”

In the context of thinking about intellectual property rights, we should then shift this conversation to considering how the formal political support for this functional monopoly of the broadcast networks and content of the world is akin to the economics of value explored in chapter four. The process of “mediation” mentioned above, is quite similar to the “labor” of the audience, producing value for the owners of intellectual property that I explored in that chapter.

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There, I discussed the way the creative practices that have become popular with the advent of
digital media technology have helped to undermine this culture of property. The expansion of
digital technology is an essential corollary to the process of globalization so it should be no surprise
that this trend continues in relation to the latter historical movement. In considering the pre-
history of the international communications system, it is clear that similar sorts of planning and
cultural imposition went into this—largely to ensure the continuation of what soon became a
ramped up regime of capital accumulation known as “globalization.” This leads to the next set of
concerns that impinge on the question of a deeper understanding of cultural imperialism, which
will then lead to the larger argument about globalization being the exogenous cultural imposition
of property rights in general.

**Technology, Globalization and the Culture of Capitalism**

The globalization of economic production and of the content and systems of
communication technology appears on the average critic’s radar screen as already constituted, as
manifested through an inevitable march of history. On one level, it makes sense analytically to
take these, as given. In exploring current practices, it is difficult to rehash what appear to be the
long-settled issues of history and development, except in the most cursory ways. Thus critics of
Intellectual Property Rights can casually refer to the transformations in technology that enable
what Yochai Benkler calls the shift “from consumers to users;” Lawrence Lessig calls a shift from
a “read/only” to a “read/write” culture; and Henry Jenkins builds on his audience and fan
community work to discuss as “participatory culture.” In each case, the change in technology is

594 Benkler, “From Consumers to Users: Shifting the Deeper Structures of Regulation toward Sustainable Commons and
User Access,”
595 Lessig, *Remix.*
596 Jenkins, *Convergence Culture: Where Old and New Media Collide.*

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pitched as the primary reason for the new antagonisms they highlight, especially in the expansion of copyright restrictions. The ability of the average consumer to access, alter, and redistribute the cultural properties that normally circulated through the closed production and distribution channels of media conglomerates supposedly justifies this isolated protest against the status quo.

As mentioned in chapter four, many of the practices of active audience negotiation have long been necessitated to appropriate mass cultural product, yet to these critics the visibility of this expanded process of social valorization is supposedly limited to digital technology. To be fair, critics of copyright like Jessica Litman were already attuned to the expanded process of creation in offline works as well. As chapter four above argued, the expanded process of valorization is visible in all forms of production and these critics’ observations about intellectual property could easily be applied to property in all means of production. Digitization, therefore, helps to expose the flaws in the property regime more generally, along with the ideological defense of the division of labor and value that their (Liberal) Lockean justification implies.

The current section expands on this argument and positions the debate about this fundamental culture or property within the conjunctural context of globalization. The latter is itself a contested concept. However, most commentators focused on the material changes note that it is intricately linked with the expansion of digital communication. Some commentators see them as almost synonymous: asserting that globalization is either only or at least primarily linked with the enlarged space of cultural transmission made possible by digital communication. In the words of a mainstream booster of this position, globalization is best understood as the result of technology rendering the world flat.\footnote{Thomas L. Friedman, \textit{The World Is Flat: A Brief History of the Twenty-First Century}, 1st ed. (New York: Farrar, Straus and Giroux, 2005).}

From this perspective, globalization is characterized as a technological phenomenon, with as little \textit{political} agency involved in its creation as the satellites and data packets that make it
possible—and, now, inevitable. On the other hand, as mentioned above, the topic of intellectual property rights seems mostly related to the problem of movie and music piracy, along with some vague concern for patents on the technology itself. More often than not, the products constituted through these property rights happen to belong to transnational corporations and individuals (the law makes no distinction) with a home address in the North. Like the atomized, individualized technological development that brought about this change—the prototype being the Jobs/Gates garages of Silicon Valley—the global reach of western media is an accident of history to which we must adapt in order to progress.

In other words, globalization is seen in this perspective as the effect of the technological expansion of the reach of C2, a process that is explained by a series of coincidences and inevitabilities—which is to say that it is not really explained at all. As with any massive, world-historical change, the extraordinary number of particular contingencies and mutually reinforcing frameworks that have to line up to make it possible give its process of development the air of complete randomness. Assigning a single cause or set of causes to it seems reductive and overly deterministic. This is especially the case when the dominant narrative about the end result of this process contends that what is actually occurring is a sort of return to nature, a freeing of societies from the iron grip of states, like one of Michelangelo’s sculptures being freed from its marble confines.

As this project has argued at length, this Liberal form of liberation needs no explanation, only a mechanic well enough versed in “Natural Law” to know what aspects of the given society should be cast aside in order to make way for “modernity.” It is no wonder, then, that the latest discourses in relation to globalization takes the Foucauldian cast of “Governance,” which is nearly identical to his neo-liberally inflected concept of “Governmentality.” We quickly move, in other words, from globalization being about the functional, dynamic expansion of C2 to globalization necessitating a framework at the level of C3 which is formal, and determining. However, as in
earlier discourses of Natural Law, the content of this formal, determining framework, its outlines, are presumed to be beyond discussion. Their implementation is a technical issue, best left up to international experts well versed in this subtractive art form. More importantly, the process which began as a mere sharing of media suddenly necessitates an entire apparatus of scientifically vetted political and economic institutions—of which Intellectual Property Rights are only one aspect.

In contrast to this understanding, I would argue against this communication/technological explanation, framing it, on the one hand, in terms of the early arguments in political economy of communication about culture and imperialism, and, on the other, in terms of the multitude of policy changes that were instrumental in bringing about this state of affairs. The former had always seen the supposedly mercurial processes of transnational communication as being part of a larger strategy of international political and economic interpellation: the latter is best seen as the endgame of this process. Although more recent critics of this theoretical paradigm have emphasized the continued agency of actors in the global south to make meaning in the products distributed through these communications networks and technologies, the isolated focus on the C2 level blinds these critics to the larger argument of the cultural imperialism thesis: that the critical focus on C2 was always in relation to it as a vehicle to transplant a more fundamental set of cultural assumptions—a cultural efficacy engaged at all levels.

The latter is what I referred to above as a deeper form of cultural imperialism. It is related to the shallower version discussed above—where the focus was on the mere preeminence of US originating media products circulating around the globe—but it looks more carefully at the material practices and values that travel with them, and which mutually constitute the laws and restrictions shaping globalization from above.

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As mentioned above, in purely material terms, as Boyd-Barrett points out "'Reading' diversity stretches the significance of cultural products beyond the indications deducible from content analysis, but offers little insight into the processes determining which cultural significations are magnified for mass dissemination, which are lost." In other words, the fact that the properties of western media conglomerates still dominate the global telecommunications commons—the functional control of mediation at C2—is the result of a concerted use of political, economic, and technological dominance to ensure this circumstance. Clearly there are then a variety of interpretations that can be given to these materials, but until recently this communication was mostly one-way. As Boyd-Barrett also contends, focusing too closely on the interpretation of the content overlooks, “covert influences, including ownership, business models, professional values, content formatting, audience preferences and technologies.”

This is the deeper version of cultural imperialism which has both transported and been transported by these media products: they have aided and been aided by the transmission of formal cultural models of political, economic, and communication institutions. The recent attention to the legal concept of Intellectual Property Rights in relation to free trade—for instance by Drahos and Braithwaite—is of crucial importance to seeing the policy transformations necessitated by the more recent, post-industrial model being imposed. But opposing IPR on the grounds that it “results in the regulation of markets, whereas citizens would benefit more from deregulated, competitive markets,” seems to miss the ideological forest for the rhetorical trees. In other words, the argument they are making could have some clout if it didn’t basically reinforce the liberal ideology of which Maximalist IPR is part and parcel. It also belies a much longer history of the imposition of both IPR and the neoliberal model of development: IPR has long been included

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600 Ibid., 54.
601 Ibid., ix.
602 Drahos and Braithwaite, Information Feudalism.
in various trade and investment agreements. As Drahos and Braithwaite as well as IPR boosters like Maskus point out, the imposition of IPR was done primarily through bilateral investment treaties, hence linking Intellectual Property with the dominant accumulation strategy of globalization: the increased power of finance. This is not an accidental correspondence.

Property in intangible products—this as a concept—is as foreign to some countries and cultures as the Anglo-American notion of property in general. That is to say that, the latter, though an important concept in western culture generally, is the indispensable imposition that makes possible the process of globalization; focusing on IPR distracts from this more fundamental form of cultural imperialism. The imposition of western norms of property and value are precisely the kind of imposition that cultural imperialism was meant to describe: it wasn’t about whether audiences correctly interpreted the character motivations scripted in *Dallas*. It is only by seeing these as “natural” that it is possible to claim them as innocent.

In this sense, the problem of relationship between communication and globalization has largely been displaced into a partitioned set of concerns. As mentioned above, the material fact that the content communicated largely originated from a handful of points on the earth’s surface is seen as insignificant in itself: bigness and dominance don’t necessarily translate into ideological hegemony. The functional monopoly of western media at the level of C2 was, therefore seen as a somewhat innocuous reality, separate from the kinds of intentional—and wholly successful—initiatives associated with something as devious as imperialism. The discussion of IPR at this level is not all that significant, except in so far as the concern for their security will inevitably be as uneven as their current distribution.

603 "Until recently it was seldom remarked that for over thirty years the World Intellectual Property Organization has been a specialized agency of the United Nations." May, "The World Intellectual Property Organization and the Development Agenda," 161.

Conversely, the increasing privatization of communications systems, the very fact that the objects that circulate and are mediated through these national and international networks are properties at all is seen as a fact of nature: the commodification of information is made inevitable by its digitization. This needn’t have been the case. First, in terms of the institutional structures of global communications, Robert McChesney and Dan Schiller point to the rapid shift in countries across the globe from one where, “Media systems were primarily national, and often possessed at least limited public-service features” to one where “a transnational corporate-commercial communication system began to be crafted and a new structural logic put in place” and note that, as I mentioned above,

The conventional explanation of globalized communication centres on technology: that radical improvements in communication technology make global media flows and global business operations feasible and that, in general, this is all to the good. However, this is a misleading account. Underlying new communication technology has been a political force – the shift to neoliberal orthodoxy, which relaxed or eliminated barriers to commercial exploitation of media, foreign investment in communication systems, and concentrated media ownership. There is nothing inherent in the technology that required neoliberalism; new digital communications could have been used, for example, simply to enhance public service provision had a society elected to do so. Encased in a framework of neoliberal practice and policy, however, communications instead suddenly became subject to transnational corporate-commercial development.\(^\text{605}\)

The political changes that made globalization possible have been well documented and I will elaborate on them briefly below. However, in so far as these novel frameworks for

communication became widespread, in so far as private ownership of the processes of mediation became standardized, they became more like belts for what Debray calls the “transmission” of culture. This is distinct from mere communication and, in fact, incorporates or presumes the process of mediation central to Martín-Barbero. Likewise, if it thinks in terms of ideology, it does so in a thick, historical, institutional fashion, rather than reducing it to a mere semiological initiative.

Debray says that the importance of transmission is in its material, diachronic, and political distinctions from mere communication. In material terms, Debray characterizes communication is merely the conveyance of a message from one space to another—the focus on the C2 above, as if the products of the content industry alone are the referent to the concept of Cultural Imperialism. Distinguished from this is the more embodied process of transmission, wherein, “The chain of effects that transforms mentalities mingles together elements of both symbolic and economic, immaterial and concrete, such that the mediologist’s interest will be repaid as much by [focusing on] networks of transmission as much as by doctrines and the material bases of inscription as much by the etymologies of words.” This admixture of the material, the practical and the symbolic that transmission implies is similar to a deeper understanding of cultural imperialism which underlies the changes in globalization and communication: the way the media institutions themselves helped to relay a dominant way of life.

Transmission, in other words, to touch on the political dimension of its distinction from mere communication, may have a symbolic existence at the level of C2, but it manifests in an integrated efficacy that joins culture as mediation with culture as practice at C1 and, ultimately, culture at the C3 meta-level of models of state, law, economy. In this, the end result of a “proper” transmission of culture is akin to a Mode of Regulation or a Bourdieuan habitus:

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“communication needs only interest and curiosity. Proper transmission necessitates transformation if not conversion.” Hinting at the religious aspect of this completes the triad of distinctions he sets out: Recalling Innis’ time-binding vs. space binding biases of communication in relation to empire, Debray says, “If communication transports essentially through space, transmission essentially transports through time. [ . . . ] Whether configuring the present to a luminous past or to a salvific future, mythical or not, a transmission arranges the effective force of the actual with reference to the virtual.”

Standing in for this point in the transmission of the culture of property was the promise of growth, development and modernity—made possible through the “natural law” of property and the liberal orientation of the state.

Thus the privatization of communication and media cannot be taken out of the larger context of globalization, they are interwoven with the larger liberal transformations of the state. As McChesney and Schiller put it, “The global media system is better understood as one that advances corporate and commercial interests and values, and denigrates or ignores that which cannot be incorporated into its mission.” The fact that nine Northern corporations own over 70% of the content and distribution infrastructure of the global media environment doesn’t necessarily mean it will communicate messages of a provincially Northern bent—or that they will be interpreted as such. But it does deepen the transcendent culture of capitalism and the reified culture of property as a basic, fundamental value transmitted through the global information infrastructure. This value mutually constitutes the legal infrastructure which makes it so. Here, it is noteworthy that all of the critics of the idea of globalization being akin to cultural imperialism focus solely on the activity of the consumer in relation to the commodity: universalized as a

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Ibid., 6.
Ibid., 3.
McChesney and Schiller, "Pol Econ of International Communications," 14.
general cultural foundation for all societies in the world is the reified relation which implies their position is (and should be) only as consumers and the media they consume a commodity.

As explored in the previous chapters, the commodity relation requires a variety of other relations for it to function in the proper disciplinary manner. Most fundamentally, it requires a state to enforce the property rights in the commodity and the contracts made for its sale, transport, or exchange. And, after that, it requires that people utilize the commodity in fulfilling their needs. I will bracket for the moment the more important issue of production for sale and point to the less visible issue of self-sustained, non-market production. The ideal subject within the current global environment is one who consumes commodified culture. The implication, going back up to Lessig in chapter four, is that the ideal is not a R/W culture—where the conversation exists at the local level through the production of mediating products—but a Read Only culture, even if that “reading” is negotiated through the local cultural situation. Here, the commodification of mediated culture as “information” through the use of Intellectual Property Rights is more of a symptom of other transformations—though it is related to them in a mutually constituting way.

On the other hand, in these changed circumstances, the terms of what Cultural Imperialism might mean have shifted significantly.

As implied in the distinction between communication and transmission above, the ideological/cultural efficacy is not primarily instantiated through the content of the media


There are two general dimensions of significance in the relationship of commodification to communication. First, communication processes and technologies contribute to the general process of commodification in the economy as a whole. For example, improving the channels of communication in the clothing business, particularly with the introduction of global computer and telecommunication technologies, expands information about the entire circuit of production, distribution, and sales, which improves inventory controls thereby saving on space and increasing the likelihood that stores will stock [and contractors and subcontractors will produce] only what consumers want. Second, commodification processes at work in the society as a whole penetrate communication processes and institutions, so that improvements and contradictions in the societal commodification process influence communication as a social practice. For example, the international tendencies to liberalization and privatization of enterprises, which picked up steam in the 1980s [and was assisted by communication networks], were felt by public and state-run media and telecommunications institutions throughout the world. (142)
industries as through the patterns of private ownership both in and outside of the media which were the true goal of the cultural imperialism. This movement has been overwhelmingly successful. Even if its superficial content is still mediated at the current moment by local cultures, in the long run it will undermine the possibility of any alternative arrangement of the media on the national or global level. This deeper cultural imposition is the institutional content of a more robust definition of globalization, which takes it not as a technological or teleological-historical given, but as a complex political process of imposing a certain the economic theory global level. Regardless, therefore, of the direct effects of the content, private ownership of media certainly plays a part in this conversation. As Ó Siochrú, et. al. put it, “media and communications are perhaps the single most important factor in molding what is acceptable and unacceptable in terms of social, economic and political action.” One might add that they mold what is possible and impossible. When these systems have themselves are folded into the structures of major corporate conglomerates, the tendency for there to be a bias in one direction is significant. On this, the deeper culture of commodification and privatized communication institutions is the main imposition, rather than simply the numerical presence of US or western content. It rides alongside the same processes in privatizing state services and social institutions of all kinds—a process which has seen its most rapid progression in Latin America.

Despite the continuity of these processes throughout whole regions of the globe, critics assert that it is flawed to see cultural imperialism (or what they might call globalization) as a process that tends to homogenize cultures. Omar Lizardo, for instance, is a vocal critic of the cultural imperialism thesis from within the subfield of the contemporary international sociology of culture. As an example disproving this thesis, he points to UNESCO data which shows that there has been

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a recent increase in the number of recordings of local artists in Latin America. In his assessment, this undermines the basic thesis of cultural imperialism because, “According to the cultural imperialism thesis, these societies should instead be in thrall of and thus overrun by the global American popular culture industry.” However, he focuses on the C2 level and overlooks the broader processes at work. Graham Murdock, looking at media institutions at roughly the same time, notes that, in order to expand the accumulation processes of commodification, many media companies were going out of their way to find local content. Always attentive to the deeper understanding of cultural imperialism he notes, “The contents may be indigenous, but the master template is made elsewhere.” McChesney and Schiller concur:

Music has always been the least capital-intensive of the electronic media and therefore the most open to experimentation and new ideas. US recording artists generated 60 per cent of their sales outside the United States in 1993; by 1998 that figure was down to 40 per cent. Rather than fold their tents, however, the four media transnationals that dominate the world’s recorded-music market are busy establishing local subsidiaries in places like Brazil, where people are totally committed to local music. [...] With hypercommercialism and growing corporate control comes an implicit political bias in media content. Consumerism, class inequality and individualism tend to be taken as natural and even benevolent, whereas political activity, civic values and anti-market activities are marginalized.

On this last point, it is useful to note that Universal Music Group, the largest business group in the recording industry is a subsidiary of Vivendi. Vivendi was, until a few years ago, the owner of the

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614 Oliver Boyd-Barrett, Communications Media, Globalization and Empire (Bloomington, IN: indiana University Press, 2006), 18.
615 McChesney and Schiller, "Pol Econ of International Communications," 14.
world’s largest private water company, spun off in 2000 as Veolia Environnement. Before that, Vivendi was central to the water privatization disputes that set off the wave of demonstrations and, eventually, the first indigenous president in Bolivia.

Without trying to solidify the vectors of causality in this scenario, it should at least be obvious that private media ownership is probably far down the list of problems the indigenous people of Bolivia. When Bolivian president Evo Morales claims that the goal of his campaign is “to live together in so-called diversity, changing the neo-liberal model and finishing off the colonial state,” it is clearly pointed at a larger imposition. In this objection, we can see the refusal of the transmission of a more fundamental culture of capitalism. On the other hand, as in the ideal model of communication in relation to social development—where the mediation of C2 helps create consensus on C3—it is clear that to the degree that individual citizens, communities or social movements rely on the media in order to participate and be informed on this conversation, it is important to have a media system that will allow for all perspectives to be heard: this makes the stakes of the freedom to communicate at the C2 level important in the overall discussion. In that discussion, exogenous media products don’t have an organic connection to the local environment.

In another paper, Lizardo argues that, since the main role of media is in assisting in local conversations, “locally and relationally relevant culture will be more likely to be integrated into recurrent interaction rituals—and thus be more avidly consumed—than locally irrelevant cultural.

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618 Amy Goodman, “Leftist Union Leader Evo Morales Poised to Become First Indigenous President of Bolivia,” in Democracy Now (USA: 2005) quote is taken from his first inaugural address.
products.” This speculation is contradicted by his couching it in his prediction of an increasingly “global culture.” The latter is basically a transnational version of E. D. Hirsch’s “cultural literacy” thesis, updated for an age of mass culture. In this, the predominance of local content must be a long run prediction. In the current moment, the only way he can dismiss the homogeneity of global culture is by rearticulating the findings of a shallow, straw man form of media imperialism.

The media-imperialism thesis conceives of a global cultural economy primarily dominated by American popular culture (as this is the most likely form of culture transmitted and produced in transnational mass media systems). The socio-structural approach on the other hand, conceives of global popular culture (of which that produced in the U.S. is still the most important ideal-typical example, although it is more accurate to now speak of global popular “cultures” with a various different production centers), as simply one—albeit a very important—facet of world cultural flows. American popular culture is seen as distinctive not because of its “brow” level, but because of its relational reach that is for clear historical reason it has achieved a status as the “default” form of culture that can establish relationships across national lines.

In short, this is like saying that the predominance of English and Spanish as world languages is an accident of history—most centrally because of the imperial enterprises in which both of those countries were involved—but that there is nothing imperialist about the relation of US (C2) culture to its own hegemonic role in defining the world system over the last half century. Aside from this sloppy reasoning about the communication of media, it abstracts the content of these networks from the transmission the media practices and transnational media institutions through which they are distributed, and ignores historical practices—such as dumping programs in other

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620 Ibid.: 25.
countries, thus making it economically difficult to finance the production of that “local and relationally relevant” programming. By focusing only on the “sovereign consumer” of the reified liberal theory he presumes to be accurate,621 he asserts this new content will manifest itself, resolving the tension between the locally relevant and globally promoted and distributed.

In the meantime, as mentioned above, the simple presence of these products is not solely representative of the present form of cultural imperialism. However, it does figure into the larger problem of the autonomous development of the local culture as a totality. The degree to which this poses a problem depends upon the degree to which the electronic media is integrated into the cultural totality as the primary means of mediation in the culture. Other endogenous methods of communicating across the space in which the community or nation exists may aid this process. In fact, as in the Bolivian case, it is arguable that the very lack off total integration into this modern system of capitalist culture and communication may help assist in the creation of a more organic antagonism to the implementation of the latter. Drawing on his experience working directly with the Zapatistas, Justin Paulson argues in his 2005 dissertation,

the extent of reification within a society - the degree to which social relationships are objectified and instrumentalized according to the needs of capital - varies as does the historical length of that society's participation in a capitalist economy, its location relevant to the market centers or peripheries, and the resiliency and tenacity of any "traditional," non-capitalist cultural or economic processes with which the logic of capital must intersect.622

On the other hand, since Paulson himself was instrumental in setting up the communications node (an informational website where news of the struggle could be posted) between the Zapatistas and

622 Justin Paulson, “Uneven Reification,” (Santa Cruz: University of California, 2005), v.
the rest of the world, it is arguable that even this uneven reification must be accompanied by some system of broadcast, if only to gain external solidarity.

However, if privatization and market capitalism, liberal property rights and the “mini-max” state are the only options on the menu, then even a completely local, endogenous, autonomous media system would be unlikely to help in the larger project of national development. This underlines the deeper understanding that Schiller resists in terms of cultural imperialism: the involvement of western culture, en toto, in the development of postcolonial states. The latter brings up issues explored throughout this dissertation: the idea of a coherent cultural inside and the discussion above of autonomous culture at the domestic level. First let us look briefly at this larger imposition in a longer historical context, then consider the final argument that Tomlinson makes against the concept of Cultural Imperialism: all that is solid melts into air.

**Cultural Imperialism: Modernity, Development, Globalization**

Tomlinson devotes a chapter of his critique of the discourse of cultural imperialism to the question of national culture. He claims that this is a key issue for Schiller in that the latter was concerned with, “advocating respect for the cultural and political sovereignty of all nations.” While Tomlinson also looks at the UNESCO discourse in relation to national culture, his prime method of argument on this topic is one of equivocation: he takes analytical, admittedly polemical frameworks of inquiry and badgers them with minutiae till they are muddled into logical incoherence. In relation to nations and cultures, this means that he insists there can be no such thing as national cultural autonomy because, effectively, all national cultures are illusions (a la Benedict Anderson’s *Imagined Communities* and Eric Hobsbawm’s *The Invention of Tradition*). They

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might be widespread illusions, but they are likely composed mostly of invented traditions or fragmented sectional loyalties. He sees this as an objective fact and this, alone, is enough to make the discourse of cultural imperialism fall into folly: “the conceptualization of [domination of one national culture by national culture] can only be strictly coherent where we can speak of a unified national cultural identity in the supposedly ‘invaded’ culture. [. . . .] The claim to a ‘swamping’ or erosion of national culture might mean imputing a cultural unity where none exists.”

What Tomlinson doesn’t discuss at all is the context of global anti-colonial struggle and post-colonial development which inspired Schiller’s interest in the question of autonomy. In this his critique, Tomlinson exposes his own preferences by committing some of the same errors he attributes to the Frankfurt School and cultural imperialism thesis. On the one hand, in reference to the notion that the C2 level of mediation—or even the totality of capitalist relations—could have the structural effect of altering the individual consciousness, Tomlinson, who likes to put on the patronizing hat of a postcolonial/poststructuralist scholar, denigrates this line of critique by asking if these critics can really speak for the consumers of these products when they presume this functional effect. Aping Spivak in a most opportunistic way, he continually asks “who speaks?” He characterizes critics of this neo-colonial communications relationship as claiming all viewers have a false consciousness and therefore cannot know what their true interest is. This, he says, denies their individual sovereignty, of their being able to choose even what an analyst might think is a bad choice. In short, the critical theory of the Frankfurt School and the notion of autonomy are plagued with a kind of paternalism that chafes his ultimately libertarian sensibilities.

However, at the level of national culture, he denies the possibility of an idea of cultural sovereignty, chalking up any identification that people might have with a community qua “national culture” as being a consequence of a collective version of false consciousness and part of

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324 Ibid., 73.
the illusions people have about their own participation in the imagined community of the
nation. In doing so, he thereby denigrates objective instances of their resistance to its being
changed by some invasion of “alien culture.” In both cases, the ultimate argument hinges on what
becomes a “cultural fate” that he tries to infuse with the agency of “choice” over the
“romanticized unfreedoms of traditional societies.”

Tomlinson presumed refutation takes a version of the much more coherent and
sympathetic Martín-Barbero’s “historic reappropriation of Latin American modernity,” and instead
makes the modernity of capitalist globalization the primary door through which all future
development must pass. As mentioned above, Tomlinson’s philosophical discussion of
development, capitalism and cultural identity takes arguments about culture at C2—of culture as a
form of mediation through the tokens of the content industries—and shifts the definition of what
both imperialism and culture would mean. Taking Giddens definition of globalization as the
globalization of “modernity,” Tomlinson argues that it is only through capitalist social relations
that subjugated peoples are able to become conscious of their cultures and, therefore, able to
defend them. In the terms laid out in this dissertation, it is only by adopting a capitalist culture
from the top down, C3 level, that subject cultures are able to defend—or even recognize—their
cultural practices at the level of C1 or C2. They were completely unaware of all the common
practices that they objectively took part in (C1), and the ideas they obviously held about these
practices (C2 or even C3) until they were exposed to the enlightenment of “capitalist modernity.”

Here he ultimately denies that the local agency can do anything more than perform a
process of transculturation with the “culture of global modernity.” He provides a supple
elaboration of the interplay of “Culture as Lived Experience” and “Culture as Representation,” or

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Cf. especially, Tomlinson, "Globalization and Cultural Identity."
what I would classify as C1 and C2. But in typical fashion, there is no need to have an alternative, even local set of representations, much less an alternative form of culture in the form of law or the structure of the state. In fact, in so far as this is resisted, it is assumed to be a form of reactionary traditionalism. Here the final turn of the screw is that he fully admits that what I am calling the reified culture of property is a western creation, but he doesn’t classify this as cultural and, therefore, doesn’t see its imposition as cultural imperialism:

There is a clear ‘political-economic’ sense in which these processes can be seen as imposed on non-western cultures since they are bound up with the history of political-economic imperialism and colonialism, a history in which the West has been and still is in a position of dominance. The sense in which they are a cultural imposition is not so clear. This is because the material and social benefits of modernity represent their own emancipation from the domination of ‘traditional’ economics, politics, and worldviews.427

The breathlessness with which he takes this leap into defending what amounts to the liberalization of the world economy and the culture it inflicts seems to be infected with the enthusiasm he felt at writing the text in 1989. For the attributes of modernity he claims will come in the stead of this mowing down of “traditional” culture are things like healthcare, education, running water, and urban infrastructure—in other words, the attributes of modernization that were ultimately the project of the state led development of the previous era.

On the one hand, we can chide Tomlinson for not noticing another possibility—that there could be an autonomous national project to appropriate these modern amenities according to some local cultural logic, i.e. the project that created the situation where, even in the post-Soviet impoverishment of the former Soviet Republic, the health care system remained in tact enough to

keep child mortality and life expectancy at their former levels. 628 In place of any other possibility, we have the culture-less culture of capitalism: the content and norms of this reified culture of property must be presumed for the transmission to be completed. 629 As Bourdieu observes of the “enforced conversions” to the logic of market discussed in chapter five, the proper completion of this transmission, demands a process which is

Often very costly and painful, which the newcomers to the strictly ‘economic’ economy have by force of necessity to undergo, doubtless enables us to form a rough idea of what happened during the origins of capitalism, when dispositions were being invented at the same time as the field in which they were to find scope for deployment was gradually being established. 630

The difference between the imposition of this set of cultural practices in the current moment is that they occur unevenly across the globe, with other agents are in a better position, possessing more knowledge, resources, and expertise in the navigation of this field. In short, the establishment of these norms is certainly a cultural imposition, but to see this, we have to consider culture as an actually open-ended process, rather than unified march towards capitalist modernity.

The lack of a “culture as a process” in the imposition of these priorities and dispositions is evident in that, in the actual policies which ultimately dictate this culture, the law of the state (C3) is not allowed to even be tinted with a local hue. As Peter Yu says of international laws regarding intellectual property,

Most of the recent intellectual property literature concerns the “enclosure of the public domain” or the “one-way ratchet” of intellectual property protection. While these concerns are significant and rightly placed, a different, and perhaps more important,

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628 Cf. Gapminder.com
enclosure movement is currently taking place at the international level. Instead of the public domain, this concurrent movement encloses the policy space of individual countries and requires them to adopt one-size-fits-all legal standards that ignore their local needs, national interests, technological capabilities, institutional capacities, and public health conditions. Unlike the movement to enclose the public domain, which “fenc[es] off common land and turn[s] it into private property,” the international enclosure movement fences off areas that provide attractive policy options for less developed countries.

As I’ve insisted throughout this project, the debate about intellectual property and its imposition on other countries is essentially about property rights. In this sense, Yu’s point about “fencing off areas that provide attractive policy options” has long been the case in relation to developing countries. Certainly this is true in relation to intellectual property, but before that (and, in many places, still) it could have been said in relation to property.

Tomlinson may chafe at the idea of a “national culture,” but in the international political economy, the fact of the matter is that individuals have less ability to affect change in their local affairs through the market—where multinational conglomerates increasingly reign—than through political institutions of the state. This is true whether the state is itself nominally democratic or simply forced by what Ortega Y Gasset called “The Revolt of the Masses.” This fact is not hindered by the functional Retreat of the State. The argument that, in the process of globalization, these multinational forces cannot be reigned in by national political doctrines is in some ways a contingent observation of an increasingly problematic reality made possible by the very policy makers who thereafter claim nothing can be done. Here Tomlinson’s insistence that

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the state cannot dictate culture is less a nuanced account of the intricacies of culture as a concept than a reified reflection of the dominant logic of multinational capitalism.

Unlike citizens (or, as Tomlinson and other boosters like to call them, “consumers”), the international field of action for multinational capital is the guaranteed by the process of legal harmonization—first in political terms; then in economic policies. The “lack of stability” and “incessant change” that supposedly characterizes all of capitalist modernity is curiously the opposite of the investment-scape the cultural transmission of legal harmonization is supposed to enact. Likewise, the state is essential for this process, even if its agency is deemed limited. In short, globalization still means to speak in terms of states and act in terms of the administrative unit of the state. This effective container (and container of efficacy), described by Bertrand Badie as “The Westernization of the Political Order,” was brought about through, among other things, the state centered trajectory of global institutions set up at Bretton Woods (World Bank and IMF) and Dumbarton Oaks (UN). This presumption, along with the general uneven development of political and economic power, creates an environment where a state is the necessary container of action. In so far as there has been a transformation, it has been in the relation of the state to the economy.

Here we should separate out different kinds of transformations. Gramsci, for instance, cautioned against mistaking conjunctural changes—changes that were mostly a superficial response to recent stimuli—and more fundamental changes that alter the basic terms of the social formation as a whole. We can assume that there is a dynamic relationship between these kinds of changes across spatial and social boundaries—that fundamental changes in one place might create conjunctural effects in another or that conjunctural changes at one level might actually signal an

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attempt to stabilize the fundamentals and prevent any basic change. Discourses about globalization tend to flatten these distinctions.

In this vein, I would argue that globalization is the product of policies meant to support a certain class orientation of value and property; and to cement the current international division of labor. While it would be tedious and redundant to review the multitude of works charting the implantation of this model of development, it is worth noting that, to say that the current model inherently privileges a certain class of property owners should be a fairly uncontentious claim: the dominant narrative of what development requires consists mainly of the imperative that the state do all that it can to attract investment and ensure the profitability of capital. The previous chapters should have sufficiently outlined the kinds of disciplinary measures this involves.

Therefore, in relation to globalization, I would make a distinction between the essential structural priorities of the policy—which inevitably create divisions within as well as between countries—and the intended structural effects of those policies in the current conjunction. The former is a reflection of the fundamental “culture of property” which, though generally mediated by the social formation, has largely informed most of the development of western capitalism. The latter, however, is more conjunctural and is informed by the reification of the latter according to “natural law” as well as a host of new ideologies. Therefore, Globalization, like the culture of property it promotes, is a part of a longer political economic project. That there are formal and functional elements to this should not distract from its constructed aspect. It begins, like in 17th

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century Britain, with the idea that there must be a central state authority to manage the affairs of the nation. That this fact is denied later—as chapter 3 explored to some extent—shouldn’t stop us from recognizing it.

The state led development that immediately preceded this was a combined process of active decolonization and the reconstitution of the global political economy along new state lines. This time, local political struggles, the dominant paradigm of development, and the political systems of the UN and Bretton woods institution more directly affirmed what Bret Benjamin has called “nation-state” culture. Obviously recounting this entire project would be beyond the scope of a single chapter, but the anti- and post-colonial struggle was central to the concerns of Schiller, Mattelart, and others in their weariness of cultural imperialism. In this, the struggles themselves were complicit in the first order of business—to subdivide the colonial world into states as effective political units. The nationalist movements that took this process in hand obviously produced a mixed blessing—one which, despite his enthusiasm for the freedom of the Algerian people, Fanon recognized early as a “pitfall.”

To have functional power in the global order, territorial states had to be formally arranged in Westphalian-style sovereignty. Postcolonial studies scholars rightly point to the fallacy of the cultural supremacy of the nation in relation to the legal fiction of the state; but, as Badie argues, the political dependency this created a geopolitical situation where external legitimacy was only secured by adopting the western model of the unitary sovereign. Inayatullah and Blaney argue that this understanding of sovereignty was always wrapped up in the Western conception of

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private property and market competition; and Justin Rosenberg, international relations scholar, brings it to a more direct point:

The “pure” power of the political scientist, the medium of the balance of power, is in fact the power of the ‘purely political’ state, the sovereign state, that state which now stands outside production and is therefore abstracted from he particularities of civil society—in short, the capitalist state.

In critiquing the transhistorical, universal assumptions of the realist theory of International Relations, Rosenberg carefully draws out the implications of this ideal of sovereignty. As he has argued since then, globalization is best seen as a revival of this version of sovereignty—and especially as a revival of the economic corollary to this understanding. As discussed in chapter two, this relates to the liberal understanding of the state. This affirms the territorial authority of the state, but at the same time inflects a requirement on the way it is supposed to protect property and value. Drawing upon Ellen Meiksins Wood’s understanding of the early capitalist state, he points to a version of what she calls “The pristine culture of capitalism.” This brings us to back to the crux of the matter: if there is a cultural imperialism at the heart of globalization, what is the culture it imposes? Rosenberg’s answer to the question of the reality of the modern state system has always implied helps to answer it—and, again, recalls the model of state imposed in England in the 17th century, making the dominant model of the state the capitalist state:

The separation of the political and the economic indicates precisely the central institutional linkage between the capitalist economy and the nation-state: That is, the legal

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638 Inayatullah and Blaney, *International Relations and the Problem of Difference*.
639 Rosenberg, *Empire of Civil Society*.
structure of property rights which removes market relations from direct political control or contestation and allows the flow of investment capital across national boundaries.\textsuperscript{641}

For most of the postcolonial era, what Badie calls the clientelist state was appropriate enough for this flow of investment. As Hoogvelt points out, “Once the most important productive sectors of the colonial countries had been ‘slotted’ into the system of world capitalism and its institutions, control over these economic resources could be controlled from an arms length. [. . . .] The most important of these institutions was undoubtedly the sanctity of private property abroad.”\textsuperscript{642}

More importantly, the state led model of development linked what dependency and world system’s theorists call the periphery into the core industrial centers, with Bretton Woods institutions facilitating the replacement of local, subsistence, labor intensive agriculture with capital intensive agriculture through the “The Green Revolution.”\textsuperscript{643} This was the original form of cultural imperialism, which was always on the radar of critics like Schiller, who saw the way it used the C1 and C3 alongside the already extant C2 to execute the “the Diffusion of Innovations” through a complex understanding of mediation.\textsuperscript{644} The model of the state that dominated in this model—at least in theory—was functionally appropriate to the needs of the capitalist system: since it was largely based on resource extraction, the principle of making deals with the central government, instead of having to get approval from the affected areas, was far preferable to having to negotiate directly with, for instance, indigenous communities.\textsuperscript{645} In this, much as in the absolutist era of early capitalism, the structure of the law in relation to the governance of the state was presumed to be the predominant territorial authority.

\textsuperscript{641} Rosenberg, 	extit{Empire of Civil Society}, 14.
\textsuperscript{645} On this, the recent granting of land rights to indigenous communities in Ecuador has had the perverse effect of displacing the struggle between these communities and the central state onto the community itself, with the corporations in question using “Astroturf” campaigns to solidify the legitimacy of their contracts with the communities. Cf Sawyer, 	extit{Crude Chronicles: Indigenous Politics, Multinational Oil, and Neoliberalism in Ecuador}.
This account squeezes much of the nuance out of this historical process, but the important thing to take away from it is the observation that, though the relationship of the state to civil society was technically impure from the perspective of the reified culture of property, the social division of labor projected onto the international scene remained relatively similar to that of the colonial era that immediately preceded it. Thus the supposedly revolutionary transformations in communications technology that made globalization a foregone conclusion were more of a conjunctural change. It is arguable what necessitated the changes to the structure of the state and global economic policy, but even this change, it can be argued, was not as fundamental as enthusiasts would have it.

Neil Smith, for instance, argues convincingly that there are connections between post-1970s global economic ideologies extolling the global marketplace and the social and intellectual revolutions of the seventeenth and eighteenth centuries that ushered in a new political economy of bourgeois property rights, market power, and the rule of nation-states. This ‘classical liberalism’ was often integral with, rather than antagonistic to, latter day conservatism, and neoliberalism deliberately harkened back to that tradition.

Likewise, Smith cites Uday Mehta’s recent book, which mines the history of liberalism and finds with great regularity the tendency Tomlinson displays in his most recent work: the propensity to associate its philosophical position with such “universality and cosmopolitanism” that they end up “endors[ing] the empire as a legitimate form of political and commercial governance.”

The present form of imperialism is distinct in that, by separating the political from the economic at a

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649 Ibid., 42. Mehta’s book is also worth looking at, though the upshot of the analysis—that the conservative philosophy of Burke would have been a better alternative—seems to grasp at straws rather than provide a real alternative. Uday Singh Mehta, Liberalism and Empire : A Study in Nineteenth-Century British Liberal Thought (Chicago: University of Chicago Press, 1999).
global level, it effectively presumes private property to be such a universally understandable institution that it will not require such coercive measures. History, (and hopefully the previous chapters of this dissertation) shows that the necessity of primitive accumulation—that is the elimination of the ability of individuals to subsist—is integral to this process, so in this era, the state will retain its importance. Thus the fundamental continuity of the culture of property makes some of these conjunctural changes seem less significant.

Unquestionably, in relation to the previous era, the reorientation of the state towards protecting private property of all kinds—including Intellectual Property—has increased the power of finance capital of various public and private kinds over the decisions made at the domestic level. This is particularly the case in the developing world, though as Ankie Hoogvelt points out, different regions have responded differently. Richard Peet, following the radical geography paradigm, discusses this in terms of uneven geographical development, providing both an explanation of the ideological and institutional changes and an evaluation of how these policies have been transplanted onto the messy reality of actual states, societies and communities.

The point of this is to say that the generation of a global capitalist system—or as Tomlinson describes it, a global capitalist modernity—was not some inevitable result of changes in technology or as Tomlinson describes it “a set of political economic structures” which seem to be “a global fate.” Instead, like the imperial apologetics of “modernization” and the postwar systems of “development” this entailed an explicit model of political, economic and cultural elements requiring a certain state, a certain market and a certain set of habitual practices that responded directly to the behavioral incentives offered by these institutions. However, as hinted at above, the shallow reliance on an implied culture in conjuncture with the coercive state placed all

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of the force of broader social legitimation on the economic effects. Since these effects were largely one sided—producing, as Hoogvelt usefully articulates, “a first world in the third world and a third world in the first”—the juridical force of international trade and investment treaties, with the arbitrary tool of economic sanctions imposed by the army of lawyers employed by wealthier nations, becomes one of the only levers available to retain the international division of labor in the favor of what Brenner calls the early developed world.

Though in most cases the changes understood as “globalization” were pushed through using schemes of finance, often most directly to the benefit of finance, the latter can’t be easily separated from the growth of the global commodity chains discussed under the banner of “free trade.” The ideal of flexible specialization and globally distributed production seems to have been more of a cover for disciplining the domestic workforce of the first world to act more like the idealized sweatshop workers of the third. As Doug Henwood points out in his illuminating text, in reference to the “novelty” of the New Economy, few of the productivity gains from the burst of innovation in the 1990s came from the employment of information technology—most of the gains came from the process of producing and buying the technology itself in order to prepare for the new economy. 

On the other hand, when free trade advocates promoted the idea that “high value added” jobs would be created to replace any that were outsourced, the more likely presumption was that, one way or another, the financial backers of this alteration of the production process would be able to retain their position at the top of it.

The more recent intensification of intellectual property rights illustrates the final gasps of this model. Though IPR was always included alongside other property rights in treaties on trade and investment, the current anxiety over their imposition represents an attempt to bring to fruition one last model. The ideal of a post-industrial, informational society has been a commonplace of

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"Henwood, After the New Economy."
social theorists for the past four decades—an early version being Daniel Bell’s prediction of *The Coming of Post-Industrial Society* where the US workforce would be increasingly shifting to service and informational work in industrial societies. The underside of this fantastic dream is the tacit assumption that the real work of production—and the headache of dealing with human laborers and the devalorization of fixed capital—could be displaced through the expansion of a global production chain. The more academic version of this articulated a New International Division of Labor, whereby,

theorists sought to explain the shift in manufacturing from advanced capitalist to developing countries, with the fragmentation of production and the transfer of low-skill jobs while the bulk of research and development (R&D) activities was retained in the heartlands of capitalism.\(^{555}\) Mittelman, astutely, observes that there is nothing all that new about this international division of labor; we might point out that it is also not all that different than the division of labor that is basic to the history of capitalism, as explored in the work of Harry Braverman in chapter four of this project. The difference is that, instead of it obviously being split between social classes within a single factory, it is fragmented through global space, making solidarity more difficult and, through monopsonistic processes like Wal-Mart’s, producing cheaper goods for badly paid workers everywhere. It would be a mistake, however, to think that Wal-Mart was concerned with producing or selling anything: this is a means to and end for their financial goals.

Here, despite the heightened rhetoric, the processes of globalization and digitization discussed above are shown to be incredibly banal in the value relation that their attendant policy regimes have attempted to inscribe. This replicates the processes of primitive accumulation and commodification that ultimately promise to serve an increasingly detached collective of rentier

financiers. However, the ephemeral, flexible workplaces that have made it easier to threaten and
displace laborers (including the informational workers) have also made it harder to control or
enforce these measures. While disciplining agrarian squatters and sit down strikers equally required
the power of the state, at least the physical site of production could be more easily controlled.
Now the juridical work the law and the state are asked to do in protecting the value of property
owners is much harder and comes on the heels of a significant reorientation of the state which has,
in many parts of the world, already damaged its credibility as a social institution.

This is at a time when the basic Lockean defense of both the distribution and ownership
of the value created in property is being undermined by the ways both globalization and
digitization make visible the expanded process of valorization. Chapter four explored some of the
arguments about the expanded process of valorization in relation to intellectual property and drew
striking parallels to the process of valorizing property more generally. The expanded production
of value in the global commodity chain makes it equally visible and, while their efficacy may be
questionable, anti-sweatshop and fair trade campaigns have drawn attention to this at an impressive
pace. On the one hand, the expansion of global production into increasingly shady and
unmonitored channels of production—mostly to avoid what meager labor, environment, and
product safety regulations exist—has had the perverse effect of empowering the black market of
counterfeit goods in ways that clearly threaten the future of this regime. As with digitization,
teaching people how they can create value for you could ultimately help them see how they could
create value for themselves. On the other hand, in both cases, the expansion of IPR at the level of
the state would be effective in limiting these activities to the informal sectors of these economies
rather than ever letting them become competition for the US rentiers.

657 The possible exception being China, which seems to be gaining enough financial and manufacturing clout that,
outside a full military intervention, there is not much US owners can do: moreover, with an internal market of over a
sixth of the world’s population, the threat of re-export seems beside the point.
In this environment, it seems a bit fantastic to imagine that intellectual property rights could really solidify these relations or patch over the holes created in the reified culture of property more generally by those very relations. This is clearly part of the reason so many US critics are exercised at the attempt to extend them further. However, I would argue that they don’t push far enough: in this opening it seems reasonable to take this a step further and question the continued relevance of the liberal model of property rights more generally. While the imposition of IPR may present a challenge to the entrenched, maximalist interests, the culture of property more generally seems to be well on its way to becoming the global juridical status quo. Still, in both cases the clearest vision of hope for the transformation of this seems to arise from the places where the culture of property and intellectual property remain the least reified. Here, finally, we can return to the question of culture as a complex totality and the relation of this to the law and the state.

What if something solid remained?

Here the contrast has to be drawn between the cultural possibilities of neoliberal globalization and those of other domestic and international visions. I think that, on the topic of cultural imperialism, I have established the imperialist part rather concretely. But there still remains the issue of the conceptualization of culture and its alternative futures. Tomlinson seems to think that the only way alternatives can be imagined or even recognized as existent is if they are exposed to the illuminating “sweetness and light” of capitalist modernity. The meta-discourse about culture is certainly helpful for framing resistance, but the aspects of culture over which the struggle ensues are certainly existent beforehand. More importantly, he—like the critics of intellectual property throughout this project—sees the only possible understanding of culture as a
process as taking place through the “creative destruction” that is characteristic of capitalism and the competitive market. The latter, as the previous chapters outline, therefore necessitates that, if you want to engage in the enlightening, progressive, modernizing activities of “culture as a process,” a society must first commodify everything existing and then base its worth on the outcome of the spontaneously generated market for these wares. The only other alternatives to this are the backwardness of either communist totalitarianism or clinging to something on a range ending with so-called traditional societies. Integration increasingly subjects one’s society and culture to the structures and discipline the capitalist culture; resisting this signals that you are not engaged in the process of culture, which can only exist in capitalist modernity.

But there is obviously another option. It recalls the idea of autonomy in Adorno and Schiller and it might be best illustrated by an example. One of Tomlinson’s pet peeves is the idea of National Culture as a coherent unity. But since he ignores the issue of anti-colonial struggle, he is unable to conceive of the circumstances in which either national culture or cultural autonomy could appear as both unified and progressive, even as it drew upon its traditional resources. Though there are obviously less dramatic ways that we could talk about culture as a coherent inside, it is in the concept of culture in relation to the nation that Tomlinson find his equivocation enough to dismiss the idea in any form.

Franz Fanon, on the other hand, in his study of A Dying Colonialism in Algeria, could conceive of this and more. The book looks at the cultural activities and changes that were taking place during the revolution. It is a surprisingly relevant work in the current moment. Much like the film The Battle for Algiers, which echoes in the ongoing struggle for autonomy in Palestine, Fanon’s chapter “Algeria Unveiled” points to a key issue of culture at the C1 level—the way people dress—and demonstrates how it becomes a pivot for not only involving women in the revolutionary struggle, but in helping them transform the meaning of the cultural practice in the face of the colonial attempt to liberate those women from the patriarchal structures of traditional
culture. The latter presages present day attempts to charge all practitioners of Islam with some failure to integrate into “modern culture.” However, like the capitalist apologetics of Berman, this basically racist, xenophobic generalization is presented as somehow inherently progressive and in tune with the Enlightenment values the practitioners themselves are so obviously lacking.\footnote{Here I refer to Ayaan Hirshi Ali and the 2007 debate in the European magazine Sign and Sight between Timothy Garton Ashe and Ian Buruma. \url{http://www.signandsight.com/features/1167.html}}

In Fanon’s account, these enlightened saviors of women from the dreadful pangs of traditional culture were the colonial administrators (and their own wives) who, in the hopes of justifying and prolonging their rule, began pressuring native women and men to alter their traditional lifestyles, to become more “modern” and, ultimately, to give up the wearing of the veil. Fanon attributes this to a precise political doctrine that the administration crafted based on the work of colonial sociologists and ethnologists. The latter had concluded that, despite the apparent patriarchal structure of Algerian society, women were actually quite powerful behind closed doors, where “the more significant existence of a basic matriarchy was affirmed.” Fanon goes on to express the colonial strategy thusly: “If we want to destroy the structure of Algerian society, its capacity for resistance, we must first of all conquer women.”\footnote{Frantz Fanon, \textit{A Dying Colonialism}, trans. Haakon Chevalier (New York: Grove Press, 1965), 57-8.}

As with the instrumental moralizing over the Taliban’s treatment of women in the (short) run up to the US war on Afghanistan, the political use of umbrage at this cultural practice was enjoined by “mutual aid societies” (NGOs) who made sure that “every kilo of semolina distributed was accompanied by a dose of indignation against the veil and the cloister.”\footnote{I point this out not to minimize the actions of the Taliban with regard to women’s rights, but to point out the political use of this issue by the Bush administration and their boosters in cloaking the operation in morality. As Ahmed Rashid points out in his book \textit{Taliban}, the previous administration (under Clinton) was ready to sign off on a pipeline deal with the Taliban (along with generally supporting the regime) until US women’s rights groups made the treatment of women a political issue. Ahmed Rashid, \textit{Taliban: Militant Islam, Oil, and Fundamentalism in Central Asia} (New Haven: Yale University Press, 2000).} At first, this had the effect of merely strengthening these traditional patterns of behavior, but as women were enjoined to fighting alongside the resistance, Fanon recounts a variety of permutations. Most

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strikingly, the revolution began using unveiled Algerian women as relays for the fighters themselves. Here the colonial strategy is co-opted as a weapon in the struggle—eventually resulting in the practice, portrayed in *Battle of Algiers*, of a young, unveiled women smiling at young French soldiers as she saunters into a café to drop off a bag with a bomb in it. Fanon comments on the series of tactics that led to what he saw as the necessity of using unveiled women for terrorism. Once this tactic becomes too risky, women involved in the resistance then take on the veil again—this time in order to hide grenades under their clothing.

More importantly for Fanon than this clever use of dominant cultural assumptions and subaltern practices in asymmetrical struggle is the way this actually ends up changing the dynamics of gender and family relations such that men and women, fathers and daughters, are able to negotiate their cultural assumptions about the importance of tradition in relation to the struggle for a new nation. He calls this an overall process of “counteracculturation” and mentions it as reliant on developing a new culture from the old through the process of struggling for the new nation against the imposed culture of the occupier. In this, he gives an important place to the women in the society precisely because they were able to navigate the relatively uncharted waters of what Raymond Williams called dominant, residual, and emergent culture. Speaking of the more general intensification of the meaning and practice of the veil, he says

The Algerian woman, in imposing such a restriction on herself, in choosing a form of existence limited in scope, was deepening her consciousness of struggle and preparing for combat. This withdrawal, this rejection of an imposed [colonial] structure, this falling back upon the fertile kernel that a restricted but coherent existence represents, constituted for a long time the fundamental strength of the occupied. All alone, the woman, by means of conscious techniques, presided over the setting up of the system. What was essential was that the occupier should constantly come up against a unified front. This accounts for the aspect of sclerosis that tradition must assume. In reality, the effervescence
and the revolutionary spirit have been kept alive by the woman in the home. [. . .] Side by side with us, our sisters do their part in further breaking down the enemy system and in liquidating old mystifications once and for all.”

The challenging dialectic that Fanon sees working between the sclerotic residual culture of tradition and the emergent effervescence of the national culture of the future is held somewhat in balance by the tension between each of these poles and that of the dominant “enemy system.” That this latter system might equally have potential for what might otherwise be a progressive effervescence—changing traditional gender relations, for instance—ignores the overall sclerosis that giving over to this dominant culture would involve in the long run.

It is this triad (or quadrangle) of forces that the market-oriented notions of culture above are poorly equipped to understand because they don’t see either the validity of a locally autonomous process of culture or the implied (but reified) culture of property market capitalism: it is simply a fact of nature, “a global fate.” The process of culture is therefore in adjusting to this fate as elegantly as possible. It would be entertaining to hear Fanon’s response to this, particularly in light of the imperial overtones to the request.

Perhaps an equally relevant example in terms of cultural imperialism—and the discussion of autonomy in relation to the culture industry vis-à-vis Adorno—follows in Fanon’s account of the revolution’s use of the radio. He begins by noting that the only radio station available before the revolution was a French station targeted at the colonials, which occasionally played what the programmers seemed to think of as “native” music. Still the bulk of the programming chafed the traditional sensibilities of most colonized families and, in any case, it was filled with accounts of their own culture which were often diametrically opposed to their own understanding. And, finally, radios were expensive and so were mostly left to the colonial population.

This changed with the revolution. Suddenly there was a desperate need for information from the front that was not tainted by the propaganda of the enemy—or, as Fanon finds almost
humorously problematic, the wildly unrealistic accounts of the speculative grapevine of traditional mediation. The only other source of news was from foreign papers, imported from France, which, while sometimes sympathetic to the revolution, were easily traced. Thus informants would watch to see if natives attempted to buy these papers, the presumption being that this would make them potential revolutionaries. Eventually a pirate radio station is set up called *The Voice of Algeria* which combats the information of the official broadcasts and transformed the medium from being a “transmission belt of the colonialist power” to being an instrument of creating a new national culture.

The full account is colorful in itself—particularly of the challenges to keep the station running in the face of the French army’s jamming the transmission—but the conclusion he presents is a challenge to Tomlinson’s skepticism at the notion of national cultural autonomy.

The national struggle and the creation of *Free Radio Algeria* have produced a fundamental change in the people. The radio has appeared in a massive way at once and not in progressive stages. What we have witnessed is a radical transformation in the means of perception. Of Algeria it is true to say that there never was, with respect to the radio, a pattern of listening habits, of audience reaction. Insofar as mental processes are concerned, the technique virtually had to be invented. *The Voice of Algeria*, created out of nothing, brought the nation to life and endowed every citizen with a new status, telling him so explicitly. […] The identification of the voice of the Revolution with the fundamental truth of the nation has opened limitless horizons.\(^\text{661}\)

The first thing to note is that Shiller’s idea of having autonomy at the C2 level, of having a variety of endogenous programming options and local conversations about national development, seems more valuable in this light. Likewise, the unsettled, unreified nature of the cultural practices

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\(^{661}\) Fanon, *A Dying Colonialism*, 96-7.
around media and the consumption of media—the open ended process whereby the users and producers were able to navigate the technology, without, as Boyd-Barrett mentions above, having to consider “business models, professional values, content formatting, audience preferences”—lend themselves to the kind of open-ended process of discovery and mutual interaction that Lessig argues we are only now becoming accustomed to again. The introduction of the technology, unhindered by corporate structures or property rights in airwaves or content, allowed for the free development of the process of technological mediation which accorded directly with the needs of the culture in question, while at the same time helping that culture transform, bottom to top. Granted, alongside this mediated struggle there was the actual struggle of anti-colonial revolt, yet we can see the way culture can be understood as an autonomous process—one with what Fanon hoped would have “limitless horizons.”

These two examples draw largely upon the external unifying force of the colonial occupier. But Fanon was also well attuned to the pedagogical requirements of building a national culture from the inside as well. While written a few years later, his longer, better known work, *Wretched of the Earth*, contains more developed versions of the idea of national culture arrived at through struggle and transformation of tradition. Here, we see Fanon agreeing with Adorno on the role of culture C2 in relation to the progress of culture in its totality. Commenting on the role of the intellectual, cycling through various forms of interaction with the colonial culture and the colonized he says that, in the final stage, the mature intellectual will attempt to “shake the people:” “Instead of according the people’s lethargy an honored place in his esteem, he turns himself into an awakener of the people; hence comes a fighting literature, a revolutionary literature, and a national literature.”

Ibid., 223.
Fanon’s description accords with Adorno’s idea that, no matter what the conditions, culture honors humanity by raising a protest against their reification. In so far as culture is unable to imagine an outside to those conditions, it is stultifying and dead. This is the more fundamental transformational process of culture which is ultimately undermined by the reified culture of property most liberal commentators take for granted. Most importantly, this culture takes one of the most dynamic aspects of human culture—the labor of its individuals and the ability of individuals to conceive of that labor in a separate, mental process of creation—and sections it off with a social division of labor that is ultimately entailed in any institution of property that allows the means of production to which that labor would be applied—be it land, machines, or the work of the mind—to become exclusive property, rather than remaining common. Likewise, the unitary sovereignty of the nation state—which eliminates the possibility of multiple and overlapping sovereignties—officially undermines the possibility that alternative property systems can exist. In so far as these are spread across the globe in a uniform fashion, this culture of property becomes the ultimate threshold to any process of cultural transformation.

This break on the supposedly dynamic liberal understanding of culture leads into the dialectic between diversity and homogenization that seems to animate many such discourses: as with Tomlinson and Lizardo above—and Hannerz and Couldry back in chapter one. In this, International relations scholars Inayatullah and Blaney point to “two opposing impulses” within the context of liberal sovereignty. On the one hand,

Difference is linked so tightly with doubt and anxiety, difference is feared—it is something humans feel compelled to explain and locate at some distance so that it might be contained or vanquished. The search for an “empire of uniformity [in the nation-state] reflects this impulse. A second, and recessive theme [sees doubt and difference] as something that instills desire; difference must be explored and engaged in order to expose and oppose the stifling constraints of uniformity. [. . . .] If the dominant impulse is to regard difference as
degeneration and disorder, alongside this impulse subsists another that treats difference as a medium for regeneration and possibly redemption.

Within the system of cultural levels presented here, the impulse to celebrate difference and diversity is thereby guided by the overarching impulse to incorporate that impulse into the overarching system of uniformity that is capital oriented, commodity satisfied culture. The latter can indeed draw upon a diverse wealth of cultural resources within a given society, but the overarching goal is to stamp them all with the same mold. The master template mentioned by Murdock above requires that culture as difference or complexity only circulates in ways which affirm the overarching uniformity of the capitalist system. This template can be very accommodating as even the most radical cultural objects can be commodified. So long as consumers merely consume the radical object—so long as their only political action in relation to culture is to individually accumulate and enjoy radical difference as an object of consumption—the practices of commodity culture at the C1 level and even the radical mediation of that practice at the C2 level pose no active threat to the overarching template of the state-economy-law at Culture 3.

The latter forms a column of efficacy throughout the cultural field, descending the levels below, legitimating ideas, theories, icons and practices; in turn, the practices, ideas, theories and symbols are necessary to reinforce that column of cultural efficacy. Here the difference and diversity of a culture becomes a resource for the transcultural appropriation and endogenous embedding of this template of “modernity” throughout the cultural field. Aspects outside this column may help to reinforce it, much like the heterodox positions in a Bourdieuan field of struggle. However, the heterodox positions will only be allowed to exist in so far as they do not threaten the dominant uniformity of capitalist oriented culture that is consecrated as legitimate through a combination of internal and external forces. The latter may be merely functional—like the credit market which ultimately controls all forms of external investment, public and private,
through a country’s credit rating—or they may be more formal—such as the diplomatic tools of economic, cultural, or political sanctions—but in either case they are meant to determine the legitimate framework of meaning and action. This can be dynamic within a particular range, but, in the present moment, only the support for private property, commodification, and market oriented solutions to economic, social, and cultural “development” are legitimate aims of the subaltern state apparatus.

This has long been the case, and, in looking at the way Native Americans ultimately lost their land through the legal imposition which accompanied the violence of the frontier, Carol M. Rose discusses what she calls the “myopia of property” that has existed since the liberal capitalist experiment on the North American continent began:

A third reason for the myopia about the intermediate forms of property ownership may be particularly American. Our law has been particularly hostile to most forms of collective property [such as those claimed by Native Americans] This too is an interesting puzzle. My own view is that some of this hostility is a historically self serving myopia. Our leading case about Native American property claims is Johnson v. M’Intosh, where it might have been possible to recognize property in native tribes; but the Marshall Court, while not completely dismissive of all Native American claims, ignored the possibility of collective ownership. The logic seems to have been that the tribes were not cognizable sovereign governments (hence public property was not possible), nor did individual persons in the tribes have recognizable common-law claims to property. Those two possibilities, individual property and governmental property, appeared to exhaust the Court’s idea of what counted as “property,” illustrating [Michael] Heller’s point that our categories have seriously—and unjustly—limited our property imagination. While
probably not so intended by Marshall himself, any excuse to ignore native property proved
to be highly convenient for settlers.\(^{663}\)

She goes on to describe the reasons for this as having a more rational basis than, perhaps they did.
The governance by customary norms, rather than formal government was seen as “mired in
swamps of medieval feudalism, hierarchy, and rigidity; in particular, they thought that customary
law was incompatible with democratic forms of government, in which communities pass laws for
themselves not by looking to the past, but rather by looking to the open actions of democratically-
elected representatives.”\(^{664}\) In relation to the Law & Economics tradition discussed in chapter 3,
this is very interesting because, although they wouldn’t call it such, these sorts of “customary
norms” are what they usually rely on as an unstated basis for their claims. She cites as an example
certain native lobstering communities using low level violence against outsiders and community
norms amongst themselves. Of these norms, she notes that they are often xenophobic,
misogynistic and “hardly seem paragons of democratic rule and equal opportunity.”\(^{665}\)

This may very well be the case, but ironically, there is a sort of convergence with theories
which purport to represent such a paragon, namely, those of Nozick and his “minimal state.” The
difference is that Nozick simply assumes these community norms exist—the nasty, xenophobic,
misogynistic, undemocratic processes that might ensue around discovering what someone’s
“natural rights” might be is left up to some undiscussed mechanism. Instead, we can focus merely
on the “resources” which the community might have to police itself, without the need for a state.
In this, he spends far more time trying to create equations and scenarios for how people can be
compensated for various transgressions of their property. There is, in this, no real sense of where


\(^{664}\) Rose, “Left Brain, Right Brain and History in the New Law and Economics of Property,” 486.

\(^{665}\) Here another turn of the screw is introduced in that she sees a similarity in this and the campaign to “devolve governing authority on fundamentalist religious communities” citing an article on the “Perils of Multicultural Accommodation.”
these scenarios will come from, how they will be negotiated or by whom they will be enforced: it is a basic, economic framework which, though unstated, assumes much of the Coasian model of economic allocation of resources in the absence of a government. However, if it were to actually function, in practice, it would likely have to look more like the “customary commons” mentioned above, which was conveniently declared suspicious in the supposedly more democratic era of the United States western expansion. Likewise, the history (i.e. primitive accumulation) in instantiating this culture is hidden.

Against this understanding of dominant “enforced conversions” through the transmission of the reified culture of property I’ll present a final example of “culture as a process” taken from the perspective of a Native American shaman who is the pivotal character in Leslie Marmon Silko’s book *Ceremony*. The story centers on Tayo, a Laguna Pueblo Indian who comes back from WWII shell shocked and hallucinating. His half brother and best friend is shot by Japanese soldiers during the Baatan Death March; given no help or respect by the culture he lost his brother to fight for and alienated from his own family and culture, he turns to alcohol and becomes increasingly violent and detached. As a last ditch effort, his grandmother recommends he see a shaman who is particularly adept at negotiating these issues of transculturation, and the autonomous appropriation of cultural difference. Surrounded by towering boxes full of souvenirs of western culture—coke bottles, railroad calendars, and other old scraps and trinkets that he now integrates into his ceremonies, the medicine man (Betonie) says, “There are some things I have to tell you,”

The people nowadays have an idea about the ceremonies. The think the ceremonies must be performed exactly as they have always been done, maybe because one slip-up or mistake and the whole ceremony must be stopped and the sand painting destroyed. That much is true. They think that if a singer tampers with any part of the ritual, great harm can be done, great power unleashed.” He was quiet for a while, looking up at the sky through the smoke hole. “That much can be true also. But long ago when the people
were given these ceremonies, the changing began, if only in the aging of the yellow gourd rattle or the shrinking of the skin around the eagle’s claw, it only in the different voices from generation to generation, singing the chants. You see, in many ways, the ceremonies have always been changing. […] At one time, the ceremonies as they had been performed were enough for the way the world was then. But then after the white people came, elements in this world began to shift; and it became necessary to create new ceremonies. I have made changes to the rituals. The people mistrust this greatly, but only this growth keeps the ceremonies strong. She taught me this above all else: things which don’t shift and grow are dead things. They are things the witchery people want. Witchery works to scare people, to make them fear growth. But it has always been necessary, and more than ever now, it is. Otherwise we won’t make it. We won’t survive. That’s what the witchery is counting on: that we will cling to the ceremonies the way they were, and then their power will triumph and the people will be no more.”

This navigation of cultural difference, taking other cultures as a resource for transculturation; the appropriation of it as a force which helps vitalize a culture in the face of change, to keep it from dying, is a more appropriate response to difference than to stifle it with what Inayutullah and Blaney call the empire of uniformity of the transmission of neoliberal globalization.

Ultimately, the culture of property that neoliberalism and the US Law and economics tradition aims to impose is based on fear of differences. The claim that the essence of globalization or capitalism is in the endless interplay of difference in an open ended process is undermined by the fact that the “empire of uniformity” proscribed into the laws and treatises governing these processes is ultimately designed solely to create a safe place for capital to play. The imposition of this culture, the restriction of the conversation about property, and the basic ignorance of the vast

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differences of the multitude of cultural approaches to property, value, and mutual need satisfaction represent a basic denial of its unnatural, constructed, historically contingent character. Pitching alternatives as undemocratic, traditional, or misogynistic would have a ring of progress and truth if there was any possibility that the final result wouldn’t look basically the same as it does everywhere capitalism has set down: where inequality, precarity, and increasing desperation dominate a landscape between pillars of wealth and security. Central to this is the reified culture which assumes property rights function as a natural law.

The purpose of this project has been to highlight the problems with this culture, to evaluate it as a culture, and consider its historical production in relation to the more recent imposition of intellectual property rights. I had hoped to spend more time looking at the multitude of resistances to its implantation and the alternatives that have long been on offer. But the effect of these would mostly be to provide a clearer illustration of the provincial, unimaginative cultural dominant that currently sits in the driver’s seat. In so far as I’ve at least produced a useful critique of the latter, I hope the future of the former will be more secure.
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CURRICULUM VITAE

Sean K. Johnson Andrews received his MA in English Literature with a focus in Cultural Studies from George Mason University. He received his BA in Communication from Southwestern University in Georgetown, Texas.