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Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference

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Under conditions of neoliberalism legal claims to protect, preserve, maintain, and to exploit culture have assumed a new urgency. Cultural diversity has become a matter of state concern and fears of cultural homogenization animate movements to promote a revitalized realm of cultural policy. Municipal governments see cultural amenities, attractions, and social values as important resources to attract labor and capital and engage in cultural planning exercises as they seek to brand urban space. Rural spaces become culturalised as traditions are constructed to establish market distinctions for local goods and traditional knowledge is valorized in international environmental treaties. But if culture is clearly delineated for the purposes of state management and the creation of new intellectual properties, it is also evoked in anti-globalization movements that contest growing forms of corporate hegemony. Finally, we witness the emergence of a new cultural politics of difference in place-based movements that draw upon international indigenous and human rights traditions to establish their claims to livelihood resources, territories, and cultural survival. Critical scholarship is needed to explore the conditions under which neoliberal regimes of governmentality are supported and challenged by the legal recognition of cultural assertions and the stakes and limitations of cultural claims. *Law, Culture and the Humanities* 2005; 1: 35–52

Culture, culture everywhere and everywhere, it seems, new pre-occupations with culture animate legal fora and assume legal form. A recent article by two distinguished anthropologists opens with a strong proposition:

Once upon a time, not so long ago, culture in the lower case was primarily an anthropological preoccupation. Not any more. It is hardly

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news that peoples across the planet have taken to invoking it, to signifying themselves with reference to it, to investing it with an authority, a determinacy, a superorganic unity of which even the most conservative anthropologist would be wary. Culture, now capitalized in both senses of the term, has come to provide the language, the Esperanto, of difference spoken in the active voice. And, as it has, its world-historical effect has been to unsettle all sorts of modernist certainties.¹

Although it is anyone's guess as to when "once upon a time" might have been, the claim is certainly exaggerated for rhetorical effect. Over a decade of preoccupation with multiculturalism in political philosophy,² a renewed interest in issues of cultural policy and cultural citizenship amongst those in the fields of sociology, communications and cultural studies,³ and a burgeoning literature on the cultures of digital environments⁴ are only a few examples of the proliferation of scholarly concern with "culture in the lowercase". Indeed, one major recent work of cultural studies⁵ explores the proposition that globalization has enabled culture to become an increasingly important resource; one that is managed, conserved, developed, and invested in to reduce social conflict, spur economic development, and preserve biodiversity. George Yudice suggests that this new 'expedient' approach to dealing with culture "absorbs and cancels out hitherto prevailing distinctions among high culture, anthropological, and mass culture definitions"⁶ because all forms of culture (for example – art, ritual, food, meaningful practices and values) lend themselves to these processes. To explain this, however, he too must make recourse to worlds of legality, just as the Comaroffs explore the ways in which culture has come to

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1. John Comaroff and Jean Comaroff, "Criminal Justice, Cultural Justice: The limits of liberalism and the pragmatics of difference in the new South Africa," *American Ethnologist* 31 (2004): 108.
 2. Seyla Benhabib, *The Claims of Culture: Equality and Diversity in a Global Era* (Princeton: Princeton University Press, 2002); Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995); Charles Taylor et al., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).
 3. Nicholas Garnham, "Concepts of Culture: Public Policy and the Cultural Industries," *Cultural Studies* 1, no. 1 (1987): 23–27; Toby Miller, "The Crime of Monsieur Lang: GATT, the Screen and the New International Division of Cultural Labour," in Albert Moran, ed., *Film Policy: International, National, and Regional Perspectives* (London: Routledge, 1996); Toby Miller, *Technologies of Truth: Cultural Citizenship and the Popular Media* (Minneapolis: University of Minnesota Press, 1998); Justin Lewis and Toby Miller, eds., *Critical Cultural Policy Studies: A Reader* (Malden, MA: Blackwell Publishing, 2003); Toby Miller and George Yudice, *Cultural Policy* (London: Sage Publications, 2002); Nick Stevenson, *Cultural Citizenship: Cosmopolitan Questions* (Maidenhead, Berkshire, U.K.: Open University Press, 2003).
 4. David Bell, *An Introduction to Cybercultures* (London: Routledge, 2001); Steven Johnson, *Interface Culture: How New Technology Transforms the Way We Create and Communicate* (San Francisco: Harper Collins, 1997); Michael Joyce, *Othermindedness; The Emergence of Network Culture* (Ann Arbor: University of Michigan Press, 2001).
 5. George Yudice, *The Expediency of Culture: Uses of Culture in the Global Era* (Durham: Duke University Press, 2003).
 6. *Ibid.* 4.

occupy new legal spaces in postcolonial states under conditions of neoliberalism.

Preoccupation with culture (in its high, mass, popular or anthropological meanings) across a range of disciplines is not at all new but a recognition of the ways in which culture is reified, asserted, claimed, defended, managed or preserved in and through legal institutions is both relatively novel and rather overdue. Global cultural flows are legally regulated, imagined, managed, and contested; the legal regimes that regulate the flow of imagery and textuality, the domination of these regimes by the logic of trade and the commodity, the juridical shape of cultural industries, local resistances to global harmonizations of law, and the evocation of culture in legal claims that challenge Enlightenment universalities continue to be key areas for critical inquiry.⁷ Yudice's volume and the provocative work of the Comaroffs⁸ attest to the fact that this is a fertile field for interdisciplinary inquiry. Still, it is a new field and scholars are only beginning to make tentative explorations of the relationship between neoliberalism and the legalization of cultural claims. This essay will attempt to provide an introductory overview of a variety of these new claims but further ethnographic and analytical work is necessary to fully understand their inter-relationships. It appears that neoliberalism is capable of accommodating those forms of cultural difference that can be formulated in commodity terms but that it is challenged by those who assert rights based upon cultural difference that are difficult to encompass within the conceptual frameworks of modernity. It remains to be seen if the modern discourse of rights is sufficiently elastic to interpretively accommodate forms of alterity that seek negotiated autonomies from market relationships.

I. Global Cultural Flows

Critical considerations of globalization have long considered global flows of culture to be as significant as global flows of capital, labor, goods, and services in defining the shape of contemporary societies.⁹ One theorist suggests that it is the dissemination of symbolic processes that drives the economic and political changes we describe as globalization.¹⁰ The

7. See Rosemary J. Coombe, "Contingent Articulations: a Critical Cultural Studies of Law," in *Law in the Domains of Culture*, eds. A. Sarat and T. Kearns. (Ann Arbor: University of Michigan Press, 1998), 21–64 at 39.

8. See also "Reflections on Liberalism, Piculturalism, and ID-ology: Citizenship and Difference in South Africa." (n.d.) available at <http://academic.ac.za/sociology/Comaroff.doc> and "Millennial Capitalism: First Thoughts on a Second Coming," *Public Culture* 12 (2000): 291–343.

9. Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, MN: University of Minnesota Press, 1996); Ulf Hannerz, *Transnational Connections: Culture, People, Places* (New York: Routledge, 1996); Greg Urban, *Metaculture: How Culture Moves Through the World* (Minneapolis: University of Minnesota Press, 2001). The journal *Public Culture* focuses on this process.

10. Malcolm Waters, *Globalization* (New York: Routledge, 1995).

so-called “new economy” rests upon an increase in the protections afforded to cultural forms by way of intellectual property laws that have proliferated around the world under free trade regimes over the past decade and provide the legal scaffolding necessary to support new forms of informational capital.¹¹ Global cultural flows are thus channeled as goods and services to return more certain profits.

In a more general sense it could be argued that all global flows are cultural to the extent that they acquire or require means of representation – fictions, narratives, and metaphors that enable them to be made humanly intelligible. This is evident in the ways that flows of people as well as flows of capital are inscribed with significance, normatively evaluated, and authoritatively channeled in legal terms and fora. Legal categories of citizenship and immigration, for example, constitute categories of desirable and undesirable others who are racially marked in ways that often reveal colonial histories and legacies of labor exploitation.¹² But capital, too, has a metaphysics and as Marx put it, abounds in “theological niceties”.¹³ All forms of capitalism are accompanied by forms of enchantment. Markets are animated by fictions, tropes, and rhetorical forms.¹⁴ If the phantom prosthesis of the “invisible hand” assured an earlier bourgeoisie, evermore speculative “objects” of capital today “circulate” to rhythms established by forms of accounting that demand ever new assumptions of risk and suspensions of disbelief. As legal anthropologist Bill Maurer reminds us, Western banking requires a particular sacramental machinery but there are alternative instruments for profit animated by other moralities.¹⁵ Islamic banking, for example, claims both greater transparency and virtue than the dominant Western system on the basis of injunctions

11. Rosemary J. Coombe, “Commodity Culture, Private Censorship, Branded Environments and Global Trade Politics: Intellectual Property as a Topic of Law and Society Research,” in *The Blackwell Companion to Law and Society*, ed. A. Sarat (Malden: Basil Blackwell, 2004), 369–391; Rosemary J. Coombe, “Works in Progress: Indigenous Knowledge, Biological Diversity and Intellectual Property in a Neoliberal Era,” in *Globalization Under Construction: Governmentality, Law and Identity*, eds. R. W. Perry and W. Maurer (Minneapolis: University of Minnesota Press, 2003) 273–313.
12. Susan Coutin, “Clandestinity and Citizenship among Salvadoran Immigrants” *PoLAR: Political and Legal Anthropology Review* 22(2) (1999): 53–63; Susan Coutin, *Legalizing Moves: Salvadoran Immigrants Struggle for U.S. Residency* (Ann Arbor: University of Michigan Press, 2000); Carol Greenhouse with Roshanak Khesthi, *Democracy and Ethnography: Constructing Identities in Multicultural Liberal States* (New Brunswick, NJ: Rutgers University Press, 1998); Ong, Aiwua. *Flexible Citizenship: The Cultural Logics of Transnationality* (Durham: Duke University Press, 1999); Richard Cooper, Thomas C. Holt and Rebecca J. Scott, *Beyond Slavery: Explorations of Race, Labor and Citizenship in Postemancipation Societies* (Chapel Hill: University of North Carolina Press, 2000); Nancy Appelbaum et al. *Race and Nation in Modern Latin America* (Chapel Hill: University of North Carolina Press, 2003).
13. Karl Marx, *Capital (Volume 1)* (New York: Vintage, 1976 [1867]), 163.
14. James Carrier, ed. *Meanings of the Market* (Oxford: Berg, 1997). See also Michael Callon, ed. *The Laws of the Market* (Oxford: Basil Blackwell, 1998).
15. Bill Maurer, “International Political Economy as a Cultural Practice: The Metaphysics of Capital Mobility,” in *Globalization Under Construction: Governmentality, Law and Identity*, ed. Richard W. Perry and Bill Maurer (Minneapolis: University of Minnesota Press, 2003), 71–98. More generally see Stephen Gudeman, *The Anthropology of Economy* (Oxford: Blackwell Publishers, 2001) and David Graeber, *Toward an Anthropological Theory of Value: The False Coin of Our Own Dreams* (New York: Palgrave, 2001).

against usury. Alternative forms of currency circulate in many places of the world which do not assume the universal equivalence of money but nonetheless manage to meet human needs for transaction and exchange.¹⁶

In an earlier era academic swords were drawn over the issue of whether the globalization of capitalism would create global cultural uniformity. Would “the modernization process” lessen cultural difference, inflame renewed tribalisms or promote greater cultural hybridity?¹⁷ Neither the jeremiads of jihadism nor the monoliths suggested by McDonaldization that were once posed as the inevitable specters of globalization loom particularly large in contemporary understandings of the state of “culture”. However, the postmodern pastiche of disembodied and displaced cultural fragments unrelated to forms of sociality foretold by cultural theorists in the early 1990s¹⁸ seems even less prescient today and appears more like the narrow perspective of a situated form of social privilege. Anthropologists have helped us to understand that capital encounters and must accommodate or negotiate with the societies and worldviews of others and that these dialectic transformations constitute alternative and multiple modernities.¹⁹ Moreover, new information technologies and relations of transnationalism are enabling new diasporas to simultaneously spread and reinforce forms of national cultural difference that are no longer (if they ever were) congruent with state territorial borders even as these ‘nations’ are given new meanings as they are experienced and interpreted in the places of others.²⁰

Whatever the social evidence of proliferating cultural difference in most if not all parts of the world today, it is nonetheless the case that many policy-making elites consider the need to find new legal measures to preserve and maintain cultural diversity a matter of pressing concern. Culture has attracted renewed attention in international legal circles under conditions of

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16. Amory Starr, *Naming the Enemy: Anti-Corporate Movements Confront Globalization* (London and New York: Zed Books, 2000).
 17. Benjamin Barber, *Jihad vs. McWorld* (New York: Random House, 1995); Thomas L. Friedman, *The Lexus and the Olive Tree* (New York: Anchor Books, 2000); Homi Bhabha, *The Location of Culture* (London: Routledge, 1994). The concept of hybridity in particular has attracted critical appreciation in Avtar Brah and Annie E. Coombes, eds., *Hybridity and its Discontents: Politics, Science, Culture* (London and New York: Routledge, 2000).
 18. Fredric Jameson, *Postmodernism or the Cultural Logic of Late Modernity* (Durham: Duke University Press, 1991).
 19. Alberto Arce and Norman Long, eds, *Anthropology, Development, and Modernity* (London: Routledge, 2000); Jean Comaroff and John Comaroff, eds., *Modernity and its Malcontents: Ritual and Power in Postcolonial Africa* (Chicago, University of Chicago Press, 1993); Don Donham, “On Being Modern in a Capitalist World: Some Conceptual and Comparative Issues,” in *Critically Modern: Alternatives, Alterities, Anthropologies*, ed. Bruce M. Knauft (Bloomington: Indiana University Press, 2002), 241–257; Dilip Parameshwar Gaonkar, “On Alternative Modernities,” in *Alternative Modernities*, ed. D. P. Gaonkar (Durham: Duke University Press, 2001), 1–23; Lisa Rofel, *Other Modernities: Gendered Yearnings in China After Socialism* (Berkeley: University of California Press, 1999); Bruce M. Knauft, ed., *Critically Modern: Alternatives, Alterities, Anthropologies* (Bloomington: Indiana University Press, 2002), 1–54. A classic statement, although it does not deploy the vocabulary of modernity *per se* is Marshall Sahlins, “What is Anthropological Enlightenment? Some Lessons of the Twentieth Century,” *Annual Review of Anthropology* 28 (1999): i–xxiii.
 20. Karim Karim, ed, *Diasporic Media* (London: Routledge, 2003).

neoliberalism – which I will refer to here as an ensemble of conditions that include trade liberalization, market fundamentalism, the reduction and withdrawal of state services and subsidies, the evisceration of labor rights, an acceleration of extractive industries, threats to subsistence livelihoods, and a concomitant loss of human security. This is, ironically, a priority both to those who fear that loss of cultural distinction is a consequence of a market fundamentalism they reject and to those who embrace this fundamentalism and seek to maintain meaningful social differences to feed the growth of new economy enterprise.

Some of these legal initiatives seem to represent defensive or protective responses to trade liberalization and the concomitant over-extension of the logic of the commodity. Other aspects of this renewed legal attention to culture evidence a desire to capitalize upon cultural difference and profit from local cultural distinctions (even if these have to be created for marketing purposes). This represents an extension of the logic of the commodity entirely consonant with neoliberal premises. On the other hand, anti-globalization movements challenge the legal agreements and traditions that have enabled the hegemony of corporately-controlled culture, agriculture, and the new biotechnologies with countercultural values, looking to maintain diversity through respect for expressive forms and meaningful experiences that resist mass consumer mediation. Finally, new cultural rights are being asserted by peoples who have been historically marginalized by modern regimes of power. They increasingly use the vocabulary of human rights, particularly cultural rights, to seek new forms of place-based autonomy to build alternative futures that avoid the violence of modern development. I will address each of these in turn.

II. Legally Protecting Cultural Diversity?

We have witnessed a revitalization of international interest in national cultural policy development in the wake of international trade regimes that tend to treat cultural goods as mere commodities and fail to respect their importance in expressing social identities, meanings, values, and national character. To the extent that the state appeared to become a mere agent of domestic capital interests under the WTO, the movement to forge an international legal instrument on cultural diversity represents a desire to reposition the state in cultural matters so that it better represents the interests of national publics. The International Network on Cultural Policy represents 53 governments, creators' alliances, domestic cultural industries, and professional cultural workers' associations have concluded that it is neither possible nor desirable to treat culture as something to be continually exempted as a special case from international trade agreements. Instead, they assert the need for an internationally recognized affirmation of cultural

diversity sustained by unimpeachable cultural policies backed by an international legal instrument that represents a legal counterweight to the TRIPs Agreement.²¹ Such an instrument, they suggested, would make the right to access to a diversity of cultural forms produced and distributed by both market and non-market mechanisms as well as rights to transform and interpret these fundamental, on the basis that a culturally pluralist public sphere is integral to the functioning of democracies.²²

The adoption by acclamation of the UNESCO Universal Declaration on Cultural Diversity in November 2001,²³ building on work by the Council of Europe²⁴ and followed by extensive documents in the fall of 2002 is evidence of growing international support for the proposition that states have a legitimate right to support and create a favorable environment for the creation and expression of diverse forms of culture through the creation of cultural policy. Cultural diversity presupposes the existence of a process of exchanges, open to renewal and innovation but also committed to tradition, but it does not aim at the preservation of a static set of behaviors, values and expressions. It is a concept premised on the belief that different forms of inspiration are generated from within distinctive cultural heritages and the maintenance of these as sources for ongoing creativity is a public good. Indigenous peoples are given special priority in this initiative as their 5000-odd languages are understood to represent most of the world's remaining linguistic diversity.²⁵

The 2001 UNESCO Declaration was regarded by member states as an inadequate response to specific threats to cultural diversity in the era of globalization. For this reason, a binding standard-setting instrument on the Protection of the Diversity of Cultural Contents and Artistic Expressions is now under consideration²⁶ but critics complain that through the processes of negotiation assertions of rights have been abandoned. Culture has been reduced to the content of goods and services, with special rights for minorities and indigenous peoples to benefit from the development of their

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21. See Ivan Bernier, *Preserving and Promoting Cultural Diversity: Necessity and Prospects for Action*. Available at <http://www.cdc-ccd.org>. A history of documents and meetings is found at <http://206.191.7.19/shtml>
 22. See Ivan Bernier, *A New International Instrument on Cultural Diversity: Questions and Answers*, at <http://www.incd.net/html/english/conf/bernier.htm> (22 Sept. 2001); The Honourable Sheila Copps, Minister of Canadian Heritage, Closing Remarks at the Second International Meetings of Professional Cultural Organizations (4 Feb. 2003) (at http://www.pch.gc.ca/pc-ch/min/notes/2003-02-04a_e.cfm).
 23. Available at <http://www.unesco.org/culturelink/review>.
 24. Tony Bennett, ed, *Differing Diversities: Cultural Policy and Cultural Diversity* (Strasbourg: Council of Europe Publishing, 2001).
 25. Anthropologists and linguists are divided about the validity of claiming linguistic "loss" and the equation of this with cultural "loss" which is itself a problematic concept. Nonetheless these concepts appear to have been widely embraced by policy-makers for whom they sufficiently capture or describe processes of undesirable change that inflict great social and economic costs for communities and nation states. For a discussion see Stuart Kirsch, "Lost Worlds: Environmental Disaster, 'Culture Loss,' and the Law," *Current Anthropology* 42, no. 2 (Apr. 2001): 167–198.
 26. The Preliminary Draft Convention is available at http://portal.unesco.org/culture/admin/file_download.php/Eng-PreliminaryDraftConv-conf201.pdf

traditional cultural expressions poorly integrated into a document that is primarily designed to protect public sector interventions into market economies.

Although this might be seen as a defensive and protectionist movement to the extent that states seek to protect domestic creators and cultural industries (rather than the forms of capital investment that intellectual property laws primarily protect regardless of the national origins of texts or their creators) the policies projected also address the need to ensure dialogue between cultural traditions and exchanges between multicultural nations and amongst diasporas. Notwithstanding vague platitudes in the draft convention that human rights and intellectual property rights shall both be respected, these are often in conflict.²⁷ State practices designed to protect cultural diversity will need to contend with entrenched intellectual property interests and conflicts between individual and collective human rights norms if these ‘protections’ are to be more than hortatory in effect.

III. Urban Distinction as Cultural Capital

The desire to maintain and to market local cultural distinctions is an old one but it appears to have received heightened attention in the past decade. As cities and regions compete for capital investment and for “knowledge workers” their cultural attributes have become “resources” ripe for marketing and integral to urban development. This takes a number of forms. In urban areas, cities have long marketed their cultural attributes to attract tourists, but today those who bear cultural difference, be they artists, homosexuals, or “ethnic” minorities are considered to have a specific value in attracting real estate speculators and new economy workers who are believed to appreciate social tolerance as an attribute in a potential workplace environment. In the new economy, the dominant narrative asserts, “the competitive advantage of nations and places is the creativity of its people”²⁸ but creative people are drawn only to areas that respect diversity, cultural dialogue, the arts, and social tolerance. “Diversity, tolerance, respect and acceptance of others is not just an expression of social solidarity but a profound economic good.”²⁹ This creativity, more-

27. Many governments and UN organizations have complained in the past decade that the current legal regimes governing intellectual property rights were in conflict with human rights and undermined development objectives. See James Boyle, “A Manifesto on WIPO and the Future of Intellectual Property”, 2004 *Duke Law and Technology Review* 0009. Indeed, a movement of civil society organizations co-operating with third world governments has organized to promote a “development agenda” for the World Intellectual Property Organization to mitigate against this tendency. See the Geneva Declaration on the Future of the World Intellectual Property Organization and the Proposal by Argentina and Brazil for the establishment of a Development Agenda for WIPO (2004), both available at <http://www.cptech.org/ip/wipo>

28. Michael Moore, “Opinion: Diversity Creates the Next Generation of Wealth”. Available at <http://www.creativeclass.org> Visited 27 Aug. 2004.

29. *Ibid.*

over, must be “underpinned by open communications systems, property rights and the predictable rule of law.”³⁰

Many urban centers now advertise themselves as “creative cities” and are attempting to develop “cluster strategies” that bring cultural industries into proximity for the spill-over benefits that such synergies apparently engender as ‘incubators’ for innovation. The figure of the “creative industries” has emerged across the U.K. and Ireland, United States and Canada, Australia and New Zealand, Europe and Asia as the new idiom by which governments, the culture industries and the higher education sector engage in the management of populations for the primary purpose of extracting economic value from a heterogeneous array of cultural practices. The “creative industries” are defined in legal terms as those industries that generate copyrights, patents, designs and trademarks.³¹ The practice of “cultural management” is a new form of recognized expertise that emphasizes the best practices whereby cities and regions establish cluster-focused strategies to maximize the intellectual property-based profits of these industries. Ironically, this valorizing rhetoric around creativity appears to be accompanied by the intensification of insecurity in conditions of work for those who labor symbolically or otherwise in the industries that rely upon informational capital and increasing income inequalities.³² We need critical analyses of these emergent ideologies of culture and their relationship to and reliance upon legal forms and understandings.

Artists are increasingly called upon to help cities develop distinctive cultural images for global marketing purposes and a number of urban areas have developed cultural plans and policies that involve cultural workers. In these exercises of urban objectification and commodification, heritage sites are restored, old buildings are re-used in creative ways, niche market products are identified, symbols to serve as trademarks discerned, and a branding strategy is often devised to create a uniform ‘look and feel’ for urban cultural experiences. Legal vehicles such as “geographical indicators” or indications of source (which may include words, phrases, symbols, or iconic emblems) for goods and services may serve as a means to sequester cultural commodities that build municipal corporate goodwill, prevent unfair competition, and provide symbolic benefits for consumers.

Recently I had the experience of speaking with and to a group of design faculty students from the Jan Van Eyck Arts Academy of Maastricht engaged in a project called “Micropolis”. Knowing before I left North America only that I was being asked to speak with artists on the topic of using geographical indicators for political purposes, I was surprised to discover that these artists had been approached by officials of the City of Leuven looking for new means to create urban distinction. I quickly did an

30. Ibid.

31. John Howkins, *The Creative Economy*. Allen Lane, 1991. For a critical discussion of the new discourse of creative industries see Ned Rossiter, “Creative Industries, Comparative Media Theory and the Limits of Critique from Within,” *Topia: Canadian Journal of Cultural Studies* 11, no. 3 (2004): 21–48.

32. Jean Gadrey, *New Economy, New Myth* (London and New York: Routledge, 2003).

internet search to see if the city had a “cultural plan” and the Micropolis project itself came up as the city’s first effort to develop a “cultural communication plan”. A small city, housing Europe’s oldest university and a global beer distributor, it was using an uninspired architectural image of the municipal hall as its trademark. Seeking to create a distinctive image for itself in a country featuring many more architecturally impressive and naturally scenic cities it was nonetheless clear that city fathers were uneasy about the implications of using the rather obvious combination of students and beer as any kind of marketing theme. A small statue of a youth pouring a glass of beer over his head sat in a central square and was obviously venerated by local residents. We debated whether this image combined with a logo (“Through Beer, Wisdom”) could be protected as an indicator of source and used to market services (pub crawls with beer tastings and literary readings?). As academics and artists we also wondered aloud how we had found ourselves in positions as marketing advisors; as experts in aesthetic and cultural distinction and the legal means to protect it, we ourselves had a new value in the eyes of municipal authorities.

Peoples’ awareness of being part of the global space of cultural flows appears to have generated a search for new points of orientation and new discourses of identity.³³ One manifestation of this is a resurgence of regional identities, particularly in Europe where political union may have exacerbated people’s desires for alternative forms of emplacement and belonging. Historically, however, these regions may also map ethnic tensions. Leuven, for instance, is the capital of the Flemish Brabant region and the memory of divisive ethnonationalism in the region is still fresh in many minds. As a university town it was arguably too cosmopolitan to want to take advantage of this status and the political disadvantages of calling this to attention appeared to outweigh any distinction it could provide. Nonetheless, opportunities for historical and educational tourism were clear. The city was the heart of the Flemish nationalist movement in 1968 and a “Museum of ’68” that recounted and compared local experiences with global events in that momentous year was one option the Micropolis group discussed.

IV. Rural Distinctions as Intellectual Property

Cities are not alone nor even particularly privileged in this global quest for identifying and legally securing protection for markers of significant difference. The production and marketing of rural cultural distinction is also enjoying a resurgence under conditions of trade liberalization as producers attempt to find niche markets for unique goods and governments struggle to find economic opportunities for people living in rural hinterlands so as to stem the tides of urban migration. Popular strategies involve reifying

33. Anssi Paasi, “Region and Place: Regional Identity in Question,” *Progress in Human Geography* 27 (2003): 475–485.

local traditions and burnishing images of rustic authenticity onto goods, some of which were marginal products only two generations ago. For example, in some Italian mountain areas, the creation of *talleggio* – a particular kind of cheese – has become central to local development strategies.³⁴ It has also transformed subsistence family farming into an “ecotourism” attraction as people produce images of a rural way of life for the consumption of others. The cheese is marketed with pictures of an idyllic, rural lifestyle set in a picturesque alpine landscape. “Local skills” have been created as a publicity strategy that has enabled *talleggio* to assume a particular identity in the market. The basic method of making this cheese may go back many years, but today it must be made under more modern sanitary restrictions that have no historical basis. Only in the twentieth century, however, did locally-made cheese become a commodity and only in the past two decades has it been marketed as integral to local traditional culture.

International law invites the production of such traditions by providing favorable protection to names and symbols that indicate a particular geographical source for a good. International trademark agreements also protect appellations of origin – the name of a country, region, or locality that serves to designate a product as originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment (including natural and or human factors). This means that if local practices can be shown to give a product its characteristics the producers may be granted monopoly rights on the name that will be recognized and enforced in all states that adhere to the agreement.

Most of us are familiar with these laws through their application in the wine industry and the rules governing how a particular variety can be produced – the spacing of vines, pruning methods, permitted forms of fermentation, for example. By engaging in various forms of self-imposed communal discipline local producers create market distinctions. These can be changed only by social consensus such as when the syndicates in Burgundy decided to mechanize production by developing a tractor that would straddle the vines thereby leaving the microclimates that influence photosynthesis intact.³⁵ Producers of Gruyère cheese agreed to use only one breed of cow, not to permit the use of silage for feed and to use no refrigeration. Producers of Blue d’Bresse, on the other hand, have distinct methods of making cheese, but recognizing that it can also be made in other regions with similar climates, have licensed the use of the term to farmers in New Zealand using the same “traditional” methods. More often, however, these legal protections are evoked by those who claim that the unique qualities of certain products derive from some combination of geographical features and traditional practices that cannot be replicated elsewhere. In

34. Cristina Grasseni, “Packaging Skills: Calibrating Cheese to the Global Market,” in *Commodifying Everything: Relationships of the Market*, ed. Susan Strasser. (New York and London: Routledge, 2003), 259–288.

35. Wayne Moran, “Rural Space as Intellectual Property,” *Political Geography* 12 (1993): 263–277.

short these are largely place-based entrepreneurial activities in which local worlds of nature and culture are projected and protected as privileged markers of meaning in global markets.

It is not surprising that as globalization spreads Western concepts and categories of intellectual property law through agreement, persuasion and some duress, other countries strive to have these appellation systems and indicators of source extended to other products. Why should we enable producers of wine and cheese to hold these advantages but not those of coffee, tea, potatoes, and rice? The Mexican government was successful in having protection extended to tequila because it fell within the category of alcoholic beverages already recognized and local distinctions amongst agave plants were easily elaborated in cultural terms.³⁶ States reliant upon agricultural exports increasingly consider it unfair that intellectual property laws protect Europe's privileged forms of agriculture but few if any of their distinctive crops and products and are now actively seeking their extension.

The prospect of extending these legal protections has met with stiff opposition from European states who want them restricted to the existing range of products, and from the U.S., Australia, Canada, and Japan who want them eliminated altogether as illicit forms of protectionism and unfair barriers to market entry that institutionalize competitive advantage. These measures do, after all, limit competition, raise consumer prices and may overly empower local elites to the extent that the regulation and control of methods of production are usually closely held. At the same time it has been suggested that the promotion of these products also serves as a counterweight to neoliberal free trade regimes that produce tendencies for the greater standardization of products by transnational corporations. These forms of legal protection may enable socially-linked groups of simple commodity producers to resist their subsumption by fully capitalistic forms of production by securing the economic rents of localities.³⁷

The Trade Related aspects of Intellectual Property Agreement (TRIPs) has expanded the category of legally protected appellations to define geographical indications as those signs or expressions which identify a good as originating in the territory of a member state or a locality thereof where a given quality, characteristic or even reputation of that good is essentially attributable to its geographical origin.³⁸ If, by reference back to the Lisbon Agreement, geographical origin includes human or cultural factors, the stage is set for an expansion of legal protections and a proliferation of 'culturalised' landscapes in which traditional products originate. This prospect is enhanced by the adoption and ratification by over 180 countries of the Convention on Biological Diversity that requires signatory states to

36. Ana G. Valenzuela-Zapata and Gary Paul Nabhan, *Tequila: A Natural and Cultural History* (Tucson: University of Arizona Press, 2004).

37. Moran.

38. Michael Blakeney, "Proposals for the International Regulation of Geographical Indications," *The Journal of World Intellectual Property* 4 (2001): 629–652.

find means for the protection of traditional knowledge relevant to the preservation of biological diversity and affirms the relation between biological and cultural diversity.³⁹ Through the national legal implementation of provisions that entail both recognizing and compensating local communities for their traditional ecological knowledge (and the active role of NGOs in locating and documenting such knowledge), it is highly likely that we will continue to see greater attention paid to cultural practices of agriculture and landscape management throughout the world. Indeed, it has been suggested that Mysore silk will soon follow Darjeeling tea, Pochampalli sarees, and Aranmulai kannadi (a type of mirror) as an Indian “traditional knowledge” product whose unique origins will be legally protected as a geographical indication.⁴⁰

There is also the possibility that legal protections for characteristics due to conditions of origin may potentially be deployed in new ways to project other values. They might be used to advertise products grown in environmentally friendly ways, in areas free of genetically modified organisms, without pesticides harmful to workers, or even in industrial conditions free of certain contaminants. Finally, indigenous peoples have begun to use these systems of protection to designate their own products and to protect against forms of cultural appropriation that commodify their heritage in offensive ways and collective marks are deployed by communities in the promotion of ecotourism services to signal that profits are locally generated and distributed. Representations of cultural distinction thus flow as means of accumulating various forms of capital and preventing the development of others. In circumstances where goods travel great distances and sources are often obscure the desire to mark and to consume local cultural difference is likely to continue to grow.

V. Asserting Local Cultural Distinctions against Globalization

One of the great icons of the so-called anti-globalization movement is the French sheep farmer Jose Bove who first came to world attention with his symbolic dismantling of a McDonald's in Millau. He later pointedly served wedges from a wheel of Roquefort cheese during the protests against the World Trade Organization in Seattle. These gestures, originally misunderstood as a form of anti-Americanism and indicative of French food snobbery are now embraced as part of a movement to assert the “right to local democracy and cultural diversity in a world governed increasingly by the principles that govern McDonald's: the same fare everywhere you go. It is about the right to distinct, uncommodified spaces – cultural activities,

39. Rosemary J. Coombe, “Works in Progress”; Rosemary J. Coombe, “Fear, Hope, and Longing: For the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property,” *De Paul University Law Review* 52 (2003): 1171–1191.

40. “Mysore Silk to become global brand,” *Deccan Herald*, Bangalore, India, 18 Aug 2004. Available at <http://www.deccanherald.com/deccanherald/aug182004/i4.asp>

rituals, places of our ecology, ideas, life itself – that are not for sale.”⁴¹ This emphasis on cultural diversity and the right to preserve cultural identities has also been voiced by networks of NGOs at the World Social Forum where under conditions of globalization, rights of communication in local vernaculars, rights of access to cultural products other than commodities and rights to foster “genuine interculturality” are asserted.⁴² Participants in anti-World Trade Organization protests have included peasant farmers and food security activists, as well as indigenous peoples who jointly protest the biological and cultural homogenization they fear from the growing spread of biotechnology, genetically modified crops and increased industrial access to genetic resources in indigenous traditional territories:

Biodiversity and GMOs are not issues or objects but powerful networks for the production of nature and culture. These networks are sites of resistance to what many actors see as the extension of the commodification and technologization of nature, and the loss of local autonomy over ‘natural’ and cultivated environments in the face of global capital and genetic rationality . . . As the WTO protests in Seattle show, social movements are emerging within the international antiglobalization movement in which actors are resisting the managerial and market logic embedded in discourses of both biodiversity and GMOs.⁴³

In biodiversity politics the dominant discourse of intellectual property rights has been challenged with alternative understandings that draw upon the cultural rights tradition in the human rights framework that includes collective rights to cultural integrity and heritage rights in international indigenous rights declarations associated with claims to local autonomy over territories, resources and knowledge.⁴⁴

Cultural issues, from the democratization of communications media, intellectual property-created controls on knowledge that exclude the poor from knowledge-based goods, and the collective rights of indigenous peoples to self-determination in ancestral territories are central to new social movements that comprise an emergent global civil society mobilization that some designate the Movement against Neoliberal Globalization.⁴⁵

41. Naomi Klein, “Foreword,” in *The World is Not for Sale: Farmers against Junk Food*, Jose Bove and Francois Dufour (London: Verso, 2001), vii–viii.

42. Fatma Alloo et al., “Culture: Cultural Diversity, Cultural Production, and Identity,” in *Another World Is Possible: Popular Alternatives to Globalization at the World Social Forum*, ed. William F. Fisher and Thomas Ponniah (London and New York: Zed Books, 2003), 212–217.

43. Chaia Heller and Arturo Escobar, “From Pure Genes to GMOs: Transnationalized Gene Landscapes in the Biodiversity and Transgenic Food Networks,” in *Genetic Nature/Culture: Anthropology and Science Beyond the Two-Culture Divide*, eds. A. H. Goodman, D. Heath, and M.S. Lindee (Berkeley: University of California Press, 2003), 156.

44. Rosemary J. Coombe, “Contingent Articulations.”

45. See essays collected in William F. Fisher and Thomas Ponniah, eds, *Another World is Possible: Popular Alternatives to Globalization at the World Social Forum* (London: Zed, 2001).

Perhaps the emergence of a widespread rejection of absolute dependence on consumerist consumption and the desire for greater local autonomy to reconstruct sustainable livelihoods that are not totally subsumed by markets expressed by numerous interlinked peoples' movements constitutes the most radical of the new countercultural currents in the anti-corporate movement.⁴⁶ Indeed, the very structure of the corporation has attracted renewed attention in a climate of growing hostility to the increasingly anti-social behavior of this peculiar legal institution.⁴⁷

VI. Cultural Traditions and Anti-Capitalist Imaginaries

There is growing evidence, particularly in the Americas, of the legal evocation of culture by indigenous peoples and local peasantries seeking to control the nature and pace of their integration into global markets as well as in attempts to create place-based forms of alternative development that are in significant ways "de-linked" from globalized capital and the hegemony of neoliberalism. The best known of these movements involves the Zapatistas in Chiapas, but similar struggles can be discerned in Colombia, Ecuador, Bolivia and Peru. Drawing creatively upon human rights and indigenous rights discourses in international law, peoples who have been historically marginalized by the state and have retained subsistence livelihoods are making demands for collectively-held land, control over resources and local political autonomy in cultural terms that stress the vital role of traditional knowledge and institutions in enabling them to assume their proper place in newly democratic states.

The struggle to include traditionally-defined collectivities in the Mexican constitution includes claims "to bilingual education, the right to local and regional autonomy and to communal land as the basis for the cultural reproduction of the group."⁴⁸ The rights asserted are cultural but these are not demands for mere recognition, a form of identity politics, nor a defensive retreat to tradition in the face of modernity. Instead, Jung suggests that the assertion of an indigenous identity is made to advance political claims in a context where class-based identities no longer afford any political leverage. Still others studying the situation in Chiapas suggest that indigenous peoples are asserting new forms of citizenship in pluricultural settings in which forms of collective autonomy are asserted as rights of

46. Starr.

47. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (New York: Simon and Schuster, 2004).

48. Courtney Jung, "The Politics of Indigenous Identity: Neoliberalism, Cultural Rights and the Mexican Zapatistas," *Social Research* 70 (2003): 433.

community survival and the continued access to subsistence resources necessary for social reproduction.⁴⁹

Anthropologist June Nash, along with political scientist Neil Harvey,⁵⁰ suggests that indigenous peoples' very marginality to earlier forms of capital expansion has left them in resource-rich areas of great biodiversity. Rejecting the Mexican government's embrace of neoliberalism and the demand that they open their territories and sell their knowledge of its resources, they assert the legitimacy and necessity of non-market relationships as the basis of peoples' lives and identities. Their cultural traditions as indigenous peoples are accorded respect in international human rights laws; it is not surprising, then, that political, economic, and social claims should be made in cultural terms. In Mexico, the struggle for recognition of collective rights is a struggle against poverty and underdevelopment, for respect and involvement in local decision-making around resource use, and to resist forms of citizenship that would incorporate them wholly into markets, as well as an insistence upon a right of cultural survival.

In a series of articles, anthropologist Arturo Escobar⁵¹ has explored the emergence of place-based social movements that assert the primacy of cultural collectivities and their relationship to local ecosystem resources as responses to state neoliberal restructuring agendas in the Colombian Pacific. Both Afrocolombian and indigenous peoples organized themselves into a networked community-based movement in the early 1990s to defend their territories, traditional environmental practices and forms of subsistence as integral to their cultural identities. They did so, he argued, to further their aspirations for greater economic and political autonomy and to forge ecologically sustainable forms of development as alternatives to state sponsored and corporately driven resource extractivism. They also expressed global solidarity with the world's other oppressed black peoples. With the help of international NGOs and creatively deploying resources drawn from the Convention on Biological Diversity and international

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49. R. Aida Hernandez Castillo, *Histories and Stories from Chiapas: Border Identities in Southern Mexico* (Austin: University of Texas Press, 2003); June Nash, *Mayan Visions. The Quest for Autonomy in an Age of Globalization* (New York: Routledge, 2001); Lynn Stephen, "Between NAFTA and Zapata: Responses to the Restructuring of the Commons in Chiapas and Oaxaca, Mexico," in *Privatizing Nature: Political Struggles for the Global Commons*, ed., M. Goldman (New Brunswick, NJ: Rutgers University Press, 1998), 76–101; Lynn Stephen, "Indigenous Autonomy in Mexico," in *At the Risk of Being Heard: Identity, Indigenous Rights and Postcolonial States*, eds. Bartholomew Dean and Jerome M. Levi (Ann Arbor: University of Michigan Press, 2003), 191–219.
50. Neil Harvey, "Globalization and Resistance in post-Cold War Mexico: Difference, Citizenship and Biodiversity Conflicts in Chiapas," *Third World Quarterly* 22, no. 6 (Dec. 2001): 1045–1061.
51. "Whose Knowledge, Whose Nature? Biodiversity Conservation and the Political Ecology of Social Movements," *Journal of Political Ecology* 5 (1998): 53–82; "Beyond the Search for a Paradigm? Post-Development and Beyond" *Development* 43, no. 4 (2000): 11–14; "Culture Sits in Places: Reflections on Globalism and Subaltern Strategies of Localization," *Political Geography* 20 (2001): 139–174; "Place, Nature, and Culture in Discourses of Globalization," in *Localizing Knowledge in a Globalizing World*, eds. A. Mirsepassi, A. Basu, and F. Weaver (Syracuse: Syracuse University Press, 2003), 37–59; "Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements," *Third World Quarterly* 25 (2004): 207–230.

human rights vocabularies, these subaltern groups challenge capitalist development and “enact a cultural politics of difference as they struggle to defend their places, ecologies and cultures.”⁵²

Most of these movements are conceived explicitly in terms of cultural difference and on the ecological differences that this difference makes. They are not movements for development and the satisfaction of needs, even if economic and material improvements are important for them. They are movements of cultural and ecological attachment to a territory. For them, the right to exist is cultural, political, and ecological question. They necessarily are open to certain forms of the commodity, market exchange and to technoscience (for instance, through engagement with biodiversity conservation strategies), but they resist complete capitalist and scientific valorization of nature. They thus can be seen as advancing through their political strategy a tactics of postdevelopment and alternative ecological rationality to the extent that they forcefully voice and defend discourses and practices of cultural, ecological, and economic difference.⁵³

Geographer Thomas Perreault⁵⁴ has similarly explored the mobilization of cultural identity claims by indigenous movements in Ecuador who have asserted rights to territory, livelihood resources, and autonomous development to contest the environmentally destructive incursions of large-scale agriculture and petroleum extraction into traditionally-held lands. He shows how federations of peasant organizations adopted an indigenous identity across ethnic lines in conjunction with NGOs who have become increasingly influential under neoliberalism. Ironically, the recreation or revitalization of indigenous cultural communities rooted in local places as privileged political actors in Ecuador appears to be integrally related to linkages with international activist networks and global legal regimes that accord special rights for indigenous peoples and posit them as uniquely positioned to protect local ecosystems. When these Quichua groups make claims as environmental caretakers in the name of tradition, Perrault, like Escobar, does not see them as rejecting modernity, but negotiating their place within it by “calling for environmentally sustainable forms of development based upon culturally specific values and practices.”⁵⁵ They do so “from a fully modern subject position – interacting with state agencies, national NGOs,

52. Escobar, “Beyond,” p.14.

53. Escobar, “Place,” p.51.

54. “Developing Identities: Indigenous Mobilization, Rural Livelihoods, and Resource Access in Ecuadorian Amazonia,” *Ecumene* 8 (2001): 381–413; “Changing Places: Transnational Networks, Ethnic Politics, and Community Development in the Ecuadorian Amazon,” *Political Geography* 22 (2003): 61–88; “A People with our own identity: Toward a Cultural Politics of Development in Ecuadorian Amazonia,” *Environment and Planning D: Society and Space* 21 (2003): 583–606.

55. Perrault, “Developing,” p.400.

and transnational networks of development, human rights, and environmental organizations.”⁵⁶

These new social movements express forms of aspiration that deploy the rhetoric of international human rights, indigenous rights, and environmental agreements in ways that nonetheless significantly exceed the modern categories that dominate rights claims. If these assertions are made in cultural terms, it may be because the area of cultural rights is the least interpreted of the human rights fields and thus most amenable to claims that combine but go well beyond our modern understandings of the political, the economic, the social, and the cultural. The specific paradigms of Western modernity and rationality that govern human rights laws are arguably too narrow to encompass the aspirations for social justice expressed by the world’s poor in their resistance to the violence of modernization and the destruction wrought by state and capitalist development projects. This, at least, is the powerful argument made by Balakrishnan Rajagopal⁵⁷ who suggests that international law and legal theory have yet to come to terms with it:

Unlike national liberation movements, which saw themselves and were seen mainly in political and economic terms, these ‘new’ movements have embraced culture as a terrain of resistance and struggle. This ‘turn to culture’ among mass movements in the Third World during the last two decades has emphasized rights to identity, territory, some form of autonomy and most importantly, alternative conceptions of modernity and development . . . these movements pose the question of how to be both modern and different. . . . place-based, concrete strategies for survival of individuals and communities in the Third World often constitute another kind of human rights, aimed at building radical alternatives to the received models of markets and democracy.⁵⁸

In summary, under conditions of neoliberalism, culture is being repositioned within as well as differentiated from market forces in state practices, international policy-making, and social movements that make strategic recourse to law as they challenge its current limitations. Critical scholarship in law and the humanities is sorely needed to explore and evaluate the motives, stakes, and limitations of ‘culturalising’ rights assertions and property claims and to consider the conditions in which they support and those in which they undermine neoliberal regimes of governmentality.

56. Perrault, “A People,” p.602.

57. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

58. *Ibid.*, pp.165–166, 170.