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IP Law Book Review, Vol. 4#1, April 2014

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The IP Law Book Review

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**A NEOFEDERALIST VISION OF TRIPS:
THE RESILIENCE OF THE
INTERNATIONAL INTELLECTUAL
PROPERTY REGIME, by Graeme B.
Dinwoodie & Rochelle C. Dreyfuss**

Reviewed by Molly Land, University of
Connecticut School of Law

**RELOCATING THE LAW OF
GEOGRAPHICAL INDICATIONS, by
Dev Gangjee**

Reviewed by Michael Handler, Faculty of
Law, University of New South Wales

**13 WAYS TO STEAL A BICYCLE: THEFT
LAW IN THE INFORMATION AGE, by
Stuart P. Green**

Reviewed by Irina D. Manta, Maurice A. Deane
School of Law at Hofstra University

**CONFIGURING THE NETWORKED
SELF: LAW, CODE, AND THE PLAY OF
EVERY DAY PRACTICE, by Julie Cohen**

Reviewed by Frank Pasquale, Professor of Law,
University of Maryland Carey School of Law

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A NEOFEDERALIST VISION OF TRIPS: THE RESILIENCE OF THE INTERNATIONAL INTELLECTUAL PROPERTY REGIME, by **Graeme B. Dinwoodie & Rochelle C. Dreyfuss.** Oxford University Press, 2012. 203 pp. Hardback \$85.00.

Reviewed by Molly Land, University of Connecticut School of Law. molly.land@law.uconn.edu.¹

Professors Dinwoodie and Dreyfuss's recent book, *A NEOFEDERALIST VISION OF TRIPS*, is an important and exciting new addition to debates about international intellectual property governance. In this book, the authors take on one of the field's most central questions: is the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) in fact an intellectual property "code"? The authors argue that TRIPS is commonly misconstrued, both by rights holders and academics, as a supranational code that tells members of the World Trade Organization (WTO) "*what* they must do and *when* and *how* they must do it" (p.5). Although many have argued that TRIPS imposes only minimum standards, Dinwoodie and Dreyfuss provide in this book the most thorough and decisive refutation of the "code" view of TRIPS to date. The authors contend that TRIPS is not a code but a "neofederalist" regime that imposes basic substantive expectations in order to promote coordination but which nonetheless preserves considerable member state autonomy.

A NEOFEDERALIST VISION OF TRIPS addresses both the fragmentation of norms and the fragmentation of authority in international intellectual property law,² with a particular emphasis on the latter. In particular, the book draws attention to the TRIPS regime's allocation of authority between states and international institutions.³ Dinwoodie and Dreyfuss consider this "vertical" allocation of authority between states and international institutions under the TRIPS agreement in historical, textual, and structural terms. They argue that the TRIPS regime is "neofederalist"—not in a constitutional sense,⁴ but rather in terms of the considerable discretion it reserves to states to implement intellectual

property policies in ways responsive to local needs. Calling for increased use of techniques such as proportionality analysis (p.107), the book makes a compelling case for state autonomy in regulating innovation policy through the framework of the TRIPS agreement.

The book proceeds in three sections, looking at the past, present, and future of global intellectual property lawmaking. The first section, entitled “Where We Were”, considers the history of this regulation and the genesis of the TRIPS agreement. The authors support their case for a neofederalist understanding of TRIPS by pointing to the central demands that have shaped global intellectual property lawmaking over time—the need for balance, diversity among countries in terms of priorities and innovation strategies, and changes in the creative ecosystem. These demands are best accommodated within a structure that “gives states autonomy to address the complexity, diversity, and historical contingency of intellectual property law” but at the same time “requires them to act within the overlay of a coordinated international intellectual property regime” (p.14). Dinwoodie and Dreyfuss then turn to the negotiating history of TRIPS, arguing that although some of the states involved in the negotiations sought to make TRIPS into a global “code”, the resulting document was the product of real compromise and protects considerable state discretion and autonomy in implementing TRIPS’s minimum standards.

The second part of the book, entitled “Where We Are”, examines how TRIPS operates in practice. The authors first consider a series of national innovations in intellectual property lawmaking in light of the existing jurisprudence of the dispute settlement bodies of the World Trade Organization (WTO). They conclude that the impact of dispute resolution has been mixed, with some decisions respecting national autonomy and others adopting a more restrictive approach. The authors then turn to the structural features of the TRIPS agreement, including the principles of national treatment, most favored nation, and non-discrimination. They argue that national treatment, in particular, would provide more appropriate guidance for panels addressing the validity of new innovations such as sharing workloads among national patent offices and the EU Database Directive. The final chapter in this section argues that in evaluating local policy innovations, dispute settlement panels should consider tradeoffs in legislation overall rather than looking at particular policies in isolation; afford more room to states seeking to respond to changes in the innovation ecology; and consider the special problems of capacity faced by developing countries.

The final section, “Where We Are Going”, presents the authors’ vision for the future. The first chapter in this section considers the fragmentation of intellectual property lawmaking. Arguing that fragmentation must be managed in order to ensure the coherence needed for a robust innovation, Dinwoodie and Dreyfuss suggest several techniques for integrating non-WTO law into TRIPS lawmaking in order to “gain the benefits of regulatory competition while minimizing its costs” (p.147). In considering whether to use non-trade law, the authors contend that panels and the Appellate Body should consider the source of the norm, its timing, governance issues (e.g., “hard” versus “soft” law), and the degree of overlap in coverage between the norm and the subject matter of TRIPS. The final chapter then introduces the idea of a global intellectual property “*acquis*”—a set of “background norms” that might guide intellectual property policy-making on the international level (p.176)—and begins to identify in national and international sources, judicial lawmaking, and scholarship some of the normative commitments that might form the basis of such an *acquis*. Dinwoodie and Dreyfuss argue that identifying shared normative commitments would aid the WTO’s dispute settlement bodies and remedy some of the overly restrictive interpretations identified earlier in the book. An international intellectual property *acquis* could also help foster normative integration across regimes and guide future international lawmaking in this area. Among these intellectual property “meta-norms” (p.180), the authors include principles about access to knowledge goods (what they call “access-regarding principles”), norms designed to adapt to the challenges of new technologies, and national treatment for both users and producers.

This book makes several important contributions to international intellectual property scholarship. First, Dinwoodie and Dreyfuss decisively refute the “code” vision of the TRIPS agreement. Despite what might seem to be widespread agreement in some circles that TRIPS imposes only minimum standards, the belief that the treaty is instead a comprehensive supranational code of intellectual property rules continues to have considerable vitality. Efforts to use a European Union Regulation to seize shipments of medicines while in transit, for example, even when the shipments would not violate the intellectual property law of either the sending or receiving country, are tied to a perception of TRIPS as imposing global norms and limiting individual state discretion to vary intellectual property rules in ways that allow generic production.⁵ More recently, this “code” vision is reflected in Eli Lilly’s initiation of arbitration proceedings under the North American Free Trade Agreement challenging the invalidation of one of its patents by Canadian courts, despite the

considerable discretion that TRIPS leaves to member states to decide what inventions meet the standards it imposes.⁶ Dinwoodie and Dreyfuss's refutation of the "code" vision of TRIPS is particularly important in light of these new intellectual property claims being asserted through enforcement measures and in the investment treaty context.

Second, the book provides an extraordinarily useful playbook for defending local innovations in intellectual property policy making. Dinwoodie and Dreyfuss provide a comprehensive and pragmatic assessment of how the WTO dispute settlement bodies might respond were they asked to assess the validity of three recent examples of local policy innovations—raising the inventive step, new statutory defenses to patent infringement, and varying the relief for infringement. Their analysis of these innovations is especially valuable given how few cases address the scope of TRIPS flexibilities and, in particular, the lack of cases litigated by parties with an incentive to defend state autonomy. For TRIPS litigants, scholars, and governmental officials, especially from the developing world, the book provides a very useful and instructive assessment of the arguments that might be marshaled for and against these recent policy initiatives.

Third, the book calls attention to the difficulty tribunals face interpreting ambiguous treaties. Treaties are notoriously indeterminate: capable of multiple interpretations and inconsistent both internally and externally.⁷ There is no requirement of a "meeting of the minds" in treaty drafting, and indeed, many of the ambiguities in treaties might be understood as precisely the opposite—as agreements to disagree.⁸ Ambiguities in treaties, and particularly the use of standards instead of rules, also reflect the fact that anticipating all possible contingencies might have been prohibitively costly or even impossible.⁹ Dinwoodie and Dreyfuss's argument can be understood in part as a critique of the interpretive methodology chosen by the dispute settlement bodies in the face of such ambiguity in TRIPS cases.¹⁰ For intellectual property cases, the dispute settlement bodies have chosen a strictly textual interpretive methodology, which has resulted in awkward and strained reasoning that—as the book persuasively argues—is both inconsistent with the text of the agreement and fails to fulfill its goals. A methodology that considers context as well as the object and purpose of the treaty would better achieve the goals of the global intellectual property system that the book articulates at the outset.

The book also points, however, to what is I think an even more fundamental problem with interpretation by adjudicators in TRIPS cases: the challenge of resolving ambiguities in a text that is designed to achieve a complex

variety of goals, many of which are in considerable tension with one another.¹¹ In choosing one interpretation over another—for example, in deciding whether databases are covered by the TRIPS agreement—the “object and purpose” of the TRIPS agreement could point in several different directions at once, as the authors discuss (pp.95-97). In such situations, the WTO’s dispute settlement bodies will inevitably be required to choose between competing visions of “the good.” Even when a broader reading would seem consistent with the purpose of the TRIPS agreement—such as a broader definition of “diagnostic” (p.67) or a more flexible interpretation of the term “limited” (p.62)—panels and the Appellate Body will still be required to determine where precisely to draw the line between monopoly and access. The TRIPS agreement, however, often provides little by way of guidance for navigating hard cases such as these (indeed, as the authors note, where the agreement *does* provide guidance, such as with the mention of “fair use” in Article 17, the panel interpreting this provision in the *EU-GI* case was able to better respect the balance that intellectual property law seeks to achieve (p.69)). The result of the lack of overall guidance has been a retreat into textual methodologies, an approach that is particularly inappropriate in “public law” cases, which require evaluation of the state’s authority to regulate in the public interest.¹² Such cases may require more “purposive” methodologies that allow the decision maker, in construing ambiguities in the treaty, to consider the object of the challenged state regulation and the interests of non-parties affected by that regulation.

Dinwoodie and Dreyfuss’s proposal for an *acquis* is an important step toward developing a common body of values from which adjudicators can draw in reaching interpretive decisions. Of course, at least in the near term, the development of an *acquis* will not necessarily help panels resolve the difficult cases. Because the *acquis*, as proposed by the authors, is restricted to values shared by all WTO members—as must be the case, or risk imposing obligations without consent—it will likely be limited to principles too general to be of much use in hard cases. For example, intellectual property exporting and importing states might agree that access is an important value, but disagree strongly on the precise balance to be struck between monopoly and access in particular cases. That said, an *acquis* might serve—at least for the moment—the more modest goal of reorienting the dispute resolution bodies and WTO members alike on the values underlying the system and on the interests of non-parties affected by their decisions. Recognizing an *acquis* will not help panels decide where precisely to draw lines, but it may encourage them to view access and other public interest values as important countervailing concerns that they can and should consider.

I do think, however, that the authors might have more fully embraced the interpretive role of the WTO dispute settlement bodies. In several places, the authors disavow that the dispute settlement bodies should be engaging in “gap filling” (pp.41, 196), express concern over panels making value judgments (p.101), and condemn the idea of “judicial activism (p.196). Although Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes prohibits the dispute settlement bodies from adding to or varying the rights of the parties, it also charges them with clarifying the existing provisions.¹³ Interpretive authority necessarily involves some measure of law creation, and delegation accompanied by imprecision—such as we see throughout the TRIPS agreement—constitutes a transfer of substantial interpretive authority.¹⁴ Such delegation is not, however, incompatible with state autonomy in setting intellectual property policy. For all the reasons that the authors set forth in the book, the authority delegated to the dispute settlement panels should in many instances be re-delegated or re-allocated to the member states.¹⁵ Their proposals for more deferential standards of review and the use of a margin of appreciation (e.g., pp.56, 90, 102, 107-108) are two possible techniques for achieving this goal.¹⁶ Moreover, the interpretive moves recommended by the authors for protecting local intellectual property innovations might in fact *require* the panels to exercise a certain measure of interpretive authority. A departure from strict textualism—even if only to re-delegate authority to the state—inherently requires some gap filling.

I would also have been interested in even more discussion of the political context in which the dispute settlement bodies operate. It may be that what is constraining the dispute settlement bodies and causing them to be so conservative in their decisions is a function of the political space in which they operate.¹⁷ Perhaps the discourse around TRIPS has been so contested and impassioned that it has led panels to be particularly concerned about their expertise and legitimacy. If this is true, legal arguments alone will not be enough to persuade dispute settlement bodies to be less conservative in their interpretive methodology. Attention to the political context may make it possible to foster a more supportive political environment for neofederalist decision making. For example, in their work comparing the European Court of Justice (ECJ) with the Andean Tribunal of Justice, Professors Helfer and Alter have argued that the ECJ’s more expansionist lawmaking can be attributed to the support of external actors, such as legal advocacy networks, non-governmental organizations (NGOs), national courts, and even government officials.¹⁸ In the TRIPS context, greater

engagement by NGO networks and other constituencies around particular disputes could help support more flexible interpretations of the treaty by panels and the Appellate Body.¹⁹

With this book, Dinwoodie and Dreyfuss have moved the discussion about global intellectual property regulation forward in significant and important ways, providing detailed analysis of new local innovations, focusing attention on the structural features of the TRIPS agreement, and generating new proposals for resolving conflicts of authority and norms both internal and external to the TRIPS regime. It would be a highly valuable read for anyone who works in the field of international intellectual property.

ENDNOTES

¹ The author thanks Harlan Cohen, Cynthia Ho, and Lisa Ramsey for very helpful comments and feedback on this review.

² See Tomer Broude, Fragmentation(s) of International Law: On Normative Integration as Authority Allocation, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 99, 101-102 (Tomer Broude & Yuval Shany eds., Hart Publishing, 2008) (distinguishing between fragmentation of norms and fragmentation of authority).

³ See Joel P. Trachtman, Fragmentation and Coherence in International Law 4 (Aug. 12, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908862 (distinguishing between horizontal and vertical allocations of authority). Fragmentation of authority is typically thought of primarily as a question of the applicable standard of review or judicial abstention. See, e.g., Steven P. Croley & John H. Jackson, WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 187 (Ernst-Ulrich Petersmann ed., Kluwer Law International, 1997); William W. Burke-White & Andreas von Staden, Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations, 35 *Yale J. Int'l L.* 283 (2010); Matthew Windsor, A Fine Balance? Delegation, Standards of Review, and Subsidiarity in WTO Dispute Settlement, 14 *Auckland University L. Rev.* 41 (2008); Laurence R. Helfer, Adjudicating Copyright Claims Under the TRIPS Agreement: The Case for a European Human Rights Analogy, 39 *Harv. Int'l L. J.* 357 (1998).

⁴ Robert Howse and Kalypso Nicolaidis have argued against understanding the WTO as a “federal construct” in a constitutional sense because doing so would raise significant legitimacy concerns. See Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, in *DELIBERATELY DEMOCRATIZING MULTILATERAL ORGANIZATION*, 1-2 (Marco Verweij & Tim Josling eds., 2003) (special issue of *Governance*, vol. 16, no. 1).

⁵ In her recent book on access to medicines, Professor Cynthia Ho considers this debate about in-transit seizures and connects it to competing visions of patent rights as either privilege or property. She observes that while the privilege view would be opposed to such seizures, those who view patents as property rights “may believe so strongly in the sanctity of patent rights that if an invention is granted in one country, a patent should be granted in other jurisdictions as well.” Cynthia M. Ho, *ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS* 290 (Oxford University Press, 2011).

⁶ See, e.g., Henning Grosse Ruse-Kahn, *Investor-State Arbitration to Challenge Host State Compliance with International IP Treaties?*, *International Economic Law and Policy Blog* (Dec. 11, 2012, 11:07 AM) <http://worldtradelaw.typepad.com/ielpblog/2012/12/investor-state-arbitration-to-challenge-host-state-compliance-with-international-ip-treaties.html>; Brook K. Baker, *Corporate Power Unbound: Investor-State Arbitration of IP Monopolies on Medicines—Eli Lilly and the TPP 18-22* (PJIP Research Paper Series No. 36, May 2013), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1038&context=research>.

⁷ Joel P. Trachtman & Kamal Saggi, *Incomplete Harmonization Contracts in International Economic Law: Report of the Panel, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009, 10 *World Trade Rev.* 63, 82 (2011).

⁸ Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 *American J. Int’l L.* 247, 273 (2004); Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 *Harvard Int’l L. J.* 333, 351 (1999).

⁹ Trachtman & Saggi, *supra* note 7, at 83.

¹⁰ Although the Vienna Convention on the Law of Treaties, which as part of customary international law is relied on by the WTO adjudicatory bodies, provides a rough priority of approaches (favoring textual and purposive above the drafting history), there is more than enough “wiggle room” for adjudicators to resort to nearly any methodology at any point in time.

¹¹ The creation of adjudicatory bodies exercising public authority but not embedded in a functioning legislature also leads to problems of democratic accountability. See Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 23 *European J. Int’l L.* 7 (2012).

¹² In the investment law context, Professors Burke-White and von Staden have defined public law disputes as those “in which the outcome-determinative issue in the arbitration requires a determination of the state’s power and legal authority to undertake regulation in the public interest.” Burke-White & von Staden, *supra* note 3, at 288. They argue that arbitrators should adopt a more deferential standard of review when the subject matter of the arbitration involves public law elements and the relevant treaty includes language indicating that the states “sought to maintain some freedom of action to regulate in these circumstances.” *Id.* at 293.

¹³ In other areas, it appears that the Appellate Body is in fact engaging in a kind of constitutional lawmaking designed to protect the purpose of the parties’ agreement but which exceeds its ostensible powers under the relevant treaties and customary international law. See Sungjoon Cho, *Global Constitutional Lawmaking*, 31 *University of Pennsylvania J. Int’l L.* 621 (2010) (discussing the Appellate Body’s decision to strike down “zeroing” in the anti-dumping context).

¹⁴ See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *Int’l Organization* 401, 415 (2000) (“Imprecision is not synonymous with state discretion, however, when it occurs within a delegation of authority and therefore grants to an international body wider authority to determine its meaning.”); see also, e.g., Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 *Virginia J. Int’l L.* 103, 111 (2011).

¹⁵ Shaffer & Trachtman, *supra* note 14, at 147-149.

¹⁶ Other re-delegation techniques include the principle of judicial economy, abstention doctrines such as political question or justiciability, interpretive principles such as in *dubio mitius* and *non liquet*, among others. See Steinberg, *supra* note 8, at 272.

¹⁷ See *id.* at 267-274 (discussing the political space of the Appellate Body and concluding that it had largely attended to political signals from the states in trade matters); see generally Tom Ginsburg, Bounded Discretion in International Judicial Lawmaking, 45 *Virginia J. Int'l L.* 631, 656-668 (2005).

¹⁸ These actors “provide [international courts] with constituencies that encourage lawmaking and promote compliance with expansionist rulings.” Karen J. Alter & Laurence R. Helfer, Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice, 64 *Int'l Organization* 563, 587 (2010).

¹⁹ See also Joost Pauwelyn, The Transformation of World Trade, 104 *Michigan L. R.* 1, 8 (2005) (arguing that the World Trade Organization needs law *and* politics to ensure both loyalty and efficiency).

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13 WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE, by **Stuart P. Green**. Harvard University Press, 2012. 400 pp. Hardback \$45.00.

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Stuart Green's book *13 WAYS TO STEAL A BICYCLE* impresses with its breadth and insightful detail as the author performs a tour de force in his comprehensive treatment of the historically rich and in parts still controversial law of theft. Green argues that the scholarly framework regarding theft has remained fairly undeveloped to this day, and he seeks to begin to fill this gap by delving into the history of theft law, the essential components of theft, the principles behind and unresolved tensions in the criminalization of theft, and the question of what constitutes property in the context of potential theft. Concluding, most importantly, that theft law today has eliminated moral distinctions and apportioned similar punishments for vastly different offenses in a manner severely disconnected from community sentiments, Green calls for significant reforms of theft law. As part of his discussion, Green also tackles difficult issues relating to the application of theft law to intangible property, such as intellectual property, virtual property, and information. The result is a fascinating introduction into every major area of theft law, although, as Green himself acknowledges throughout, many questions remain for further exploration.

What makes Green's book particularly interesting for those who study intellectual property is that it combines the often-asked question of whether intellectual property is truly *property* with an analysis of how the answer to that question in turn shapes criminal law. The applications of this examination are varied and of both legal and ethical significance, determining matters such as whether or for how long individuals should be imprisoned who never improperly acquired tangible property, but rather only goods covered by copyright, trademark, patent, or trade secret law.

Chapter 1, entitled “Theft Law Adrift”, examines the history of theft law, and in particular the movement in the twenty-first century across Anglophone countries to overhaul arbitrary and inconsistent systems of theft law. The American Model Penal Code (MPC), the English Theft Act 1968, and similar legislation sought to eliminate some of the archaic distinctions that the common law drew between various related offenses as well as some of the unhelpful categorizations of different types of property. The main goals were ones of consolidation and streamlining, but Green argues that—in addition to cleaning up arcana—the reforms also swept aside useful moral distinctions regarding the means of committing theft and the types of property stolen. Green explains that the corresponding flaws in legislation neither have been nor can be corrected at the sentencing level, whether through sentencing guidelines or individual judicial decision-making (pp.30-33). One of the key problems with the consolidated schemes, Green states, is that they violate the principle of fair labeling (pp.52-54), which dictates that the law must reflect and signal the community’s perceptions of differences in the kinds and respective gravity of offenses; hence, crimes should be categorized and labeled such as to embody the type and extent of legal violations.

In pursuit of achieving fair labeling in theft law, Green conducted extensive empirical work that he describes in the book (pp.57-68) in which he sought to test the community’s perceptions of various theft-related legal wrongs and uncover whether the law reflects these sentiments. Some of the study stimuli to which he exposed his experiment participants included scenarios involving the theft of a bicycle and scenarios describing the theft of a test preparation tool. He varied aspects of the scenarios such as the means by which the relevant theft was committed or its likely financial impact. Green asked participants to grade and rank the blameworthiness of the offender between different variations of the bicycle theft and of the test preparation tool theft, and the participants also had to assign a sentence to the offenders in the bicycle theft scenarios. The study results provided evidence for a chasm between people’s intuitions and the existing consolidated law of theft, with participants giving more weight to the type of theft and kind of property involved than theft law considers.

In Chapter 2, named “The Gist of Theft”, Green attempts to “develop a theory of theft law practically from scratch” (p.69). He begins by examining the role of blameworthiness in the criminal law, or to what extent particular types of conduct can be said to entail moral fault. Building on his previous work in this area,¹ Green studies three elements to determine blameworthiness (p.72). The first element is harmfulness to

others. The second is the *mens rea*, or mental state required for an offense, usually consisting of intent, knowledge, recklessness, or negligence. The third element is moral wrongfulness in the sense of the breach of a norm, rule, right, or duty.

Green first turns his attention to the harm in theft, which generally consists of substantial interference with property that is both commodifiable and rivalrous (p.74). He argues that theft law should reflect the value of the property stolen, though he does not believe that the law can take into account the subjective value of property to the victim (pp.76-77). Green also shows the difficulties inherent in defining the *mens rea* for theft, such as how to best define the necessary “intent to deprive” (pp.84-87). How permanent does the deprivation need to be? What if a perpetrator takes an object with the intent to return it and changes his mind later? Unsurprisingly, there turns out to be variation between jurisdictions on some of these matters that cannot escape some degree of arbitrariness.

Green goes on to discuss the wrongs of theft, which he separates between primary and secondary wrongs. Primary wrongs are those occasioned by the violation of a property right itself (p.93). Green explains that “the norm against stealing does have a prelegal, natural existence, but that the norm is so thoroughly mediated and shaped by the law of property and by other cultural and social forces that we cannot make much practical sense of it without reference to such influences” (pp.95-96). Green cites four types of evidence for the prelegal aspect of the prohibition against stealing. The first is that society views stealing as wrong as a purely moral matter because it “is regarded as both sinful and deeply threatening to society” (p.96). Second, some forms of theft are illegal but not immoral while others are viewed as immoral but not illegal (p.96). Third, even young children have a sense of ownership and an awareness that taking another’s belongings is wrong (p.97). Fourth, anthropological studies have shown that groups and tribes with only the most rudimentary system of laws enforce prohibitions against stealing (p.98). When it comes to the post-legal nature of theft, Green shows how property, contract, and agency law actually fill in the content of the basic prohibition against stealing (p.99). His study of the primary wrongs of theft in practice take him through the concepts of lack of consent, unlawfulness, fraudulence, and dishonesty (pp.104-114).

As far as the secondary wrongs of theft are concerned, Green defines those as the wrongful means that accompany the deprivation of property (p.115). He showed in his empirical study that these means are very relevant to the extent of individuals’ judgments of the gravity of different kinds of thefts,

and he walks readers through the issues of violence, coercion, housebreaking, stealth, breach of trust, exploitation of the circumstances of an emergency, and deception (pp.117-131). For offenses involving each of these types of wrongs, Green uncovers the tensions that underlie close cases and provides guidance as to how he would resolve them.

Chapter 3, “Theft as a Crime”, deals with the ability and need of the criminal law to respond to theft. After giving an overview of the civil law and non-legal tools to address theft, Green presents his view of how and when theft should be treated as a crime. He explains that criminalization is generally justified because “[t]hose who steal challenge the authority of property rules; they express contempt for the property owner and for society more generally; they trample over others’ rights in pursuit of their own selfish interests” (p.141). Green explains how the state has traditionally been viewed as justified to intervene in theft because individual civil plaintiffs will not always be willing and able to seek remedies, the state can best prevent violent retaliation, and theft run amok can undermine the sense of trust between citizens (pp.144-146). Not entirely satisfied with these explanations, Green proposes a two-step inquiry as to whether a form of theft should be criminalized. In the first step, lawmakers would have to ask themselves if “the crime type *typically* or *normally* involved (1) the kind of conduct that is properly declared wrong by the community as a whole, (2) a non-negotiable wrong of the sort that one should expect to be categorically safe from, and (3) something more than a mere conflict that can be negotiated and resolved” (pp.147-148). The second step of the inquiry would have prosecutors apply the same analysis when faced with an alleged criminal (p.148).

In his discussion of the state’s interest in preventing theft, Green mentions the direct financial costs of theft, estimated at about \$15 billion per year in the United States, but also the indirect costs that come in the form of reduced property values, lowered life satisfaction, raised anxiety, and damaged neighborhoods (p.149). Green supports a classical economic approach to establish an optimal system of criminal sanctions (p.151). He acknowledges that it is difficult to prove the deterrent effect of theft law with any precision and that in some cases of theft, the costs of criminalization may exceed the benefits (pp.152-55). Green concludes Chapter 3 with an extensive discussion of borderline cases of theft such as *de minimis* thefts, theft by failing to return lost or misdelivered property, receiving stolen property, theft by false promise, writing bad checks, and extortion that involves a threat to do an unwanted but otherwise legal act. In the end, he criticizes the MPC and to some extent the English Theft Act

1968 for subjecting these forms of conduct to the same level of punishment and allowing proof of one to be sufficient to constitute proof of any other (pp.157-202).

Chapter 4, “Property in Theft Law”, attempts to understand why in Green’s empirical work participants made clearly different moral judgments depending on the type of stolen property involved. His study showed that people viewed the stealing of a physical book as more wrongful than the unlawful downloading of an electronic book or than sneaking into a lecture without paying the entrance fee (whether the lecture was sold out or not) (p.204). Green’s goal is to understand the rationale of study participants in this respect and to determine what deserves the label of “theft”, which ultimately determines “how an offense is formulated, classified, and codified; how such lawbreaking is viewed by the general public; the level at which punishment will be assigned; and how prosecutorial policy will be carried out” (p.207). Green states that any property subject to theft must be commodifiable, rivalrous, and excludable, and that every theft must create a genuine zero-sum transaction (pp.208-211). Next, he analyzes the applicability of the theft label to variations of property within these categories, like things illegal to buy, sell, or possess (such as contraband and stolen goods); things legal to possess but not to buy or sell (such as body parts); and things incapable of being bought or sold (such as credit in the case of plagiarism and honor in that of the Stolen Valor Act) (pp.211-225).

The book then moves on to the topic of the unlawful taking of semi-tangibles such as electricity, cable, and Wi-Fi services, as well as other private and public services. After examining to what extent theft of the first three types of services occasions losses to the seller or third parties, Green concludes that the strongest case of theft is for electricity, followed by cable and then by Wi-Fi (pp.225-230). Green also believes that unlawful behavior in the case of other types of services is best pursued via breach of contract claims rather than criminalization and the use of the theft label (pp.230-234).

Most of the rest of the book focuses on the theft of intangible property. After showing that some forms of such property can be commodifiable but not always also rivalrous in the way that theft law requires (p.238), Green explains how identity theft is a misnomer because “personal identities are nontransferable and therefore noncommodifiable” (p.245). He then tackles the main forms of intellectual property as they relate to theft. As Green mentions, both intellectual property (especially copyright) owners and the

Department of Justice routinely refer to some forms of infringement as theft (p.246). As far as social norms are concerned, far more individuals engage in illegal downloads of copyrighted materials than in theft of tangible property (p.249).

Green questions whether copyright can be subject to theft law by testing whether the materials it covers are indeed commodifiable, rivalrous, and subject to zero-sum transactions (p.255). He gives the hypothetical example of a copyrighted monograph with limited market potential that is available for download on the publisher's website for forty dollars and that is expected to sell about 1,000 copies (p.255). In variation one of the scenario, a defendant makes an illegal download for personal use. In variation two, the defendant downloads the book, makes 1,000 digital copies, and distributes them to libraries and individuals that she thinks would likely buy the book otherwise. In variation three, the defendants are 1,000 likely buyers who circumvent the paywall on the publisher's website and each illegally download a copy of the book for personal use. Green notes that the material in question is a nonrivalrous public good, and hence the typical zero-sum nature of tangible property theft is not present, but he notes that the copyright owner lost, or potentially lost, a thing of value in each case anyway (p.256). He argues that variation one does not constitute theft because the owner has suffered only a limited setback to his property interests but no deprivation of his property (p.256). In variation two, the defendant possibly deprived the owner not only of the purchase price paid by the defendant himself but also of that paid by another 1,000 purchasers, and thus theft has occurred (p.256). In variation three, while the total financial loss to the owner is the same as in variation two, "no single offender or group of offenders is sufficiently culpable to justify criminalization" (pp.256-257).

A similar analysis follows for patent infringement, where Green believes that losses of a certain level (mainly, the loss of the value of a patent), could turn an offense into theft (pp.258-259). He acknowledges some of the special problems related to patent infringement, however, including the difficulty of criminalizing such infringement in light of the uncertainty about the validity of an infringed patent, as I have also discussed in my work on the matter (p.257).²

When it comes to trademark infringement, Green brings up the existence of two kinds of victims. First are consumers who mistakenly buy counterfeit goods, and second are trademark owners who lose sales when potential customers buy counterfeits or who are deprived of potential licensing fees

(pp.260-261). Green also references the risk that the use of a trademark on lower-quality infringing goods will lead to a weakening of the mark and that, therefore, trademarks are “at least semi-rivalrous in the sense that if anyone other than the trademark owner uses the mark, it will normally interfere with the benefits the owner derives from the mark” (p.261). Should an infringer completely or almost completely deprive a mark of value, this could result in the use of a label of theft (p.261).

The type of intellectual property that Green deems to be the best fit for theft law is trade secrets, whose value is often greatly diminished once confidentiality has been destroyed (p.264). Last, Green believes that virtual property such as website URLs and the goods in massively multiplayer online role playing games (MMORPG) could technically qualify for theft law purposes, even though in the latter case a gaming company could eliminate a game without owing players indemnification for accumulated virtual property (pp.265-267).

Concluding Chapter 4, Green cautions that just because something could qualify as theft, criminalization is not always wise (pp.267-268). Green also stresses that only misappropriations that involve deprivation of the owner’s ability to substantially use her property should possibly be labeled as theft (p.268). Green emphasizes that other legal and non-legal means can serve to prevent theft, and that some areas such as plagiarism and MMORPG theft should remain outside the purview of legal regulation from a policy perspective (p.269).

Green’s parting words acknowledge that this book constitutes a “first cut”, whose main goal is to encourage other scholars and policymakers to engage in a more meaningful discussion about theft law (p.270). Green offers some advice for law reformers wishing to engage in related debates: avoid overcriminalization; balance concerns of fair labeling with administrability; define both the *actus reus* and *mens rea* elements; define property for purposes of theft law; grade theft offenses according to three independent variables: the value of the stolen property, the means by which the theft was carried out, and the type of stolen property; specify how to allege and prove theft; and in some cases allow reprosecution for a different form of theft than that originally charged (pp.271-276).

13 WAYS TO STEAL A BICYCLE is a much-needed book in the world of legal scholarship. Stuart Green provides the most thorough account of the foundations, logic, and tensions of theft law of which I am aware, thus giving an unparalleled overview of an important and strangely neglected

field. As with any book that seeks to offer a readable account of a broad and complex area, some gaps and questions remain. For example, while Green offers his thoughts on whether a significant number of hypothetical scenarios should qualify as theft, several of the dilemmas he presents are left unanswered. To name just one example of where the lesson to draw remains a bit elusive, Green discusses how the case for labeling the unlawful taking of cable television services as theft is more difficult than that for the taking of electricity (pp.228-229). He then moves on to discussing Wi-Fi services, however, without giving further guidance as to whether he would deem any taking of cable television services to be theft (p.229). Rather, he says a bit later that the case for labeling Wi-Fi piggybacking as theft is weaker than that for the taking of electricity or cable, and that one possibility would be to treat such piggybacking as theft only if it results in degraded service for others (pp.229-230). I would have enjoyed reading a bit more about his ideas of what this means in the end as to the optimal criminalization of each of these types of services under theft law rather than just as to the relative merits of doing so.

Some of the greatest strengths of Green's book stem from the breadth and depth of his knowledge of criminal law, which he brings to life through both historical examples and sometimes amusing yet always enlightening examples from pop culture. The section on theft in intellectual property could have been expanded further in my view, in particular because the book seeks to focus on "Theft Law in the Information Age" as the second part of its title indicates. One of my questions about the copyright section was how to determine the total pre-infringement value of a good given that Green would apparently only allow for a finding of theft if most of the value has been removed. Even leaving aside some of the other complexities, the value of a copyrighted good significantly fluctuates over time and is often more subjective than that of tangible property, and it appears disconcerting to have such a potentially arbitrary criterion determine criminalization.

Further, in Green's example with the three variations on the monograph download, I remained curious as to how he would feel about some hybrids of the scenarios he gives (pp.255-256). For example, if someone who illegally distributes copies to 1,000 potential buyers may be a thief, what about someone who just tells 1,000 potential buyers how to circumvent the paywall and access the material themselves? Perhaps more poignantly, I am not sure why Green exempts individuals who each only downloaded for themselves from theft liability when he states elsewhere in his book that exempting *de minimis* takings from theft law in the context of tangible

property is unlikely to work because “[b]y creating a license to steal low value items, it would undermine the norm against theft generally and potentially raise the aggregate level of . . . theft to intolerable levels” (p.169). What is the meaningful difference for theft law, to draw a comparison to variation three of Green’s hypothetical, between 1,000 people each taking one dollar from a man’s wallet that contains no more money afterwards and the 1,000 likely buyers of the monograph each illegally downloading the text and hence depriving the owner of its value? Why are the individuals in the latter scenario insufficiently morally culpable to subject them to criminal law punishments when those in the former scenario are not? These tensions pose some important difficulties for Green’s framework and his requirement of individually caused substantial deprivation of value for intangible goods in the context of theft law.

In future work, Green may also want to give greater credence to the possibility that a number of intellectual property goods outside of trade secrets and virtual property are actually to greater or lesser degrees rivalrous. For example, Green allows for the possibility that trademark dilution harms owners. As others³ and I⁴ have argued, however, there is a chance that dilution could also harm the consumers of the originally branded goods, leading to a diminished enjoyment of it and potentially also a lowered resale value. Whether that should enter the calculus when it comes to the theft label is subject to exploration, but these are some examples of issues that had to remain untouched due to how condensed the section on intellectual property is in the book.

Stuart Green has given us much to consider, and I have only touched on some of the fascinating issues with which we can now wrestle more wisely and better equipped with knowledge thanks to *13 WAYS TO STEAL A BICYCLE*. Future readers will certainly enjoy the ride.

ENDNOTES

¹ Stuart P. Green, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME* (Oxford University Press, 2006).

² Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 *Harv. J. L. & Tech.* 469 (2011).

³ Shahar Dillbary, *Famous Trademarks and the Rational Basis for Protecting Irrational Beliefs*, 14 *George Mason L. R.* 605 (2007).

⁴ Irina D. Manta, Hedonic Trademarks, 74 Ohio State L. J. 241 (2013).

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RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS, by Dev Gangjee. Cambridge University Press, 2012. 341 pp. Hardback \$120.00.

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Near the end of Dev Gangjee's wonderful monograph, *RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS*, and thinking about its impact, my mind turned to a different issue relating to geography—that of maps. By the mid-sixteenth century a flourishing trade in maps and sea charts had developed throughout Europe. Yet cartographers still struggled at this time with a fundamental problem of representation: namely, how to project the curved surface of the world on a flat map. The problem of inaccurate maps and a lack of a uniform approach to projection was particularly acute for seafarers, many of whom would describe identical sea journeys in ships' logs by reference to very different latitudes, depending on the maps they were using.¹ Cartographers squabbled over which projection of the world was the most accurate, but without a uniform standard developing. In 1569, Flemish cartographer Gerardus Mercator produced a giant map of the known world titled *Nova et Aucta Orbis Terrae Descriptio ad Usum Navigantium Emendate*. Drawing on a grid-based cylindrical projection developed by Ptolemy in the second century AD, the key advance in Mercator's map was his spacing of parallel lines of latitude so that the gaps between them increased exponentially the further they moved away from the equator.² The effect of this was that any straight lines drawn between any two ports on the map accurately represented both the distance between those two ports and a bearing that a navigator could take to make the journey. In the empty space on his map over North America, Mercator wrote that his mission was "to represent the positions and the dimensions of the lands, as well as the distances of places, as much in conformity with very truth as it is possible so to do".³ Mercator's map and projection had an almost immediate impact as a navigational aid. But it had a far greater significance in shaping how we see and understand the world. This is something that can still be felt

today—you only need to go to Google Maps and zoom out as far as possible to see a modern day example of the Mercator projection.

Gangjee’s monograph is to geographical indications scholarship what the Mercator projection is to cartography. It solves problems that have bedevilled scholarship in this field for a century, and imposes order on, and makes sense of, a field of law that the author rightly describes as “spectacularly messy” (p.1). The reasons for this mess are well known. The nature and scope of protection that must be afforded to, and the institutional forms of protecting, indications of geographical origin (IGOs) are unsettled throughout the world—something reflected in the bewildering array of terms and acronyms used to describe various types of IGO and in the outwardly inexplicable dual levels of protection for geographical indications (GIs) contained in Articles 22 and 23 of the TRIPS Agreement.⁴ Debates over IGOs, whether undertaken by government policy-makers or commentators, also tend to be highly polarized, often shaped by cultural beliefs that a particular model of protection is the only appropriate means of safeguarding IGOs. Beyond a limited consensus that IGOs should be protected against use that misleads consumers as to the origin or qualities of goods, there is no agreement as to whether more extensive protection (for example, against dilution or pure misappropriation) is warranted, what legal form such protection should take, or to what extent it is appropriate to privilege “localized” production in international trade when to do so imposes costs on importing countries.

Gangjee’s thesis is that only by stepping back and trying to understand how signs that indicate the geographical provenance of goods came to be protected in international intellectual property law from the late nineteenth century can we evaluate the current legal landscape, in particular, the GI provisions of the TRIPS Agreement, and think constructively about the future of GI protection. Taking such an approach involves setting up new epistemic frameworks to explain why IGOs have been conceptualized and protected as they have at the international, regional and domestic levels. It also involves calmly mediating the often hostile debates that have occurred over the regulation of IGOs, which only seem to have intensified with the growing recognition amongst some countries, particularly from the developing world, of the potential export value of geographically branded goods. Gangjee has succeeded admirably in achieving his stated goals. His novel organization of the topic, the new insights he has been able to provide based on his exemplary, comprehensive research, and his even-handed, critical engagement with the claims made by both advocates for and opponents of stronger GI protection, are likely to change the thinking of many scholars in this field and help to shape future global debates and policy agendas. As Mercator’s projection did,

Gangjee's monograph should become the key, unifying resource in its field.

Part I of RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS consists of a detailed, historical, interdisciplinary analysis of IGOs, something which has not been undertaken in this sort of depth or with this sort of intellectual rigor before. Here, Gangjee unpacks the decisive contribution of three treaties—the Paris Convention for the Protection of Industrial Property of 1883, the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 1891, and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of 1958—as well as a number of domestic IGO protection regimes, in order to explain the way in which IGOs emerged over the twentieth century as distinct legal subject matter that took a wide variety of forms. This is highly original work that sheds light on a largely forgotten body of law. More fundamentally, it makes a convincing case that understanding the current international GI framework and making normative arguments as to the optimal scope of international GI standards can only be done after first untangling the skein of regulation that developed over the previous hundred or so years, and fully engaging with the question of “how has the GI come to mean what it does and function in the way that it does?” (p.14).

In Chapter 2, in considering the Paris Convention, Gangjee deals with the overlooked question of why “indications of source”—signs that merely describe the provenance of goods—were deemed worthy of protection in an *industrial property* treaty. He demonstrates, through a thorough analysis of extrinsic materials, that the “valuable intangible” sought to be protected was in fact the collective reputation that attached to regional products. Indications of source were, accordingly, treated as similar, though ontologically separate from, trade marks, with Union members required to provide broadly similar rights against the use of “false” indications under Article 10 and misrepresentation by way of Article 10*bis*. In this way, Gangjee identifies an early model of IGO protection that recognized the collective nature of the subject matter, with the scope of protection based on a purely communicative logic—that is, that the indication provided useful information to consumers about the origin of goods produced by one of a number of local traders entitled to use the indication. At the same time, Gangjee uncovers a strong degree of opposition amongst founding members of the Paris Union, notably France, to a minimum standard of protection based on consumers having been misled. The concern here was that such a standard was inadequate to protect indications in export markets, where the indication might not be understood as having geographical significance. Gangjee suggests that a desire for more absolute

protection explains the quickly assembled Madrid Agreement of 1891, the effect of Articles 1(1) and 4 of which is to oblige members to ensure the seizure on importation of wine bearing false indications of source, even if those indications are generic in the country of importation. Here, Gangjee identifies the emergence of a different logic underpinning IGO protection—that certain indications might represent not only origin, but also a unique link between product and place, such that they ought never to be able to be used as generic product descriptors, irrespective of what consumers in a particular country might understand the term to mean. That is, we start to see the emergence of a *terroir* logic underpinning IGO regulation, albeit at this stage only in relation to geographical terms used to identify one type of product, namely, wine.

It is at this point that what might appear to be an unusual decision in terms of the structure of the monograph makes perfect sense. Having identified two different and competing logics underpinning international IGO protection (the communicative and *terroir* logics), Gangjee turns away from the multilateral regime to explore these logics as manifested in a number of national models of IGO protection. This is done to show that any attempt to understand how the notion of “the GI” that emerged in international intellectual property law at the end of the twentieth century cannot be undertaken by reference to international conventions alone. Rather, it requires an appreciation of the seemingly irreconcilable interests of those advocating for particular standards and forms of IGO protection, which can only be achieved by an examination of their national laws *and* their rural policies. Gangjee’s approach also allows for a wider critique of the two logics based on their historical origins and development, which is important given his stated desire to reframe the global debate about the justifications for protecting GIs at particular levels.

The primary focus of Chapter 3 is therefore on the development of the *terroir*-influenced French *Appellations d’Origine Contrôlée* (AOC) system. In a superb analysis at the start of the chapter, Gangjee unpacks the obscure notion of *terroir*. He argues that it can be conceived of as a “mythical” or spiritual bond between place and product that has been used for the purposes of regional identity formation, a “deterministic influence” that prioritizes the uniqueness of physical and environmental elements in the production of goods, or “a more contingent composite of natural and human factors, open to innovation” (p.85). He then demonstrates how the French system of IGO protection was informed by this second, deterministic notion of *terroir*, with a gradual recognition of the third, composite notion. More specifically, in a painstakingly researched and engagingly written part of the chapter, he shows how in the late nineteenth century the French state, prompted by significant vine shortages which led to fraudulent origin labelling of wine, sought to

intervene in the market for wine by managing production levels in wine-producing regions. Through various decrees, it first sought to define the boundaries of such regions and, following the adoption of the AOC regime from the 1930s, to administer the registration of the names of such regions and to prescribe the qualities, characteristics and methods of production of wines from such regions whose producers were entitled to use registered names. On the basis that registered names were thought to indicate unique qualities and characteristics of wine, these laws gave entitled producers the right to prevent non-entitled traders from using the registered name outright (that is, even for the purposes of comparison). The value of Gangjee's historical approach is that it shows how contingent the strong French *sui generis* model of protection was on a range of purely domestic factors that helped shape its rural policy. His analysis also raises real questions about the "transferability" of such a model to the international stage, something he takes up in later chapters. At the same time, Gangjee charts a subtle shift in the French AOC model in the increasing importance it placed on human factors, such as stable customs or localized knowledge, in the production of regional goods. In doing so, his approach avoids falling into the trap of caricaturing *terroir* as a fabricated idea of uniqueness based on static conceptions of place, and instead recognizes the potential significance of human know-how and its intersection with geographical factors as explaining why IGOs might serve more than a communicative function, which might then impact on the scope of protection afforded to them.

This characterisation becomes especially important as Gangjee returns to the international arena in Chapter 4, which focuses primarily on the Lisbon Agreement of 1958, an agreement underpinned by *terroir* logic that sets up a multilateral registration and protection scheme for appellations of origin for all products. Gangjee makes a strong case that, despite its low membership, this treaty is worth examining because it shows not only how the French notion of the appellation of origin came to be received in international discourse, but also some of the significant difficulties involved in structuring an international agreement around the category. He traces particular problems with the Lisbon definition of "appellation of origin" (such as whether it contains an implicit requirement that the qualities or characteristics of the named product be unique to its place of origin, or whether human factors alone would be sufficient to justify protection), and with the registration scheme designed to "settle . . . matters of definitional validity and protected status in the home country, then export this status to the entire Lisbon Membership" (p.157).

It is at this point that the monograph takes another unexpected, but entirely justifiable, turn. Rather than offering a descriptive account of the operation of Article 3 of Lisbon, which requires Members to protect

registered appellations “against any usurpation or imitation, even if the true origin of the product is indicated or if the appellation is used in translated form or accompanied by terms such as ‘kind,’ ‘type,’ ‘make,’ ‘imitation,’ or the like”, Gangjee engages with the normative arguments that could be marshalled to justify protecting IGOs at particular levels. In doing so, he makes the original claim that Lisbon is not aimed at preventing “dilution” or even “misappropriation” of geographical names, but rather that it obliges “absolute” protection, based on a contractual model where each Member has recognized the mutual advantage in providing unqualified protection to others’ appellations. This is the most convincing explanation of Lisbon put forward to date, particularly given the small number of countries responsible for its negotiation. It also helps explain why such a model is unlikely to be accepted by WTO Members more generally, except in the context of bilateral arrangements between Members that are negotiated on a similar “contractual” basis.

Having set up the competing epistemic frameworks and charted the tortuous history of IGO protection domestically and internationally, Gangjee turns in Part II to the GI provisions in the TRIPS Agreement. Here, he builds on his thesis by arguing that TRIPS, being “burdened with unstable compromises” based on competing communicative and *terroir* logics, cannot provide a coherent blueprint for international protection. Despite this, he suggests that it is the very “indeterminacy of its provisions [that] makes possible the reconceptualisation of GI protection within the existing framework” (p.184). To this end, Chapter 5 explores the origins, operation, and indeterminacy of TRIPS, while Chapter 6 looks to the flexibilities within TRIPS for accommodating “an alternative or supplementary epistemology of GIs” (p.266).

Chapter 5 covers territory that is likely to be familiar to scholars of GIs, but it does so in a fresh way, affording new insights throughout. For example, most treatments of GIs in TRIPS start by focusing on the disagreement in the GATT Uruguay Round negotiations over whether, and to what extent, IGOs ought to be protected in a treaty intended to have broad membership. Gangjee goes further back, discussing the attempts at WIPO from the mid-1970s to construct the “geographical indication” as subject matter occupying a different conceptual space from both the Paris-based indication of source and the Lisbon-based appellation of origin, and showing how this approach provided the foundations for the TRIPS GI definition. He then challenges the idea that TRIPS represents a major advance in this area of the law, arguing that what was agreed in TRIPS was a heavily negotiated compromise between the EU and the US, based on their fundamentally different understandings of the message and guarantee associated with geographic terms and the appropriate legal mechanisms for protecting them against

misuse, underpinned by competing communicative and *terroir* logics. In one remarkable passage (pp.224-229), he shows that the position is even more convoluted than this. He demonstrates that the reason that the TRIPS definition of a GI requires only that the reputation of the good (rather than its quality or a specific characteristic) be essentially attributable to its geographical origin for the indication to be protected was not the result of a desire to accommodate the certification mark models of protection in countries such as the US and Australia. Rather, it was the product of competing understandings *within* the EU over what sort of geographic terms should be protected (something reflected in the EU's internal, dual model of protection, which itself fuses communicative and *terroir* logics). Exploring these themes of compromise and instability further, Gangjee then addresses the lack of a normative basis for the differing levels of protection contained in Articles 22.2 (the Paris-based misrepresentation standard, applying to GIs for all products) and 23.1 (the Lisbon-based absolute standard, but applying to GIs for wine and spirits only). He also offers a lucid account of some of the limitations of the exceptions contained in Article 24, notably those dealing with generic terms and with the relationship between GIs and trade marks. Although this is not by any means its primary purpose, Chapter 5 could serve as an excellent stand-alone primer for those seeking a detailed, nuanced understanding of the TRIPS GI provisions. More than this, the chapter succeeds as critical analysis, in that it upends the teleological reading of TRIPS that has taken hold in some scholarship (that is, that TRIPS should be seen as a useful "consolidating project" (p.262) that has set up clear, stable, global rules for protecting IGOs).

It might have been expected that the monograph would conclude with an analysis of the ongoing GI debates in TRIPS—over whether the absolute protection contained in Article 23.1 should be extended to apply to GIs for all products, and over the nature of the multilateral notification and registration scheme required to be set up under Article 23.4. Chapter 6 does deal with these issues, but Gangjee's main interest in this penultimate chapter lies elsewhere. His concern here is to ask whether there are different logics and other justifications for protecting GIs, particularly those that might support something more than misrepresentation-based protection. His central argument is that if the object of legal protection is recognized to be not just the geographic sign but also *the product itself*, this might greatly expand the range of potential justifications for legal protection. Thus, drawing on agricultural economics, he considers arguments for protecting such products based on biodiversity conservation and on rural development (that is, the improvement of rural incomes and the sustenance of rural populations by privileging regionally produced goods in international trade). Gangjee concludes by considering that the most promising

rationale, particularly given the growing interest in GIs amongst developing countries, relates to the protection of traditional knowledge. Specifically, he suggests that “‘absolute’ protection could potentially be explained on the basis that it recognizes a certain form of TK—the *savoir faire* or local knowledge identified in Chapter 3 and potentially incorporated within the TRIPS definition in Chapter 5” (p.287). His concluding argument here, building on his historical work in Part I, is that reserving the use of certain names to the “original” producer group both recognizes the collectively generated and intergenerationally transmitted knowledge that has gone into the production of the goods and allows space for such knowledge to continue to evolve.

This is a rich, densely packed book, and a major contribution to the scholarship in the discipline. But, like the Mercator projection, it does have some limitations, particularly in the way in which it prioritizes some issues (and countries) over others. For example, while Chapter 3 does an excellent job of deconstructing *terroir* and explaining the emergence of the French *sui generis* model of protection, the treatment of other countries’ models of protection in this chapter is underdeveloped. Although the communicative logic of IGO protection as reflected in German and British law is more easily explained, it would have been useful to have considered the rural and trade policies of Germany and the UK in this chapter. In addition, it would also have been useful to have addressed the experiences of other key agricultural exporters (many with large immigrant communities) at this point, in exploring why it was that the conditions for AOC-style protection did not emerge throughout the world. This would also have given more context in Chapter 4 as to why the Lisbon Agreement is generally viewed as being of such marginal importance and why recent calls for Lisbon’s “misunderstood potential” to be recognized by WTO Members⁵ have perhaps received such a muted response. Further, while Gangjee draws an insightful connection in Chapter 3 between early French boundary determinations and the current Australian and US wine GI registration schemes, this analysis tends to gloss over the context of the latter countries’ adoptions of GI-specific laws and the influence of bilateral arrangements in this regard.⁶ While Gangjee touches on the role of GIs in bilateral and preferential trade agreements at various places in the book, more might have been made on the relationship between these and the multilateral sphere. This is because such agreements bring into focus how much GIs have been used by particular countries as instruments of pure trade policy, where one trading partner is asked to afford higher or absolute levels of GI protection in exchange for other, non-GI related, trade benefits. With a growing number of preferential trade agreements making specific provision for GIs in this manner, this calls into question the importance of debates at the multilateral level over appropriate standards of protection. At the very least it suggests

that despite the growing number of WTO Members arguing in favor of GI extension, any renegotiation of the international standards is unlikely to take place on the basis of principled arguments, but rather only if appropriate trade concessions (potentially extending well beyond intellectual property issues) are granted.⁷

A related concern is with Gangjee's discussion of alternative justifications for protection in Chapter 6. While this thought-provoking chapter contains some of the most sophisticated interdisciplinary research in the monograph, the arguments here are perhaps not quite as sharp, and the conclusions not as fully realized, as in many other places in the book. Recognizing that GI protection might be justified on various non-trademark related grounds does not, of itself, provide normative arguments in favor of increasing international levels of protection beyond the misrepresentation standard. A separate case needs to be made that the rationale for protecting regionally produced goods in one country justifies mandatory international standards that oblige importing countries to privilege such goods in their domestic markets, notwithstanding the market distortions that might be involved. One can both support, for example, the EU's internal attempts to sustain its rural economy through strong GI protection and query the costs that exporting EU levels of protection would impose on other countries in which European goods are sold. Further, the idea that the preservation of traditional knowledge can provide a normative argument that supports absolute levels of GI protection raises difficult questions about the precise role that legal standards play in ensuring that developing country producers can secure access to foreign markets, and whether other issues such as ensuring adequate investment in local production, quality control, proper marketing, and fair distribution of returns from the sale of geographically branded goods are in fact key here.⁸ The problem with the attempt to draw a link between justifications and levels of protection is encapsulated by a quote at the end of the chapter, where Gangjee suggests that "[i]f the products—and those who produce them—are *sufficiently valued or important*, then the associated sign ought to be reserved for the home producer group, regardless of the sign's reception before a given audience" (p.296, my emphasis). Yet this begs the question of exactly how this "sufficiency" is to be worked out in the international sphere: at what point does the desire to safeguard, or the value of, the human know-how of a community take precedence over the communicative function of the sign in a different country? (Or is this something that can realistically only be determined on a bilateral basis?) These are extremely difficult normative questions and, in fairness, Gangjee recognizes that the ideas he raises in the latter part of Chapter 6 are at an embryonic stage, and are best seen as a call for future research.⁹

Notwithstanding these minor concerns, RELOCATING THE LAW OF GEOGRAPHICAL INDICATIONS remains an outstanding monograph. It is beautifully and engagingly written, impeccably researched and, above all, compellingly argued throughout. It imposes much needed clarity and order over the law of GIs, but not at the expense of complexity, nuance or analytical rigor. It is the most authoritative text that has been written on the topic, and will be an invaluable aid to navigators of this body of the law for years to come.

ENDNOTES

¹ See Simon Garfield, ON THE MAP: WHY THE WORLD LOOKS THE WAY IT DOES (Profile Books, 2012).

² See John P. Snyder, Map Projections in the Renaissance, THE HISTORY OF CARTOGRAPHY, VOLUME 3: CARTOGRAPHY IN THE EUROPEAN RENAISSANCE (David Woodward ed., University of Chicago Press, 1987).

³ In the original Latin: *Alterum quod intendimus fuit, ut terrarum situs magnitudines locorumque distantias juxta ipsam veritatem quantum assequi licet exhiberemus.*

⁴ Throughout the book, Gangjee uses “IGO” as an umbrella term when referring to “a category of sign denoting the geographical origin of the associated product and that category has previously figured within the IP discourse” (p.4) and “GI” more specifically when referring to what WTO Members are required to protect under the TRIPS Agreement, namely “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin”. I have tried to maintain the same distinction in this review, accepting Gangjee’s point that using the umbrella term helps to “avoid the artificial backward projection of the GI in TRIPS onto categories which are not functional analogues” (p.4).

⁵ See, e.g., Christophe Geiger et al., Towards a Flexible International Framework for the Protection of Geographical Indications, 1 W.I.P.O. J. 147 (2010).

⁶ For a comprehensive analysis of the Australian boundary-determination experience, see Gary Edmond, Disorder with Law: The Determination of the Geographical Indication for the Coonawarra Wine Region, 28 Adelaide L. Rev. 59 (2006).

⁷ This is a point I explore more fully in Michael Handler, Rethinking GI Extension, RESEARCH HANDBOOK ON INTELLECTUAL

PROPERTY AND GEOGRAPHICAL INDICATIONS (Dev Gangjee and Justin Hughes eds., Edward Elgar, forthcoming 2014).

⁸ For strong, recent analyses, see Justin Hughes, *Coffee and Chocolate—Can We Help Developing Country Farmers through Geographical Indications?*, International Intellectual Property Institute (2009), <http://iipi.org/wp-content/uploads/2010/09/Coffee-and-Chocolate-J.-Hughes.pdf>; Webster D. McBride, *GI Joe? Coffee, Location, and Regulatory Accountability*, 85 *New York University L. Rev.* 2138 (2010); May T. Yeung & William A. Kerr, *Are Geographical Indications a Wise Strategy for Developing Country Farmers? Greenfields, Clawbacks and Monopoly Rents*, 14 *J. World Intellectual Property* 353 (2011).

⁹ Indeed, Gangjee has, since the publication of his monograph, started to engage with some of these issues in more detail: Dev Gangjee, *Geographical Indications and Cultural Heritage*, 3 *W.I.P.O. J.* 92 (2012).

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CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE, by Julie Cohen. Yale University Press, 2012. 352 pp. Paperback \$52.00.

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Julie Cohen has made extraordinarily illuminating contributions to the field of law and technology. In **CONFIGURING THE NETWORKED SELF**, she articulates a compelling normative framework for her earlier interventions. Her method is eclectic, situated, and particularist. She adopts no sweeping philosophical desiderata to unify her treatment of intellectual property online. Nor do economic measures of efficiency and utility motivate the project.

Cohen's **CONFIGURING** is instead a book that takes online subjectivity and community seriously, in both its established and emergent forms. It cautions against either public or private entities trying too hard to monitor and control information flows online. It does so not in the name of fairness, welfare, utility, or deontology, but in the name of play—or, more expansively, recognizing the value of intrinsically worthwhile, “pursued-for-their-own sake” activities on the net. Grounded in cultural theory and thick descriptions of life online, Cohen's work should lead thinkers within law—and well outside it—to reconsider how they think about critical problems in the design and regulation of technology.

To demonstrate this, I'm going to focus less on how **CONFIGURING** should affect others' thought, and more on how it changed how I think about digital copyright infringement. In past work, I've endorsed legal reform that is broadly in the mainstream of technocratic meliorism,¹ including a proposal to tax broadband to compensate artists based on their popularity.

Those who take CONFIGURING seriously can't endorse such a proposal without more adequately acknowledging its "costs." Moreover, Cohen shows us why the term "costs" deserves scare quotes. Influenced by her, I use it here only in the broadest sense of "negative effects," and not to claim the patina of quantified rationality enjoyed by cost-benefit analysis.

My review focuses first on the practical implications of CONFIGURING, then addresses Cohen's methodology. A cautionary note: CONFIGURING is an extraordinarily rich, dense book. Rather than merely applying extant cultural theory to law, Cohen tends to distill it into her own distinctive social theory of the information age. Thus, even relatively short sections of chapters of her book often merit article-length close readings, optimally done by a reader far better schooled in social theory than me. What I can offer here is a brief for the practical importance of Cohen's theory, and ways it should influence Internet policy and scholarship.

As Cohen shows in her discussion of "the emergence of architectures of control," both government and corporate efforts to manage computers and the Internet have a long history. The 1986 Computer Fraud and Abuse Act criminalized "unauthorized access" to "protected" computer systems. In the 1990s, a series of changes in copyright law parried the impact of new technologies of reproduction and distribution of works. Worries over cybersecurity, industrial espionage, and pornography also shaped legislative battles and law enforcement decisions.

By the late 1990s, the Internet appeared to be at a crossroads, drifting either toward either "info-anarchy" or "perfect control." Just as the major record labels seemed to have secured an impregnable oligopoly, services like Napster disrupted their (and many other content owners') control over works. "File sharing" provoked new technology and law designed to control users' activity. Cohen wrote a series of articles at the time critiquing misguided initiatives and proposing technology and law that would give users some assurance that rights they traditionally enjoyed in the analog world would endure as more works went digital.²

Then, as now, there has been a divide between an academic community deeply committed to promoting user rights, and the content managers who aspire to monetize works. Some academics proposed a middle ground, designed to separate the issue of control from compensation. In the past, when Congress realized that new technology would lead to widespread copying, it often imposed a small fee per copy—a practice known as compulsory licensing. This regime, still in place for many works, could

perhaps be applied to digital copying, assuring some payment to artists and distributors without trampling free speech and a thriving remix culture.³ The recording industry itself has repeatedly (and successfully) lobbied to force composers and lyricists to accept a governmentally set compulsory license; turnabout is fair play.

Some say that the compulsory licensing regime can't work in the Wild West of untrammelled Internet distribution. But Terry Fisher has offered a detailed proposal in *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT*.⁴ The Fisher plan would subsidize culture by lightly taxing the communication networks that enable its uncompensated duplication, and distributing the proceeds to artists based on how often their works are accessed and viewed.

I have endorsed proposals like Fisher's in the past. And yet, looking at them from the perspective of Cohen's "networked self," I grow more skeptical. To work well, the new compulsory licensing must rely on pervasive surveillance of what is being listened to and watched. If purely based on "number of downloads" or "number of views", it would provoke extensive gaming. We've already seen scandals concerning artists who allegedly manipulated their YouTube view count (either to gain more ad revenue, or to appear more popular than they actually were). Such gaming will in turn provoke countermeasures—monitoring who is viewing and liking what. Do we really want some central authority to collect all this information, merely in order to ensure that Lady Gaga gets, say, 100 times more revenue than Lana del Ray?⁵

After reading Cohen's work, it's hard not to see technocratic plans for allocating entertainment industry revenue as an instance of "modulation," an effort to monitor and exercise soft control over certain communities (here, artists). We should reconsider the plasticity of institutions like compulsory license fees. Maybe there should be minimum compensation, to assure some degree of security to all artists (WPA 2.0?), and maximum gains, to discourage gaming at the high end? Perhaps the aspiration to precisely calibrate reward to "value," as measured by the number of times something is viewed or watched, fails on its own economic terms: a particularly effective film may do its "work" in one sitting.⁶ Or someone might reasonably value one experience of a particularly transcendent song over 100 plays of background music.

The larger point here is that there is not just a tension between the play of creativity and the copyright maximalism of dominant industry players.

Even the most progressive reform proposals can unintentionally warp creative endeavors in one way or another. The legal establishment has more often than not tried to wall out these considerations: “we’ll worry about the law and the money, and let the artists themselves figure out the creative angle.” But, as Cohen shows, the experience of play and creativity are at the core of the enterprise—they shouldn’t be treated as “add-ons” or independent of legal deliberations. We can’t get cultural policy right if we fail to consider what better and worse modes of artistic creation are on the terms of creators themselves.

What if it turns out that properly calibrating risk and reward is a near-impossible task for law? I’m reminded of the insights of John Kay’s *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY*,⁷ and in that spirit, let me make a side observation on the way to my point. At least in my experience, the best way of predicting whether someone would pursue a career in the arts was a wealthy spouse or family. The word is out: it’s simply too risky to try and make a living as a painter, musician, actor, or poet—particularly given constant pressure for cuts to welfare benefits, food stamps, and Medicaid in the United States.

But in other countries, where the social safety net is more generous, the possibility of failure is not so bone-chilling. Consider the fate of J.K. Rowling, who hit “rock bottom” (in her words) while writing, and had to rely on Britain’s benefits system.⁸ A few years of support allowed her to get a foothold in the literary profession—and without it, Harry Potter might never have been written. The implementation of the Affordable Care Act in 2014 is one bright spot for the marginally employed in the United States. Perhaps we’ll find, decades hence, that the biggest impetus to artistic careers (and independent employment of all kind) was guaranteed issue of health insurance policies via state exchanges, and subsidies to purchase them. Perhaps the health policy experts will do more to advance creativity than all the copyright policymakers combined, simply by assuring some breathing room for the (hopefully, temporary) failures of those in creative industries.

These reflections may not gather much of a following in an academy that prizes methodological rigor and citation counts over whimsy and the acknowledgement of contingency. But the academy’s own disciplines and forms of problem definition can obscure as much as they clarify.⁹ Their appeal can be more rhetorical than substantive. As Cohen has stated:

[T]he purported advantage of rights theories and economic theories is neither precisely that they are normative nor precisely that they are scientific, but that they do normative work in a scientific way. Their normative heft derives from a small number of formal principles and purports to concern questions that are a step or two removed from the particular question of policy to be decided These theories manifest a quasi-scientific neutrality as to copyright law that consists precisely in the high degree of abstraction with which they facilitate thinking about processes of cultural transmission.¹⁰

Cohen notes many “scholars’ aversion to the complexities of cultural theory, which persistently violates those principles.”¹¹ But she feels they should embrace it, given that it offers “account[s] of the nature and development of knowledge that [are] both far more robust and far more nuanced than anything that liberal political philosophy has to offer [particularly in understanding] how existing knowledge systems have evolved, and how they are encoded and enforced.”¹²

A term like “knowledge system” may itself seem very abstract, and far from the urgency of contemporary debates about privacy or intellectual property. But its very open-endedness and capaciousness is precisely what is needed as technology advances and leaves us in an increasingly “weightless” economy and society. As more economic value is located in software systems, “big data”, pattern recognition, and the “lords of the cloud” with privileged access to all these processes, we ought to feel more free to reimagine the terms of social cooperation—not less. These systems are in principle more plastic than the industrial economy they are supplanting—but may well end up being less easy to influence to reflect public values.¹³

Notably, Cohen evokes imagination in two of her chapter titles—“Imagining the Networked Information Society” and “Reimagining Privacy.”¹⁴ The value of her emphasis on particularism—and the cultural theory such close reading of actual practice supports—lies precisely in its ability to catalyze creative thought about social arrangements, fueled by attention to actually existing cultures and creativity and discretion. Like the “constructed commons” project of Madison, Strandburg, & Frischmann, Cohen’s work points to experiments in information sharing (and protecting) that need to be preserved against standardization according to monolithic economic or philosophical models.

Inspired by Cohen's work, we may well be able to get beyond the usual antinomy of information as "end product" (which justifies a high purchase price) vs. "input" (which is used as a justification for policies that set a zero or low price on content, like fair use or compulsory licensing). Cohen's work insists on a capacious view of network-enabled forms of knowing. Rather than naturalizing and accepting as given the limits of copyright law on the dissemination of knowledge, she can subsume them into a much broader framework of understanding where "knowing" is going. That framework includes cultural practices, norms, economics, and bureaucratic processes, as well as law.

We've seen that kind of ambition before, in Lawrence Lessig's *CODE: AND OTHER LAWS OF CYBERSPACE*.¹⁵ But Cohen is not willing to accept its pathbreaking "modalities" approach to the shaping and control of human action.¹⁶ As stated in Chapter 7 of *CONFIGURING*:

The four-part framework [of Lessig's *CODE*] cannot take us where we need to go. An account of regulation emerging from the Newtonian interaction of code, law, market, and norms [i.e., culture] is far too simple regarding both instrumentalities and effects. The architectures of control now coalescing around issues of copyright and security signal systemic realignments in the ordering of vast sectors of activity both inside and outside markets, in response to asserted needs that are both economic and societal.¹⁷

What is happening beyond the *CODE* framework? Aside from the theoretical rationales Cohen gives, historical developments motivate a move beyond Lessig's pre-millennial framework.

The Internet is in many ways centralizing power.¹⁸ But life online runs the gamut from frivolity to high public purpose.¹⁹ As Ethan Zuckerman observes, these high and low aims can be mutually reinforcing.²⁰ A video like "Collateral Murder" can be spliced into MIA's "Vicki Leekz" mixtape.²¹ A Twitter community formed around cricket may turn to political activism, and vice versa.²² As images, music, and words get recopied, repurposed, and remixed, symbolic orders emerge undisciplined by the usual triple authority of church, state, and home.

As legal scholars, we're conditioned to jump to the normative questions immediately, asking "is this a good thing?" It's tempting to flee to free speech-fundamentalism ("promiscuous publication and zero privacy, *uber*

alles!”) or control fetishism (“lock down and propertize!”) in order to respond decisively to fast-paced events.²³ Cohen insists that before we take any normative stance toward the blooming, buzzing confusion of Internet life, we had better understand it. Cultural theory is above all specific—to time, place, and people grappling with situated struggles.

Reading Cohen’s book, I was reminded of classic debates about the role of social science, philosophy, and values in law. As David Kennedy and William W. Fisher III have observed,

Law students struggle to understand the relationship between “the rules” and the vague arguments that lawyers call “policy.” Should “policy” begin only in the exception—when legal deduction runs out—or should it be a routine part of legal analysis? If the latter, how should lawyers reason about policy? What should go into reasoning about “policy”—how much ethics, how much empiricism, how much economics? Which of the arguments laypeople use count as professionally acceptable arguments of “policy” and which do not? Which mark one as naïve, an outsider to the professional consensus? What is it about policy argument that makes it seem more professional, more analytical, more persuasive, than talking about “mere politics”?²⁴

Cohen cleared the ground for CONFIGURING in earlier works like *Lochner in Cyberspace* and *Copyright and the Perfect Curve*.²⁵ In those articles, she explored how ostensibly neutral and objective philosophic and economic approaches failed to rise above “mere politics” in many contexts. Combining her analytic critique with the narrative of legislative history in Jessica Litman’s *DIGITAL COPYRIGHT*,²⁶ one is hard-pressed to interpret modern copyright policy as much more than a messy compromise between the commercial interests of massive communications, content, and Internet firms. That law has created a set of baseline expectations that is hard to rationalize on either economic or philosophic grounds. Moreover, efforts to justify small departures from it on such grounds miss a greater and more necessary subject of critique and reconsideration: namely, the larger information system that intellectual property and surveillance laws are underwriting.

As more traditional scholars battle over whether Comcast’s property and free speech rights should trump those of their customers,²⁷ Cohen suggests a more open-ended approach. How invasive is the deep packet inspection

that an Internet Service Provider like Comcast proposes? Who gets to monitor its monitoring? Why is it performing this surveillance? Are financial criminals as likely to be targeted as, say, copyright infringers?²⁸ Who gets the data? What type of activity will be chilled by this intervention? Can users opt out, or is the fused public and private power here for all intents and purposes monopolistic? As she notes, “[s]ome information policy problems cannot be solved simply by prescribing greater ‘openness’ or more ‘neutrality.’”

[R]ights of access to information and information networks do not necessarily correlate with rights to privacy; indeed, they more typically function in the opposite way. As network users become habituated to trading information for information and other services, access to goods and services takes place in an environment characterized by increasing amounts of both transparency and exposure [H]uman flourishing in the networked information society requires additional structural safeguards.

.....

. . . . The lives of situated subjects are increasingly shaped by decisions made and implemented using networked information technologies. Those decisions present some possibilities and foreclose others. Most people have very little understanding of the ways that such decisions are made or of the options that are not presented. In many cases, this facial inaccessibility is reinforced by regimes of secrecy that limit even technically trained outsiders to “black box” testing. We would not tolerate comparable restrictions on access to the basic laws of physics, chemistry, or biology, which govern the operation of the physical environment. The algorithms and protocols that sort and categorize situated subjects, shape information flows, and authorize or deny access to network resources are the basic operational laws of the emerging networked information society; to exercise meaningful control over their surroundings, people need access to a baseline level of information about what those algorithms and protocols do.²⁹

Trying to theorize rights and utility claims in the absence of such information may be an exercise in futility. We can’t grasp the landscape without a map.

A short review can only scratch the surface of Cohen's contributions in this book. So far, I've barely mentioned the type of selfhood her work aims to support. CONFIGURING's construction of the "networked self" is deeply insightful, and deserves at least some comment.

There is a lucky class of people who live to work, but most tend to work in order to live.³⁰ The point of life is in non-work—time to spend with family and friends, enjoy culture (low, high, and in between), to reconnect with the ultimate sources of value and meaning, and to communicate about all of this. This balance of work and leisure, or instrumentally rational action and value-driven action, is a theme of political economy. In a field preoccupied with the fair allocation of rewards from work(s) of various kinds, Cohen emphasizes the "play" of culture, subjectivity, and material practice in respective parts of her book.³¹ She helps us understand that "play" isn't just something that happens on the edges of a life well lived—it's often the point.

Cohen's work on play fills in a concept simultaneously hypostatized by natural law theory (Finnis calls play one of the seven basic human goods), and too often left under-explained within it. As Cohen shows, play is indeed capacious, ranging from remixes of music videos and punning on Twitter to the "freedom to tinker" with devices and undisturbed exploration of alternate points of view (or even alternate selves). Considering some of the edgier forms of play, we may well understand why the natural law theorists have left it relatively underdeveloped (in comparison with other basic goods like sociability, religion, life, and aesthetic experience). Moreover, one person's play can be another's boring chore (I remember how enthusiastic I was as a kid to play Monopoly, and how my poor overworked father recoiled, in mock horror, from another round of "Monotony"). Play can be paradoxical, creating (within its general aura of rest and Csikmenthalyan flow) spaces of reward and frustration, achievement and stigma. But those alternate spaces are (supposed to be a) refuge from the daily grind of getting and spending, control and submission, that are characteristic of our more hierarchically ordered economy and politics.

Space for play and leisure has been politically contested. Patterns of rest and work considered perfectly acceptable under feudalism had to be altered dramatically by capitalist enterprise. Workers fought back over decades, demanding limits on the workweek and certain basic rights. And that revolution has in turn inspired a counterrevolution in our time, promoted by both neoliberal and neoconservative ideologies.³² Under neoliberalism, the

sphere of play must either contract or bear profit. Under post-9/11 neoconservatism, there is an increasing emphasis on surveillance of all aspects of life, leaving little room for the unsupervised, unmonitored encounters vital to certain forms of intersubjectivity and self-expression.³³

Leading neoliberals and neoconservatives employ the rhetoric of emergency to announce “there is no alternative” to the social arrangements that their theories, in truth, merely recommend.³⁴ Our social networks do not need to be fonts of advertising revenue; our artists should not need to shake down every would-be fan. At least in the developed world, there is ample social surplus to support these far more creative endeavors.³⁵ Nor does the “terrorist threat” merit the level of surveillance or policing now targeted at political activists, copyright infringers, and travelers. The economic pressure of austerity and the political movement for absolute “security” are in this sense “play emergencies” in the pejorative sense of play: performed, pretended, miniature.³⁶ The men behind the curtains of banks and law enforcement agencies ominously warn of horrible consequences should they not get their way. In response, we must question: when is the cure of control worse than the diseases of disorder it promises to eliminate? When is “disorder” really an unrecognized, spontaneous order, worth preserving rather than taming and transforming?

Cohen’s book will not give us definitive answers to these questions. But in forcing us to consider them, it substantially broadens the horizon of inquiry in what are classically considered “intellectual property and privacy” disputes. While narrow specialists in each field tend to develop tunnel vision, the lived experience of Internet users inevitably discloses their intertwining (with every EULA clicked, or ad served, or warning given about the consequences of infringement and industry and government’s ability to watch it).³⁷ Powerful trends would ever more tightly restrict individual access to content, and ever expand the ability of various authorities to monitor that access. Cohen’s work forces us to reconsider those social forces in light a true “play emergency”—the declining number of free, unmonitored, unmonetized opportunities ordinary people have to pursue creative expression, cooperation, and consumption. Preserving and expanding those spaces is as worthy a vocation as promoting economic efficiency or defending rights.

ENDNOTES

¹ Matthew Fagin, Frank Pasquale, and Kimberlee Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 *Boston University J. of Science & Technology L.* 451 (2002); Frank Pasquale, *Restoring Transparency to Automated Authority*, 9 *J. on Telecommunications and High Technology L.* 235 (2001); Danielle Keats Citron and Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 *Hastings L. J.* 1441 (2011) (documenting fusion center abuses in greater detail and offering reform proposals).

² Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 *Mich. L. Rev.* 462 (1998); Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 *Harvard J. L. & Technology* 41 (2001).

³ Frank Pasquale, *Remix Culture Reconsidered*, *Madisonian.net* (Jan. 14, 2012), <http://www.madisonian.net/2012/01/14/remix-culture-reconsidered>.

⁴ See William Fisher III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (Stanford Law and Politics, 2004).

⁵ For a broader perspective on the many ways government can support creative work, see Stephen Benedict, *PUBLIC MONEY AND THE MUSE: ESSAYS ON GOVERNMENT FUNDING FOR THE ARTS* (W.W. Norton & Co., 1991).

⁶ The same problem exists in health care, where companies have an incentive to develop drugs for chronic conditions which must be taken once per day, for life (as opposed to, say, antibiotics, which are designed to completely cure the condition they target in one course of treatment). Patients (or, more likely, third-party payers) can be a continual source of revenue in the case of the management chronic conditions, but only get charged once for a cure. Frank Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 *Annals of Health L.* 269 (2010).

⁷ John Kay, *OBLIQUITY: WHY OUR GOALS ARE BEST ACHIEVED INDIRECTLY* (Penguin Books, 2012).

⁸ Mike Hale, *The Woman Behind the Boy Wizard*, N.Y. Times, July 16, 2009, at C4, available at <http://www.nytimes.com/2009/07/16/arts/television/16rowling.html> (“Ms. Rowling’s oft-told family history is told again—her strained relationship with her father, her mother’s death from complications of multiple sclerosis, her ‘short and really quite catastrophic’ first marriage, her depression while supporting her daughter on welfare payments.”).

⁹ Norbert Haring and Niall Douglas, *ECONOMISTS AND THE POWERFUL: CONVENIENT THEORIES, DISTORTED FACTS, AMPLE REWARDS* (Anthem Press, 2012); Michael Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* (Cambridge University Press, 1984).

¹⁰ Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. Davis L. Rev. 1151, 1157 (2007).

¹¹ *Id.*

¹² *Id.* at 1165.

¹³ Plasticity is a critical dimension of social power. Roberto Mangabeira Unger, *PLASTICITY INTO POWER* (Verso, 2004).

¹⁴ Julie Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE*, 9-10 (Yale University Press, 2012) (Chapters 1 and 6 are available at <http://juliecohen.com/page3.php> and <http://www.juliecohen.com/page12.php>, respectively).

¹⁵ Lawrence Lessig, *CODE: AND OTHER LAWS OF CYBERSPACE* (Basic Books, 2000).

¹⁶ John D. Luteran, *THE APPLICATION OF LAWRENCE LESSIG’S FOUR MODALITIES OF REGULATION IN A VIRTUAL SOCIETY: AN EXAMINATION OF THE LEGAL STRUCTURE OF THE WORLD OF WARCRAFT* (2007) (unpublished manuscript), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=jluteran>.

¹⁷ Lessig, *supra* note 15; Ted Striphas, Better Stories, Better Laws, Better Culture, Concurring Opinions (Mar. 6, 2012, 11:59 PM), <http://www.concurringopinions.com/archives/2012/03/story-law-culture.html>.

¹⁸ David Golumbia, *THE CULTURAL LOGIC OF COMPUTATION* (Harvard University Press, 2009).

¹⁹ See Animated GIFs: The Birth of a Medium (PBS Off Book Mar. 7, 2012), available at <http://www.youtube.com/watch?v=vuxKb5mxM8g&list=PLC3D565688483CCB5&index=1&feature=plcp> (discussing GIFs, free animated photographs that automatically replay that are widely used on the web for aesthetic or humorous purposes); Cute Cats and the Arab Spring: When Social Media Meet Social Change (lecture by Ethan Zuckerman at the University of British Columbia 2011), available at http://www.youtube.com/watch?v=tkDFVz_VL_I&feature=youtu.be (discussing why social networking sites are good places for controversial discourse, because they are easy to use, have a wide reach, and are difficult to censor); but see Tom Slee, Ethan Zuckerman's "Cute Cats and the Arab Spring", Whimsley (Jan. 5, 2012, 10:56 PM), <http://www.whimsley.typepad.com/whimsley/2012/01/ethan-zuckermans-cute-cats-and-the-arab-spring.html>.

²⁰ Cute Cats, *supra* note 19; Cory Doctorow, The Internet is the Best Place for Dissent to Start, *The Guardian* (Jan. 3, 2012, 1:12 PM), <http://www.theguardian.com/technology/blog/2012/jan/03/the-internet-best-dissent-start>.

²¹ Yochai Benkler, A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate, 46 *Harvard Civil Rights-Civil Liberties L. Rev.* 311, 321-323 (2011) (describing the "Collateral Murder" video); Video: M.I.A.—"Vicki Leekz Mixtape 1," Pinboard (Feb. 3, 2011), <http://www.pinboardblog.com/2011/02/video-m-i-a-vicki-leekz-mixtape-1/>.

²² Frank Pasquale, A Duty to Tweet?, *Balkinization* (June 18, 2009), <http://balkin.blogspot.com/2009/06/duty-to-tweet.html>.

²³ William E. Scheuerman, *LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME* (John Hopkins University Press, 2004).

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²⁵ Cohen, Lochner in Cyberspace, *supra* note 2; Julie E. Cohen, Copyright and the Perfect Curve, 53 Vanderbilt L. Rev. 1799 (2000).

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²⁸ George Washington, Copyright Infringement Is Being Treated as Terrorism, Naked Capitalism (Aug. 16, 2013, 2:28 PM), <http://www.nakedcapitalism.com/2013/08/copyright-infringement-is-being-treated-as-terrorism.html>.

²⁹ Julie Cohen, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERY DAY PRACTICE, 9-10 (Yale University Press, 2012).

³⁰ As John Kenneth Galbraith has observed, the luckier class tends to be in charge of companies and governments, with predictably biased influence on business plans and political priorities. John Kenneth Galbraith, THE ECONOMICS OF INNOCENT FRAUD: TRUTH FOR OUR TIME (Houghton Mifflin Harcour, 2004).

³¹ Cohen, CONFIGURING, *supra* note 14, at 19 (“The play of culture and the play of subjectivity are inextricably intertwined; each feeds into the other. Creativity and cultural play foster the ongoing development of subjectivity. Educators in particular have long recognized that engagement with the arts promotes both cognitive development and transformative learning. Evolving subjectivity, meanwhile, fuels the ongoing production of artistic and intellectual culture, and the interactions among multiple, competing self-conceptions create cultural dynamism.”).

³² Jonathan Crary, 24/7: Late Capitalism and the Ends of Sleep (Verso, 2013).

³³ See Mike Konczal, *Is A Democratic Surveillance State Possible?*, Washington Post Wonkblog (June 8, 2013, 12:30 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/08/is-a-democratic-surveillance-state-possible/> (discussing the convergence of the two modes of thought, the authoritarian surveillance state and the democratic surveillance state, in the modern United States).

³⁴ Naomi Klein, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (Picador, 2007).

³⁵ But cf. Nancy Fraser, *Marketization, Social Protection, Emancipation: Toward a Neo-Polanyian Conception of Capitalist Crisis*, in *Business as Usual: The Roots of the Global Financial Meltdown* 137 (Craig Calhoun & Georgi Derluguian eds., 2011) (discussing the exploitation of Global South as underwriting the Global North's welfare state).

³⁶ For historicization of emergency rhetoric, see Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, *University of Pennsylvania J. of Constitutional L.* 6 (2004).

³⁷ Margaret Jane Radin, *BOILERPLATE* (Princeton Press, 2013); *TERMS AND CONDITIONS MAY APPLY* (Hyrax Films 2013).

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