Denver Law Review

Volume 76
Issue 4 *Fifth Annual Legal Theory Symposium - Exploring Habermas on Law and Democracy*

Article 12

January 2021

The Law and Late Modern Culture: Reflections on Between Facts and Norms from the Perspective of Critical Cultural Legal Studies

Rosemary J. Coombe

Jonathan Cohen

THE LAW AND LATE MODERN CULTURE: REFLECTIONS ON *BETWEEN FACTS AND NORMS* FROM THE PERSPECTIVE OF CRITICAL CULTURAL LEGAL STUDIES

ROSEMARY J. COOMBE* WITH JONATHAN COHEN**

It would be impossible to do justice to as large and as ambitious a work as *Between Facts and Norms*[1]—nevertheless the entirety of Professor Habermas's theoretical edifice—in the space available here. Our interlocution in this symposium will address some of the central themes in Habermas's work from a particular corner of the legal academy—one that has not, as yet, been fully engaged in the rich dialogue that Habermas's work (and Habermas himself) invites. Others have suggested that Habermas overstates the pervasive and integrative nature of law.[2] Given the positivist[3] and formalist[4] conceptualization of law that dominates his work, this objection is well-founded. However, the insights, research and investigations of the Legal Realists, legal historians, legal sociologists, and legal anthropologists (whose collective enterprise we will deem a critical cultural studies of law)[5] suggest another alternative. This scholar-

---

* B.A. (Hons), LL.B. (Dist) University of Western Ontario, J.S.M., J.S.D. Stanford University. Professor of Law, University of Toronto Faculty of Law.

** B.A. cum laude (Yale), M. Phil. (Cambridge). Student at the University of Toronto Faculty of Law.

1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

2. *See* Brian Z. Tamanaha, *The View of Habermas From Below: Doubts About the Centrality of Law and the Legitimation Enterprise*, 76 DENV. U. L. REV. 989 (1999).

3. Arthur Jacobson describes Habermas's position as one of "[t]he most rigorous positivism" because, like other positivist forms of static jurisprudence, the source of law is an authoritative procedure and law is whatever those who get hold of the procedure mark as law using the procedure. *See* Arthur J. Jacobson, *Law and Order*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 190, 191–92 (Michel Rosenfeld & Andrew Arato eds., 1998). His model is "rigorous" it would seem, because it "gives control of the procedure to a political sphere" outside of and differentiated from the legal system. *Id.* at 192. Mark Modak-Truran, however, believes that Habermas goes beyond positivism by asking what provides the procedure by which "law is legitimated by its legality or by positive enactment according to certain formal procedures," with their legitimating force? The answer is "the procedure of coming to a rational intersubjective agreement." Mark Modak-Truran, *Habermas's Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461, 475 (1997). To the extent that law is still limited to its positive enactment, however, the position is still a positivist one.

4. As Jacques Lenoble puts it, "If the Habermasian model makes up for a lot of inadequacies of the Luhmannian functionalist model, it fails to move beyond formalism and remains bound to the classical idealization of human reason." Jacques Lenoble, *Law and Undecidability: Toward a New Vision of the Proceduralization of Law*, *in* HABERMAS ON LAW AND DEMOCRACY, *supra* note 3, at 40.

5. Rosemary Coombe has explored the premises and parameters of this area of sociolegal research in a recent book and in two recent articles. *See* ROSEMARY J. COOMBE, THE CULTURAL

ship indicates that law plays a more powerful role in shaping those activities we consider "political" than Habermas himself acknowledges and explores the historically contingent and contested location of the law/politics distinction he seems to take for granted. From the perspective of a critical cultural studies of law, law appears to be simultaneously more pervasive but far less integrative than *Between Facts and Norms* would have us believe.

The critical cultural study of law complicates the systems/lifeworld distinction upon which Habermas's conception of law—if not his entire theoretical edifice—rests and does so by challenging some of the central categorical distinctions of the liberal legalism that Habermas takes for granted. We will develop each of the following points in turn. First, the law may shape and provide the very substance of lifeworlds as well as the symbolic resources with which aspirations for social transformations are articulated and specific cultural meanings are, through practices of adjudication, routinely legitimated and given the force of law. Thus, even for heuristic purposes, the interaction between law and culture cannot be adequately understood in terms of a relationship between an independent system and meaningful lifeworld as discrete spaces. Second, the law creates and upholds the very public/private distinction Habermas assumes and provides forums in which social struggles over such characterizations are enacted. Rather than separating itself from the market, the law creates markets by recognizing "private" properties; it also constrains the development of democratic cultures of deliberation by excusing holders of private properties from public accountability for the political effects of their exercise of ownership. Third, a far wider range of expressive activities would appear to have "political" consequence than the narrow range of communications characterized by rational argumentation. In contexts of social pluralism, confining political speech this narrowly may reinforce systemic forms of exclusion. Fourth, capitalist mass communications systems provide not only the means, but the media for many kinds of expressive persuasion which call the social into account by calling it into question and which might therefore be considered political. Mass media provides many of the cultural forms with which communities, identities, and social aspirations are articulated in contemporary democratic societies: a theory that insists upon maintaining strict divisions between politics and the lifeworld and isolating both from market forces and commodity relations cannot acknowledge let alone accommodate these expressive practices. Finally, intellectual property laws will be drawn upon by way of example. Such laws serve to commodify mass

---

LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998) [hereinafter COOMBE, THE CULTURAL LIFE]; Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, *in* LAW IN THE DOMAINS OF CULTURE 21 (Austin Sarat & Thomas R. Kearns eds., 1998) [hereinafter Coombe, *Contingent Articulations*]; Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463 (1998).

media circulated forms as private properties, protect corporate investment in such texts, control their reproduction and circulation, and prohibit subaltern practices of media appropriation that would speak alternative truths to dominant powers. In conclusion, we will suggest that given the inherent instability of the social and its inability to fully grasp itself as a positivity, as well as the indeterminacy of language, a radical democracy cannot predefine a realm of properly political activity, but must be vigilant in providing protection to emerging forms of human expression whose political characteristics cannot immediately be comprehended.

These arguments pose serious social challenges to Habermas's characterization of law as the autonomous intermediary that neutrally transmits lifeworld energies into political expressions that speak local truths to central administrative powers. A critical cultural legal studies reveals that the law is fully imbricated in shaping lifeworld activities, bestowing proprietary powers, creating markets, establishing forms of cultural authority, constraining speech, and policing the public/private distinction that protects corporate authors from social accountability. The very marrow of contemporary political practice may be found in expressive activities that call the social into question and into account by confronting it with the contingency of its current boundaries. In worlds as textually mediated as those of late modern capitalist democracies, forms of political persuasion that call the social into question are likely to take a variety of expressive forms—including humor, parody, satire, and emotional narratives. Rather than predefining a range of activities as political—and limiting the space of the political to rational argumentation—a truly dialogic democratic politics must consider those practices that address, comment upon, and transform the meaning of dominant cultural texts. Any understanding of the political that cannot encompass such practices—and address the role of law in shaping, regulating, and constraining them—can provide only an impoverished vision of dialogic democracy and the role of law in facilitating it.

I. OF LEGAL SYSTEMS AND CULTURAL LIFEWORLDS

There is little to warrant the construction of an ideal bridge to join two autonomous realms designated as "law" and "culture." Such a construction serves only to reinforce the exhausted metaphysics of modernity which enabled their conceptual emergence as discrete and naturalized domains of social life. As Coombe (and others) have argued elsewhere, the tidy distinction between law as an autonomous system and culture as a symbolic lifeworld emerges out of a colonial framework and is itself the residual artifact of regimes of colonial governance.[6] Putting that historical argument to one side, however, an understanding of how the two terms—law and culture—have been reconfigured across discipli-

6. *See* Coombe, *Contingent Articulations*, *supra* note 5, at 21.

nary lines does serve to reveal the fundamental lineaments of critical cultural legal studies.

Over the last two decades, law and society scholars have turned away from positivist, formalist (doctrinalist or structuralist), instrumentalist, and institutionally centered accounts of law to explore law as a more diffuse and pervasive force shaping social consciousness and behavior. An enormous body of literature draws upon historical records, sociological inquiry, and ethnographic research to question law's "relative autonomy."[7] Concerns with law's legitimating function increasingly focus on law's cultural role in constituting the social realities we recognize. Such constitutive theories recognize law's productive capacities by shifting attention to the workings of law in ever more improbable settings.[8] Focusing less exclusively upon formal institutions, law and society scholarship has begun to look more closely at law in everyday life,[9] in quotidian practices of struggle, and in forms of social perception.[10]

---

7. Most scholars of law and society write against law as a body of self-sufficient doctrine, or law as an autonomous set of institutions and also reject the abstractions of structuralist analysis of law or liberal legal discourse, even when such practices are allegedly critical, as they are in critical legal studies and critical race theory. *See generally* PAUL F. CAMPOS ET AL., AGAINST THE LAW (1996); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); CHARLES SAMPFORD, THE DISORDER OF LAW: A CRITIQUE OF LEGAL THEORY (1989); PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). These might be seen as propensities to write "against law" in the sense that these scholars are writing against the law's dominant self-representations.

8. *See* Frank Munger, *Sociology of Law for a Postliberal Society*, 27 LOY. L.A. L. REV. 89 (1993); *see also* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995); Sue Lees, *Lawyers' Work As Constitutive of Gender Relations*, *in* LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 124 (Maureen Cain & Christine B. Harrington eds., 1994); Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997). For a brief, introductory discussion of the constitutive perspective, see Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide. Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21 (Austin Sarat & Thomas R. Kearns eds., 1993).

9. *See* Sarat & Kearns, *supra* note 8; *see also* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149 (1994).

10. *See generally* PATRICK EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE at xi (1998); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995); THE RHETORIC OF LAW (Austin Sarat & Thomas R. Kearns eds., 1994); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW. ENG. L. REV. 731, 731(1992); Sally E. Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11 (1994); Michael Musheno, *Legal Consciousness on the Margins of Society: Struggles Against Stigmatization in the AIDS Crisis*, 2 IDENTITIES 101 (1995); Austin Sarat, *The Law Is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 343 (1990); Austin Sarat & L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L. J. 1663, 1665 (1989).

Through historical, ethnographic and sociological inquiries, this scholarship shows that legal discourse provides significant resources for practices in which dominant social meanings are constructed and contested, and that the legal system provides institutional venues for struggles to establish, legitimate, and challenge authoritative meanings. In short, the adoption of legal strategies may give meanings the force of material enforcement. The revitalization of legal anthropology has enhanced our theoretical understandings of power and resistance.[11] Critical cultural studies of law recognize that law provides resources for rhetorical persuasion as well as regulation, possibility as well as prohibition, subversion as well as sanction. From this vantage, "law becomes a form of social mediation, a locus of social contest and construction."[12]

If law fuels hegemonic processes, it also assists counterhegemonic struggles. When law shapes the realities we recognize, it is not surprising that its spaces should be seized by those who would have other versions of social relations ratified and other cultural meanings mandated. Culturally, law is explored as discourse, process, and practice—engaged in forms of both domination and resistance.[13] Locally interpreted, law provides means and forums for legitimating and contesting dominant meanings and the social hierarchies they support.[14] Legal regimes shape the social meanings assumed by signifying properties in public spheres. Such meanings are socially produced in fields characterized by inequalities of discursive and material resources, symbolic capital, and access to channels of communication. The law creates spaces in which hegemonic struggles are enacted as well as providing signs and symbols whose connotations are always ever at risk. Legal strategies and legal institutions may lend authority to certain interpretations while denying status to others.

If understandings of law have become more cultural in this corner of the legal academy, traditional understandings of cultural lifeworlds have been transformed by developments in anthropology and cultural studies. Anthropologists have acknowledged the Orientalizing tendencies of studying culture as discrete formations—shifting focus to the study of power and meaning in everyday life. Culture has been largely reconceptualized as involving activities of expressive struggle rather than singular symbolic contexts, socially located in conflictual signifying practices

---

11. *See generally* John L. Comaroff, *Foreword* to CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (attempting to "demonstrate that new scholarship in legal history and the anthropology of law contributes to theoretical understanding of power, hegemony, and resistance").

12. Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 L. & SOC'Y REV. 1243, 1246 (1994).

13. *See* Susan F. Hirsch & Mindie Lazarus-Black, *Introduction* to CONTESTED STATES: LAW, HEGEMONY & RESISTANCE 1–2 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

14. For an extended discussion see Rosemary J. Coombe, *Contesting the Self Negotiating Subjectivities in Nineteenth-Century Ontario Defamation Trials*, 11 STUD. IN L. POL. & SOC'Y 3 (1991).

rather than integrated worlds of meaning. Culture is now recognized as both the medium and the consequence of social differences, inequalities, dominations, and exploitations—the form of their inscription and the means of their imbrication.[15] In short, an entrenched skepticism towards both law and culture as reified fields of social life—nevertheless closed systems of rationality or protected social worlds of harmonious meaning—is the intellectual hallmark of contemporary legal anthropology, and the related fields of sociolegal studies and critical legal theory.

A critical cultural legal studies explores the dynamic nature of *juridiculture* (to coin a word) as it unfolds in political processes. Habermas himself has long been concerned with the tendency of systems to "colonize" lifeworlds.[16] However, the increasing evidence that lifeworlds shape systems suggests a more dialectical relationship.[17] Culture—the meaningful forms and practices of lifeworld activity—is shaped by law, but it would be a grave misrepresentation to see this as a one way imposition. The relationship between forms of legal power, the resistance this power paradoxically both engenders and endangers, shaping and inviting—but never determining—lifeworld practices which may in turn transform law and the rights it recognizes—is both dialectic and diacritical.

Attention to the cultural dimensions of law's power suggests that law cannot operate autonomously as a hinge that protects lifeworlds from the incursions of the market and the state and neutrally transmits lifeworld "signals" to administrative powers. Although Habermas seems to believe that the lifeworld is a nonlegal form of social and behavioral regulation that provides the cultural matrix within which identities and communities are formed, it becomes clear, even in his own account, that the law's intervention in the political system affects the "signals" it mediates, such that "far from being neutral, the law is embedded in the lifeworld."[18]

A critical cultural legal studies rejects any vision of a social world in which differences exist before the law and law is merely called upon to resolve and lend authority to social claims generated elsewhere. Instead,

---

15. As Thomas McCarthy notes, Habermas's model can accommodate conflicts of interest but is less hospitable to conflicts of value, ways of life, or worldviews. *See* Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, *in* HABERMAS ON LAW AND DEMOCRACY, *supra* note 3, at 115. Disagreement continues to be marginalized even as notions of social diversity, multiculturalism, and transnationalism are incorporated into the model. *See id.*

16. Jacques Lenoble notes that Habermas recognizes that the West has entered into a historically new phase of the extension of the role of law such that juridification no longer protects lifeworlds from system intrusions but his "proceduralization" of law "does not give us a procedural way to call into question the inherent organizational structures of the state, or the specifically legal mechanisms for controlling . . . the market and the administrative apparatus." Lenoble, *supra* note 4, at 63. Hence, he characterizes Habermas as resigned to continuing colonizations. *See id.*

17. For a recent survey discussion and a set of ethnographic studies developing the proposition, see THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL (Lisa Lowe & David Lloyd eds., 1997).

18. Dick Howard, *Law and Political Culture*, 17 CARDOZO L. REV. 1391, 1428 (1996).

it explores the role of law and legal discourse in those signifying practices in which politically salient social distinctions and social differences are constructed and contested—temporarily establishing and legitimating social orders of differentiation while simultaneously providing resources with which these orders may potentially be disrupted. A critical cultural legal studies attends to the ways in which law provides the discursive vehicles that give legitimacy to socially salient distinctions, adjudicating their meanings, and shaping the very practices through which such meanings are disrupted. Law is not simply an institutional forum or legitimating discourse to which social groups turn to have pre-existing differences recognized, but, more crucially, a central locus for the control and dissemination of those signifying forms with which identities and difference are made and remade. The signifying forms around which political action mobilizes and with which social rearticulations are accomplished, may be attractive and compelling precisely because of (the qualities of) the powers legally bestowed upon them.

II. PUBLIC SPHERES AND PRIVATE PROPERTIES

If a critical cultural legal studies suggests that it is untenable to consider lifeworlds that exist before the law and illustrate, instead, that law is a constitutive force in lifeworld activity, they also join the tradition of Critical Legal Studies and Legal Realists in denying that public spheres are socially distinguishable from private interests except to the extent that the law legitimates and enforces such distinctions. A critical cultural studies of law sees such distinctions not as established prior to political activity but instead as providing sites for and stakes of political contestation.

In his early work, Habermas used the distinction between public and private to define the boundaries of political deliberation, and was properly criticized for so doing. Such a narrowing of the public sphere could not serve democratic interests if it implied that "private interests" and "private issues" would be considered inappropriate topics for public discourse. The appropriate boundaries of the public sphere must be part of any process of public negotiation, because such boundaries are never naturally given but historically constructed and "are frequently deployed to delegitimate some interests, views, and topics and to valorize others."[19] Boundaries exist only in contingent compromises that must be open to the challenges of those who seek "to convince others that so-called private matters are subjects of common concern."[20] This, at least, is a criticism of his model that Habermas has accepted[21] and largely taken into account in *Between Facts and Norms*.

---

19. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* THE PHANTOM PUBLIC SPHERE 1, 22 (Bruce Robbins ed., 1993).

20. *Id.* at 20.

21. *See* HABERMAS, *supra* note 1, at 306, 309, 314.

Two senses of the term "private" tend to disenfranchise subordinate(d) groups—that which pertains to intimate, domestic, or sexual life (which are especially likely to affect women and sexual minorities) and that which pertains to the prerogatives of private property in a market economy. By deeming such matters private, we make them off-limits to public contestation and debate.[22] Habermas's reformulated discourse theory of democracy in *Between Facts and Norms* addresses the former issue by accepting that topics cannot be ruled "out of order" by virtue of some preordained status as "private issues." Respecting the "privacy" of market allocations, however, seems to pose no particular concerns for him, primarily because of his insistence that civil society (the social space for political debate in public spheres) is distinct from the market and the administrative state.[23]

In his early work, Habermas asserted that under the altered conditions of the late twentieth century, the bourgeois model of the public sphere was no longer viable. Many legal theorists concerned with democracy and dialogue in contemporary capitalist conditions have also questioned the applicability of eighteenth-century models to late twentieth-century communications conditions. They, too, doubt the propriety of continuing to assume the communicative conditions of the bourgeois public sphere, but unlike Habermas, who appears determined to maintain its cartography, these scholars see its constitutive categories of differentiation as increasingly archaic:

> [S]peech v. action, print v. broadcast, political v. nonpolitical. Symbolic expression in its many forms . . . blurs the speech/action cleavage; new forms of technology . . . confuse courts in applying the print/broadcast distinction; arguments over what is and is not political speech have no resolution . . . .[24]

---

22. *See* George Yudice, *Civil Society, Consumption, and Governmentality in an Age of Global Restructuring: An Introduction*, 14 SOC. TEXT. 1, 22 (1995).

23. *See* HABERMAS, *supra* note 1, at 299. In this view, each sphere—the public sphere, the economic sphere, and the sphere of public administration—rather neatly has its own mechanism of social integration. Just as administrative power is the coordinating force in public administration (a rather tautological proposition), money is the coordinating motor of the economic system (a reductionist position which discounts the various social conventions and cultural belief systems which enable markets to function), and language is the medium that integrates the public spheres that comprise civil society. Although Habermas would seem to acknowledge that ordinary language communications can be distorted, he provides no mechanisms for avoiding this danger. In none of these spheres are possibilities for aggregations of wealth or concentrations of power adequately attended to.

24. Robert Trager, *Entangled Values: The First Amendment in the 1990s*, 45 J. COMM. 163, 169 (1995). Garnham makes a significant point about the shortcomings of the liberal model in contemporary conditions:

> While the rights of free expression inherent in democratic theory have been continually stressed, what has been lost is any sense of the reciprocal duties inherent in a communicative space that is physically shared . . . , the social obligations that participation in the public sphere involves . . . , duties to listen to others . . . , to alternative versions of events . . . , to take responsibility for the effects of actions that may result from that debate . . . .

Some critics of liberal legalism (from which Habermas has not fully divorced himself) complain that it continues to take communication by print as its model and aspiration. A relation between an individual intentional author and a rationally deliberating reader serves as the paradigm for the production and reception of communicative forms. Others, like legal philosopher Owen Fiss see the central rhetorical figure to be the individual "street corner speaker" who requires protection against state censorship—an increasingly anachronistic (although not wholly irrelevant) configuration in contemporary conditions.[25] In either case, justifications for constitutional rights of freedom of speech or expression cling tenaciously to Enlightenment concepts and bourgeois ideals despite fundamental transformations in the nature of contemporary communications. As Fiss asserted over a decade ago, the American constitutional tradition of freedom of expression is unable to effectively grasp the salient characteristics or challenges of capitalist mass-communications systems.[26]

In an era in which media conglomerates dominate communications, threats to the autonomy of speech and to public debate are just as likely—if not more likely—to be posed by so-called private actors than by the state. In the United States, for example, freedom of speech doctrine routinely confronts conflicts between economic and political liberties framed as competing rights.[27] Rights to political speech are often posed against rights to enjoy the prerogatives of private property (and in many jurisdictions both rights are constitutionally protected for corporations as well as persons pursuant to the fiction of the corporation as a

---

> A crucial effect of mediated communication in a context of mediated social relations is to divorce discourse from action and thus favour irresponsible communication.

Nicholas Garnham, *The Mass Media, Cultural Identity, and the Public Sphere in the Modern World*, 5 PUB. CULTURE 251, 261 (1993).

25. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) [hereinafter Fiss, *Free Speech*]; *see also* Owen Fiss, *In Search of a New Paradigm*, 104 YALE L. J. 1613, 1613–14 (1995). For an extensive discussion of the ways in which freedom of expression jurisprudence ignores fundamental facets of communication in late-twentieth-century contexts and dominant principles of protection are at odds with the realities of a mass-mediated "amusement-centered culture," see RONALD K. L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996).

26. *See* Fiss, *Free Speech*, *supra* note 25, at 1414–15.

27. Habermas does not address the numerous critiques leveled against "rights-discourse" and the defenses this critique has provoked. Lenoble correctly points to "the fundamental instability of all adjudication between competing rights. An individual right can only be established in relation to the rights of others, and therefore remains tied to the undecidability that permeates all communicative action." Lenoble, *supra* note 4, at 71. Similarly, McCarthy reminds us that

> the system of basic rights does not exist in a state of transcendental purity, but only in the interpretations of it embodied in actually existing democratic constitutional traditions. . . . [T]hese interpretations are multiple, various, and context-dependent. . . . [T]here is significant basis for reasonable disagreement. . . .[N]ot only the correct interpretation but also the proper balancing of different components of existing systems of rights will be subject to reasonable dispute.

McCarthy, *supra* note 15, at 132.

legal individual). As Fiss and others recognize, the property owner's "No Trespassing" sign generally prevails.[28]

Mass media, electronic telecommunications, instantaneous communications, and the corporate restructuring and commodification of urban space have made street corners and their speakers invisible, inaudible, and obsolete as forums and agents of political dialogue. More of the texts we encounter in everyday life are the products of corporate marketing departments than the creations of individual authors, and images beamed at us via fiber optic cables are more ubiquitous than rhetorical oratory mediated through human vocal chords. It is doubtful that protecting an individual's autonomy to speak will guarantee rich public debate when the forums for speaking and the circuits of communication are privately owned, and when those who control them have an inordinate capacity to influence the terms of debate.[29] In conditions of scarcity of access, the protection of a certain agent's autonomy to speak may well impoverish public debate to the extent that opportunities for effective communication are limited. Communications markets may ensure only that the views of those who are economically powerful will be heard in public debates.[30]

Critics of liberal free speech doctrine find that it is built upon untenable distinctions between private property and public speech in an era when so many forms of public speech require the use of private properties. Most contemporary constitutional theorists now appear to agree that some form of regulation of mass media is necessary to achieve democratic political goals,[31] given that mass communications controlled by

---

28. *See* Fiss, *Free Speech*, *supra* note 25, at 1407. For a discussion of free speech under the First Amendment, its history, and various interpretations, see PAUL CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY 123–48 (1988); DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT 39–82 (1993); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992); J.M. Balkin, *Some Realism About Pluralism. Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture. Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Allan C. Hutchinson, *Talking the Good Life. From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17 (1989); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994); Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

29. *Cf.* Fiss, *Free Speech*, *supra* note 25, at 1410–11; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987), *reprinted in* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

30. *See* Fiss, *Free Speech*, *supra* note 25, at 1413.

31. *Cf., e.g.*, THE BILL OF RIGHTS IN THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992). For an overview of recent scholarship, see Trager, *supra* note 24.

private actors and governed by market forces simply do not permit the diversity of perspectives necessary for the flourishing of dialogic democracy. State regulation of speech is thus supported as necessary to promote free speech. Free speech for those with access to media may limit the speech of those who lack such access. Access to media must be expanded if we are to secure conditions for effective communication to promote recognition of diverse interests in the political process and this may well involve regulation of the exercise of private property—limits to the rights of shopping mall owners to control access to their properties, and regulations limiting campaign expenditures, for the most oft-cited examples.[32] By excluding realms of private law and market forces from the space he regards as political, the model of democracy Habermas provides would keep existing allocations of communicative power intact while entrenching corporate dominance over realms of public communication.

Some critical legal scholars go further still, suggesting not only that a proactive state needs to intervene in private property relations to engender public debate, but that we need to denaturalize the modern public/private distinction that would frame the issue in such terms. According to Allan Hutchinson, for instance, liberal commitments to such dichotomies preclude the resolution of such dilemmas[33] or the realization of a truly democratic polity,[34] such that the modern public/private distinction is politically untenable even as a description:[35]

> As sovereign, the government is as responsible for its active decisions not to intervene and regulate as it is for its decisions to act affirmatively. . . . The protection of private property and the enforcement of private contracts by the government attests to the strong and necessary presence of government in private transactions. . . . Property and contract are creatures of the state and support for these allocative regimes is neither more or less politically neutral or activist than opposition to them. The question is not whether government should intervene, but when and how . . . .[36]

In contemporary American and Canadian jurisprudence, for example, when public speech interests come up against private property interests, the latter almost invariably triumph, ensuring that "the law insulates vast sectors of the social hierarchy from official scrutiny and public accountability."[37] Those who hold private property are not required to con-

---

32. *See* Fiss, *Free Speech*, *supra* note 25, at 1417–18; *see also* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 11–13 (1998) (discussing the threats to the public sphere posed by concentration of economic power in the context of campaign expenditures).

33. *See* Hutchinson, *supra* note 28, at 20.

34. *See id.* at 19–20.

35. *See id.* at 21.

36. *Id.*

37. *Id.* at 22.

sider public interests in expression when exercising their property rights. Once we acknowledge the state's role in creating and enforcing property rights, however, "the question of whose entitlements are to be protected from whose interference becomes a contested matter of political choice rather than the correct application of abstract principle."[38]

William Forbath, in a recent critique of Habermas's assumptions about economic life, makes a similar point.[39] Forbath suggests that Habermas's view of the economy as a self-regulating system ignores the insights of Legal Realists and their Critical Legal Studies heirs, who have repeatedly shown that markets, rather than being self-regulating are in fact "political artifacts, based on and constituted by highly plastic cultural norms and legal rules."[40] Rather than being uncontested, institutional arrangements, market presuppositions about property rules, ownership entitlements and bargaining norms are far from uncontroversial. Radical reorganizations of property relations are possible and compatible with both human autonomy and economic efficiency:

> The Neo-Realists . . . have shown in painstaking detail that far from being reasonably self-defining, the legal concepts of property and contract leave open a great variety of possible sets of rights and ground rules, each with distinctive distributive consequences. One may believe that markets, as decentralized arenas of exchange and coordination, are indispensable to freedom and efficiency, and still one must choose among an indefinitely wide range of alternative sets of rules and rights, and of alternative arrangements for decentralized production and exchange. Which of them are most autonomy enhancing, or most conducive to democracy, or most likely to promote economic growth? . . . [I]nsulating the economic order from democratic decision making means excluding a world of political choices from the very processes that Habermas insists should govern such choices.[41]

This poses serious social problems for a theory that bases democratic legitimacy in ideal discursive conditions. We would echo Lenoble when he suggests that

> the mere reinforcement of argumentative procedures at the center of civil society seems to me impotent to counter the effects of the relations of force that structure the socioeconomic field. It is doubtful that the mere virtues of argumentation in the midst of public space can counterbalance the perverse effects of the colonization of the life-

38. *Id.*

39. *See* William E. Forbath, *Short-Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life*, *in* HABERMAS ON LAW, *supra* note 3, at 272.

40. *Id.* at 280 (citing the work of Albert Hirschman, Geoffrey Hodgson, Amitai Etzioni, Fred Block, Charles Sabel, Roberto Unger, Duncan Kennedy, and Karl Klare).

41. *Id.* at 281.

world, such as the commercialization of culture and the bureaucratization of important aspects of private life.[42]

III. OF RATIONALITY AND POLITICAL COMMUNICATIONS

Just as preconceptions about "private" interests shape those activities we deem to take place in "public" spheres and thereby limit arenas of potential political dialogue, determining which expressive activities are "political" is necessarily a process of social exclusion. The distinction between political and nonpolitical speech becomes more difficult to defend in situations characterized by growing social inequalities, multiculturalism, transnationalism, and increased sensitivity to sexual and racial axes of discrimination. Most liberal legal commentators favor the protection of speech that "is both intended and received as a contribution to public deliberation about some issue."[43] Although those who favor speech rights as necessary incidents to the self-expression of sovereign individuals feel that protection of merely political speech is too restrictive a field of protection, more consequentialist approaches limit protection to speech that contributes to public deliberation of political issues. All of these positions (including Habermas's own) presuppose that the political can be defined prior to socially signifying activities and as a category for evaluating them. This predilection, we suggest, may be traced historically to European understandings of civil society and the public sphere—both concepts that have been revitalized in contemporary critical debates about their continued relevance.

Critics of the bourgeois public sphere idealized in Habermas's early work suggested that the so-called universal categories of this space of ideal communication—public and private, speech and property, political and nonpolitical—were both exclusionary and elitist. To the extent that a realm designated political is delineated in advance of social activities of articulation, such parameters will inevitably be perceived from partial perspectives, privilege particular interests, entrench identities, and limit identifications. Of particular concern to critical legal scholars is the restriction of political discourse to issues involving the common good, the foundational distinction between public and private[44] and the privileging of rationalist forms of communication.[45] Other legal scholars have ad-

---

42. Lenoble, *supra* note 4, at 76.

43. THE BILL OF RIGHTS IN THE MODERN STATE, *supra* note 31, at 304.

44. See generally Howard, *supra* note 18, for a discussion of the foundational distinction between public and private, and Forbath, *supra* note 39, for a more critical analysis of the distinction.

45. For explorations of the forms of rationality presupposed, see Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory?*, *in* HABERMAS ON LAW, *supra* note 3, at 82; Lenoble, *supra* note 4; Modak-Truran, *supra* note 3; McCarthy, *supra* note 18; William Rehg, *Against Subordination*, *in* HABERMAS ON LAW, *supra* note 3, at 257; Ulrich K. Preuss, *Communicative Power and the Concept of Law*, *in* HABERMAS ON LAW, *supra* note 3, at 323.

dressed the first of these restrictions,[46] and we have already considered the second. The third restriction will be our concern here.

Habermas's concept of rational discourse draws on Kant's idealized conception of reason as well as Hannah Arendt's work on political judgment and communicative power. In its most abstracted form, it consists of "an idealized linguistic exchange [between a speaker and a hearer] in which [the] hearer [makes] a yes or no response to a validity claim [embodied] in a speech act . . . uttered by [the] speaker."[47] Can such a simple exchange provide an adequate building-block for democracy in political communities characterized by the coexistence of multiple and ever-emergent forms of social difference, or does it reflect a form of cultural bias?

Feminist scholar Iris Marian Young suggests that to restrict the political to deliberation about the common good will have discriminatory effects whenever existing distributions of symbolic or material goods are unequal; appeals to a "common good" are likely to perpetuate and reproduce existing privileges to the extent that "particular" experiences and interests are defined as such from the vantage point of the powerful.[48] Political communication, however, necessarily involves encounters with differences which cannot be "transcended" by appealing to a common language (which will inevitably be that of the dominant class to the extent that local vernaculars will be deemed idiosyncratic). As political theorist Nancy Fraser points out, even the process of discursive interaction in formally inclusive arenas puts some people at a disadvantage; those in subordinate social groups tend to employ styles and idioms of expression denigrated and marginalized by the mainstream.[49] For Fraser, this implies the need for a number of distinct public spheres (which Habermas appears now to agree with) in which deliberations take place in the context of local lifeworlds. For Young, however, the political itself must be expanded to encompass more than mere argument. To speak "across differences of culture, social position, and need"[50] requires respect for embodied and particular expressive practices such as greeting, gesture, humor, wordplay, images, figures of speech, seduction, and narrative. In short, Young argues that models of deliberative democracy ignore or trivialize those very forms of communication through which differences are expressed.

---

46. For critical discussions of the concept of the common good in *Between Facts and Norms*, see Jacobson, *supra* note 3; McCarthy, *supra* note 15; Rosenfeld, *supra* note 45.

47. Lenoble, *supra* note 4, at 47.

48. *See* Iris Marian Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120 (Seyla Benhabib ed., 1996).

49. *See* Fraser, *supra* note 19.

50. Young, *supra* note 48, at 127.

By restricting his "concept of democratic discussion narrowly to critical argument" Habermas "assume[s] a culturally biased conception of discussion that tends to silence or devalue some people or groups."[51] Young proposes that a truly "communicative democracy" would respect other forms of meaning-making activity than those of rational argument, because the latter contain cultural biases which devalue forms of understanding and expression characteristic of those who are socially marginalized. They may also facilitate gender bias to the extent that women's use of language may be more "tentative, exploratory, or conciliatory."[52] The speaking styles and rhetorical forms characteristic of sub-cultural vernaculars may put their expressions of social concern beyond the pale of what is properly considered political in deliberative democracies. Rap music and forms of black religious oratory, for example, often (but not always) convey highly political messages through culturally specific forms of persuasion, but are unlikely to be acknowledged as political expression due to their form, regardless of their effects.

Habermas's rationalism cannot encompass the range of expressive activity that has political meaning and consequence. There is no doubt that in *Between Facts and Norms*, Habermas has greatly expanded the scope of communications that might be considered politically relevant by multiplying the number of operative public spheres in which opinions, interests, wills, and identities are forged. Such publics are privileged precisely because of their intimate relations with meaningful experiences in the contexts of contingent lifeworlds. Nonetheless, his work still seems to assume that lifeworld contexts exist in a pristine integrity from market forces and that "ordinary language" is the authentic vehicle of their maintenance and reproduction.[53]

Public spheres are dominated by the mass media as channels for communication, community-formation and exerting influence—as Habermas himself acknowledges. Such media, however, are seen merely as conduits for communications that are imagined to be autonomous from market forces.[54] Habermas does finally acknowledge the literature on the culture industries that delineates the political economy of media ownership, program structuring, and financing. Moreover, he gives long overdue acknowledgment to reception theories and cultural studies that emphasize the interpretive work that consumers do as audiences in actively refashioning the media texts they receive. Ultimately, however, this literature is only deployed to nuance Habermas's theory, rather than serving to subvert or transform it. These interpretive strategies are viewed as the activity of rational agents whose agencies are in no way influenced by the texts they consume and whose lifeworlds remain

51. *Id.* at 120.
52. *Id.* at 123.
53. *Cf.* HABERMAS, *supra* note 1, at 352–64.
54. *Cf. id.* at 376–79.

autonomous from the cultural forms the media affords them. The possibility that market driven means, meanings, texts, and forms of communication may actively shape lifeworld contexts and that media texts might themselves become part of "ordinary language" is never envisioned. Nor is the constitutive role of law in these processes alluded to.

IV. OF CULTURAL LIFEWORLDS AND MARKET FORCES

If the protection of public speech can no longer be guaranteed in contemporary conditions of late capitalist democracies to the extent that we insist on isolating it from considerations of private property, it has also become more and more incredible to believe that politics is a sphere we can isolate from consumer capitalism. One does not need to embrace a postmodernist philosophy to agree that "the modernist separation of social spheres, in particular the separation of culture on the one hand from politics and economics on the other" begs the question of how people endow their lives with the meaning that motivates and legitimates social action.[55]

In *Between Facts and Norms*, Habermas assumes a less hostile attitude towards mass media than he did in earlier work, but his ambivalence towards mass mediated cultural forms is still clearly manifest.[56] Primarily this ambivalence appears to stem from Habermas's conviction that the conveyance of information to reach understanding is the privileged, if not exclusive form of political communication. Whether what is communicated is needs, interests, or issues, and whether wills or opinions are formed, he assumes that rational communications will fully accomplish this. The political economy of mass media interests Habermas only to the extent that it may influence the flow of information between the public spheres and the political system. To the extent that modern political spheres are defined by rational debate, "information provision is stressed

---

55. *See* Garnham, *supra* note 24, at 253.

56. As Peter Dews puts it:

> He does not conceal the mass of evidence suggesting the extent to which the manipulated, media-saturated public sphere destroys the potential for an effective democratic opinion to form . . . . One could also argue that Habermas's enthusiasm for the "post-Marxist" category of "civil society," already tarnished by the latest developments in Eastern Europe, seriously underplays the continuing role of social class as a factor in determining access to channels of political influence. In *Faktizitat and Geltung* he is obliged to appeal, rather weakly, to the "normative self-understanding of the mass media," as informing and facilitating public discussion, in order to convince his readers that issues of sufficient common concern will eventually obtain a hearing. Even then, however, he stresses that only crises are capable of mobilizing people successfully. Can such sporadic movements really be said to constitute "communicative practices of self-determination?"

PETER DEWS, THE LIMITS OF DISENCHANTMENT: ESSAYS ON CONTEMPORARY EUROPEAN PHILOSOPHY 199 (1995). For an informative discussion of how we might rethink class relations in conditions characterized by concentrations of media power and monopolies over information, see John Carlos Rowe, *The Writing Class*, *in* POLITICS, THEORY, AND CONTEMPORARY CULTURE 41 (Mark Poster ed. 1993).

and entertainment is negatively evaluated."[57] Contemporary variants of critical social theory, however, insist that contemporary identity politics and new social movements are forged within "the institutions of mass-cultural dissemination [which] are seen as providing and structuring the cultural field on which these fragmented and diverse identities are formed and reformed":[58]

> [A]n ever-larger proportion of the cultural goods and services consumed by the world's population are being conceived, produced, and distributed by . . . multinational corporations—not to speak of the consumer goods and their associated advertising that now play such an important role in the creation and maintenance of cultural identities.[59]

We will not be the first to suggest that the sophistication of current understandings of textuality has not sufficiently informed contemporary theories of politics. The conceptual repertoire of such theories seems remarkably isolated from theoretical insights into the nature of culture and communication. The transparency of language as a public medium through which facts and values are communicated is presupposed within theories of political communication whether these are centered upon paradigms of individual face-to-face communication or of autonomous and intentional authors addressing independent reflexive readers.

Critical cultural studies (including anthropology, communications, sociolinguistics and their legal variants) have shown that human beings always speak with and within historically specific modes of representation. The lifeworld resources available for communicative activity shape our ways of knowing even as we use them to express identity and aspiration. We create social realities discursively and through systems of signification we transform in the process. Discursive social interactions and the opportunities for imaginative meaning making they yield are paramount to human life and crucial to historical change. In too much of contemporary political theory, however, highly mediated symbolic forms are treated as the unproblematic expressions of singular authors and as unmeditated reflections of external realities that pre-exist (and are uninfluenced by) their circulation.[60] Processes of information production, distribution, and consumption, however, play an ever greater role in contemporary social and cultural theories; mass media is recognized as central, not only in terms of the forms and channels of communication, but also in terms of providing the media we communicate *with*. Is it sensible to continue to maintain a Romantic opposition between culture as an

---

57. Garnham, *supra* note 24, at 253.
58. *Id.*
59. *Id.* at 256.
60. *Id.* at 261.

authentic lifeworld and capitalist market relations as rational systems which alienate us from human meanings?

Habermas, like many contemporary constitutional theorists, clearly recognizes the dangers of corporate control and concentration of ownership, and the effects of free market principles in limiting the cultural resources, information, and modes of argumentation available to us in a consumer society. Contemporary social theory, however, suggests that mass mediation is far more extensive as a force shaping communications. As Nicholas Garnham puts it, what political theory still fails to grasp is "that what has also come to be mediated is the content of communication"[61] itself.

> Our everyday social relations, our social identities are constructed in complex processes . . . of [media] mediations. We see ourselves . . . in terms of ways of seeing those identities constructed in and through mediated communications...and we often express [these] using objects of consumption provided and in large part determined by the system of economic production and exchange.[62]

This is not, however, simply to equate media with culture. Such an equation reifies and freezes culture and elides the very social practices through which meanings are generated and transformed.[63] Lifeworlds are produced through the construction and contestation of meaning. The reactivation of media-activated textuality is central to cultural reproduction and to social transformation. The political work that such practices of interpreting commodified textuality achieve cannot be reduced to information transfer in the service of rational discourse. Use of media to make meaning is often a constitutive and transformative activity, not merely a referential or descriptive one.

Individual identities and cultural communities are dialectically created and related through signifying activities that must deploy socially available vehicles of significance. Increasingly, the most widely accessible cultural forms are those conveyed by and appropriated from mass media channels of communications. Indeed, access to media signifiers might well be deemed a prerequisite to the proliferation of alternative understandings in the public sphere. Law, however, intervenes powerfully to prevent such possibilities.

---

61. *Id.* at 260.

62. *Id.* at 260–61.

63. *See* Dana Polan, *The Public's Fear: or, Media As Monster in Habermas, Negt, and Kluge, in* THE PHANTOM PUBLIC SPHERE 33, 35 (Bruce Robbins ed., 1993).

V. OF INTELLECTUAL PROPERTIES: PRIVATE PROPERTIES AND PUBLIC SPEECH

The imagery of commerce and the commodification of imagery provides a rich semiotic source for expressive activity in contemporary public spheres. In consumer cultures, however, most pictures, texts, motifs, labels, logos, trade names, designs, tunes, and even some colors and scents are governed, if not controlled, by regimes of intellectual property. As Coombe has explored in great detail elsewhere, intellectual property laws (copyright, trademark, publicity rights, design patents, merchandising rights and some consumer protection laws) create private property rights in cultural forms or lifeworld resources and thereby insinuate commodity relations into most forms of lifeworld communications.[64]

Film theorist Miriam Hansen suggests that contemporary public spheres cannot be legitimated by appeal to the liberal-bourgeois model, because they can "no longer pretend to a separate sphere above the marketplace."[65] Corporate public relations have an increasing presence and influence in public domains and spaces of leisure, entertainment, and consumption are colonized by "the privately owned media of the consciousness industry."[66] Nonetheless, as Coombe has argued, by virtue of the legal bestowal of intellectual property rights, corporate producers of those cultural forms gain all of the powers and privileges of bourgeois authors with none of the social responsibilities and public accountability historically invested in that political figure.[67]

In the modern public sphere, an "unrestricted rational discussion of public matters that is open and accessible to all in the service of producing consensus about the common good"[68] was both anticipated and encouraged. The proliferation and increased circulation of print media facilitated the creation of a critical "public." The modern figure of the author emerges concomitantly with this print-mediated public; the very act of publishing implies an appeal to reason, that is, to the reflexive capacities of a readership engaged in relationship to a print-based public sphere. This unitary author who speaks with a single voice and possesses a singular self embodied in unique textual expressions deemed to be his "works," and thus his property,[69] is the conceptual foundation of copy-

64. *See* COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 5.

65. Miriam Hansen, *Unstable Mixtures Dilated Spheres: Negt and Kluge's* The Public Sphere and Experience, *Twenty Years Later*, 5 PUBLIC CULTURE 200 (1993).

66. *Id.*

67. *See* COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 5.

68. *Id.*

69. *See* Rosemary J. Coombe, *Contesting Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397, 398–99 (1994) (exploring the historical emergence and consolidation of these ideas in England and Germany in a review of historical literature on copyright).

right, later extended by implication to trademarks, design patents and rights of publicity.[70]

As modes of technology for the transmission of cultural products have proliferated, the author-function has been stretched to accommodate them. Rather than outline a history, an example will suffice. The originating role in cultural reproduction has increasingly become centralized in corporate entities due to the complexities of the divisions of labor and the scale of capital involved in creating new media works for new technologies of dissemination.[71] Legally, however, the bourgeois author-function maintains its hegemony. Drawing upon Edelman's pioneering work, sociologist Celia Lury points to the relocation of authorship with respect to cinematographic works. A film is clearly the product of highly differentiated labor and of a multiplicity of creative processes not easily accommodated by the legal fictions of individuated creation, singular personality and juridical subjecthood that copyright law crystallizes in the figure of the author as first owner of copyright. By vesting legal rights of authorship "in the collective subject constituted by the representatives of the capital used to produce the film,"[72] the attributes of the creative author are extended to capital itself; "the 'original' moment here is thus that of investment. By contrast, the 'creative' labour of others involved in the process of film production is proletarianised in order to deprive them of such a right."[73]

Romantic ideologies of authorship justify both copyright protections and the commodification of publicly circulating cultural texts as the 'private' properties of corporate individuals. Modernity's legitimating rhetoric—historically based upon democratic dialogical ideals—now serves to protect corporate hegemony over increasingly monologic domains of mass culture.[74] Fictions of creativity, personality, and originality are preserved to legitimate the rights of investors to control the commerce in and circulation of corporately-produced textuality, and to police its reworkings by others.

Today's spaces of civil society, public spheres, and emergent counterpublics are fundamentally different from those of the bourgeois public

---

70. For an overview of some of the developing literature on the history of literary property in the eighteenth century, see *id.* and the sources cited therein. For an excellent collection of essays on historical and contemporary dimensions of authorship and copyright, see THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

71. *Cf.* CELIA LURY, CULTURAL RIGHTS: TECHNOLOGY, LEGALITY AND PERSONALITY 34–35 (1993).

72. *Id.* at 35.

73. *Id.*

74. *See generally* THOMAS STREETER, SELLING THE AIR (1996) (showing how the author-function was continually extended to maintain the fiction of individual authors and readers in relations of direct contractual exchange in the development of television broadcasting in the United States).

sphere whose demise Habermas has famously lamented. Nonetheless, intellectual property laws still privilege the figure of the author, using conceptual premises that presuppose the continuance of eighteenth-century European conditions. Today's authors—corporate holders of intellectual property rights in the promotional texts proffered by mass media—have all of the exclusive rights and privileges of the bourgeois author and none of his traditional responsibilities or forms of accountability. Corporate authors cannot be held accountable in any direct way for the advertising messages they convey in unidirectional forms of illocutionary address because they so seldom assume the form of rational argumentation and provide no space for response. They are, however, responded to in lifeworld activities of appropriation, but these are always at risk of being censored as forms of intellectual property infringement. Public dialogue about the greater good—once encouraged by the activities of publicly responsible authors—is no longer even considered a goal that might be accomplished through the legal recognition of authorship via intellectual property laws. Instead, the law increasingly serves to ensure that returns on capital investment in forms of commercial speech are secured, but at the price of creating monologic lifeworld conditions through unidirectional forms of illocutionary address. New communications technologies pose new opportunities for more democratic forms of dialogue, but even these discursive spaces (like the Internet) have become warzones between those who would seek to use intellectual property rights to censor expressive speech which "speaks back" to corporate power and those who attempt to use this space to subject mass media cultural texts to social circulation, shared deliberation, lifeworld commentary, critique, satire, and parody. Alternative public spheres are vulnerable to the very legal power that should, on Habermas's account, transmit their expressions to the core of administrative powers. Understanding how the law at once constitutes and threatens alternative public spheres undermines any simple sense of bifunctional duality.

Legal frameworks enable the reproduction and repetition of cultural forms as ever the same marks of authorial proprietorship, while paradoxically prohibiting and inviting their interpretive appropriation in the service of other interests and alternative agendas. Such legal regimes are constitutive in shaping commercial and popular culture, both in terms of the cultural power that the law affords holders of copyright, trademark, and publicity rights, but also by creating the incentives for the mass dissemination of symbolic forms which ensures their ubiquity in daily life. Scholars in literary theory, communications, film studies, and political theory point to the social importance of media-circulated cultural forms and their political significance in contemporary consumer societies. These signifying vehicles assume local meanings in the lifeworlds of those who incorporate them into quotidian practices, emergent identities, and nascent communities. They may also provide rhetorical means with

which to articulate appeals for political recognition, corporate accountability, and social transformation.[75]

We might point to one central paradox of postmodernity: just as all forms of cultural difference are appropriated by corporate interests in the authorship of new commodity forms that circulate publicly through mass-media communications, the proliferation of publicly-disseminated commodity signs simultaneously enriches the realm of cultural resources with which counterpublics may be forged.[76] Such alternative public spheres, however, remain vulnerable to the legal power that authorship confers upon commercial-industrial forces of publicity. Corporate cultural power is maintained and insulated from public scrutiny by legal liberalism's distinctions between public and private, property and speech, fact and fiction, and commercial and noncommercial forms of expression. The deployment of such distinctions in intellectual property regimes serves to privilege the appropriations, decontextualizations and commodification of lifeworlds by capitalist interests as acts of authorship, while it simultaneously delegitimates those creative reappropriations around which counterpublics form as acts of illicit piracy. Although corporate appropriation of cultural forms and the appropriation of mass media texts in the lifeworld activities of others can never be fully contained, the dialectical relationship between legally created forms of power and legally investigated forms of resistance clearly alerts us to the difficulty, if not the futility of sustaining any vision of pristine lifeworlds isolated from market systems or of law as a neutral mediating force between them. Today's spaces of civil society, public spheres and counterpublics are fundamentally different from those of the bourgeois public sphere that Habermas holds in such high regard.

Postliberal and postliterary public formations thus pose different questions for democracy and demand different political responses. The modern ideal of intentional authors appealing to the rational deliberation of readers, or the idealized linguistic exchange in which a hearer arrives at a yes or no response to a validity-claim in a speech act that has been uttered by a speaker,[77] are inadequate formulations for communication in a promotional culture[78]—such as our image and logo-saturated world—where corporately-authored messages, flashing images and rapid soundbites are dominant signifying modes. Messages conveyed by quickly circulating evanescent signifiers on a multitude of shifting surfaces can-

---

75. For longer discussions and numerous examples, see Rosemary J. Coombe, *Sports Trademarks and Somatic Politics*, *in* SPORTCULT 262 (T. Miller & R. Martin eds., 1999).

76. *See* Hansen, *supra* note 65.

77. *See* Lenoble, *supra* note 4, at 47.

78. *See generally* ANDREW WERNICK, PROMOTIONAL CULTURE: ADVERTISING, IDEOLOGY, AND SYMBOLIC EXPRESSION (1991); Andrew Wernick, *Promotional Culture*, 15 CAN. J. POL. & SOC. THEORY 260 (1991). Wernick says that North American culture has come to present itself at every level as an endless series of promotional messages; advertising, besides having become a most powerful institution in its own right, has been effectively universalized as a signifying mode.

not be effectively countered with oral arguments or written treatises. Indeed, it may be impossible even to say "no" in any fashion that is persuasive or audible when responding to commercial culture that does not deploy mass media forms and tactics and use the private properties of others to refuse their connotations.

In short, the commodification of cultural forms creates new relations of power in contemporary cultural politics—arenas for connotative struggle.[79] If we recognize cultural signifiers as multivocal sites of conflict bearing the traces of social struggles and historically inscribed differences, then laws which govern the circulation of these forms—controlling their ironic reproductions and parodic recodings—necessarily intervene in processes of defining the social and its parameters by enabling and legitimating practices of cultural authority that attempt to contain the expression of difference in the public sphere.

In *The Cultural Life of Intellectual Properties*, Coombe shows that intellectual property law does not function simply in a rule-like fashion, nor is it adequately portrayed as a regime of rights and obligations.[80] Although it is constructed through a rhetoric of private property rights and public benefits, it is necessary to go beyond its self-representation to show how it is also simultaneously a generative condition and a prohibitive boundary for practices of political expression, public sphere formation, and counterpublic articulations of political aspiration. This is not immediately apparent, however, if one limits one's scholarly gaze to constitutions and statutes, human rights covenants and reported cases. From the perspective of a critical cultural legal studies, the (social) life of the law cannot be explored simply in terms of its *logos*, positivities, or presences. It must be seen, as well, in terms of "counterfactuals,"[81] the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations. The law's impact may be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional forums. The law is at work shaping social worlds of meaning—not only when it is institutionally encountered, but when it is consciously and unconsciously apprehended. Its power is at work when threats of legal action are made as well as when they are actually acted upon. People's imagination of what "the law says" shapes lifeworld evaluations and value commitments as well as the expressive forms chosen to assert claims for collective recognition. People's anticipations of law (however reasonable, ill-informed, mythical, or even paranoid) may actually shape law and the property rights it protects. The

---

79. *Cf.* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW 204 (1991).

80. COOMBE, THE CULTURAL LIFE, *supra* note 5.

81. PATRICK BRANTLINGER, CRUSOE'S FOOTPRINTS: CULTURAL STUDIES IN BRITAIN AND AMERICA 64 (1990).

law is a palpable presence when people create their own alternative standards and sanctions governing the use of corporate properties in the moral economies that emerge in law's shadows.

VI. CONCLUSION

"We surely must address the legitimacy of the law in relation to the rights of democratic participation that underpin the 'ethics of communication' in political and legal fields."[82] We cannot do so, however, if we begin from a position that cordons off laws governing private property, communications markets, and commercial speech from critical scrutiny and democratic accountability. We cannot expect the law to protect "fundamental individual rights" as conditions of the participatory structure of public communication if we fail to recognize the political implications of the fact that law, by protecting the interests of corporations as individual rights holders in the public sphere, also guarantees forms of corporate communicative hegemony.

Theorists of dialogue and democracy in contemporary conditions must address the role of the market in shaping means and forms of communications in civil society. George Yudice and Bruce Robbins argue that the concept of civil society will only continue to have critical purchase if it is capable of engaging the "global conjunctures of culture and capitalism" as well as the practices through which publics and counterpublics "maintain significant and even adversarial autonomy within, and even perhaps, by means of the market."[83] They plead for recognition of a more "creative politics of citizenship"[84] and a greater creativity in conceiving the political such that it can at least potentially encompass a greater range of "social sites of production and reproduction" that will include spheres of commerce and consumption.[85] In a world where the media through which views are disseminated are centralized, corporately owned, and operated for profit, subaltern social groups are both culturally disenfranchised and materially deprived of means to public participation. As media theorist Miriam Hansen suggests, "the media of industrial-commercial publicity is an inescapable horizon, and the most advanced site of struggle over the organization of everyday experience."[86]

Democratic dialogue will require more than equal access to the forums and channels of communication—the material conditions for conversation. It will require consideration of appropriate access to the symbolic means of communication—the cultural conditions for conversation. If the most powerful signifiers and those most widely disseminated are the private properties of an elite—if their meanings are controlled and

82. Lenoble, *supra* note 4, at 61.
83. THE PHANTOM PUBLIC SPHERE, *supra* note 19, at 112.
84. *Id.*
85. *Id.* at 113.
86. Hansen, *supra* note 65, at 211.

their polysemy exclusively possessed—then it becomes impossible to engage in dialogic interaction with and within the historical lifeworld in which we are situated. The social systems of signification through which a dialogic democracy constitutes itself must be available, not merely to convey information—an unduly reductivist understanding of human communication—but to express identity, community, and social aspiration in the service of imagining and constructing alternative social universes. Regardless of those who assert them, such dialogic practices may be of larger social benefit, for they provide conversational means for new allegiances and affiliations—the basis for recognizing the other in one's self and one's identification with others. Dialogic practices must be public and widely visible to serve these purposes; this is only possible when they can be mass-disseminated. In a market economy, this will necessarily involve mass reproduction and distribution processes linked to the commerce that increasingly constitutes relations of communication. No pristine space of noncommercial dialogic exchange need be insisted upon, nor is it appropriate to privilege particular discursive sites, cultural mediums, or signifying vehicles as defining the limits of the properly political.

It may well be imperative, then, *not* to isolate a sphere of political activity when assessing the effects and affect of expressive activity. In David Carroll's terms, "the so-called postindustrial, postmodern, hyperreal age of information in which we supposedly live"[87] demands the articulation of a critical sense of the political formulated without Enlightenment certainties about the boundaries of public and private, culture and politics, commerce and art.[88] What makes a contemporary political community common cannot assume the form of an identity or image of collectivity but must remain indeterminate.[89] An undetermined notion of community is necessary to animate a postmodern public and to enable the full range of activities we might recognize as political:

> The critical demand we make of the political should also challenge what is accepted or acceptable as "practical politics" by constantly making possible other forms of political practice than those practised as politics.[90]

Conditions of postmodernity have opened up new possibilities for political activity that were foreclosed by modernity's metanarratives and their pretences to universality. Challenges to the boundaries of the public sphere from those formerly excluded from making public claims, for example, creates a potentially far greater realm of and for political activity.

---

87. David Carroll, *Community After Devastation: Culture, Politics and the "Public Space," in* POLITICS, THEORY, AND CONTEMPORARY CULTURE 159 (Mark Poster ed., 1993).

88. *See id.* at 164.

89. *See id.* at 166.

90. *Id.* at 172.

As Lenoble puts it, "liberal legal formalism, no less than the instrumentalization of law that accompanies the welfare state, remains bound to the metaphysical assumption that a society is able to grasp itself."[91] If we recognize, instead, that the social world must be represented, performatively expressed, and institutionally inscribed, we are compelled to abandon a metaphysics of political presence that presupposes a realm of self-evidently "political" practices. This is not to suggest that society is meaningless, but that its meaning is never fully transparent to us. Habermas cannot grasp the communicative nature of the pluralism that distinguishes contemporary democracies to the extent that his formal understanding of language and his conception of speech acts is still grounded in "a classical model of a unique validity and of the objective world as a stable system."[92] Today, democratic pluralism is, as Lenoble notes, predicated upon an unstable constellation of incommensurable systems of meaning, given the very "pragmatic undecidability of all linguistic communication."[93] The declining faith in objectivism and positivism enables us to acknowledge the contingent character of those articulations which gave full meaning to Enlightenment concepts and to the categories of modern politics.[94] The parameters of the public sphere as a space of deliberation and recognition are only ever contingently forged. Moreover, they are continuously challenged by the expressive activities of others who may be deigned without standing in political arenas, making appeals with respect to issues first understood to be the private concerns of those who occupy particularistic spaces. Contemporary public spheres must continually incorporate new social developments that press political boundaries. These include both the contestations of those whose specificities had previously excluded them from the bourgeois public sphere (those whose particular needs were rendered private issues) *as well as* the transformation of relations of representation and reception in a world of globalized media communications.[95] The result of such an engagement is a more inclusive understanding of the political that extends beyond the influence of state policy to potentially include all sites of cultural production and reproduction in which relations of social difference, entitlement, recognition, and redistribution are established and contested in conditions involving publicity.

---

91. Lenoble, *supra* note 4, at 75.

92. *Id.* at 59.

93. *Id.* at 61.

94. *See* THE MAKING OF POLITICAL IDENTITIES 1–8 (Ernesto Laclau ed., 1994). For similar arguments, see ARYEH BOTWINICK, POSTMODERNISM AND DEMOCRATIC THEORY (1993), and CLAUDE LEFORT, DEMOCRATIC AND POLITICAL THEORY 17–19 (David Macy trans., 1988), arguing that:

> Democracy is instituted and sustained by the dissolution of the markers of certainty. It inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between self and other, at every level of social life.

LEFORT, *supra*, at 19.

95. *See* Hansen, *supra* note 65.

For a critical cultural studies of law, this recognition entails attention to the structural limits or institutional obstacles to the meaning-making capacities of ever-emergent others. Rather than insisting on a pristine space of noncommercial dialogic exchange, or predefining the political according to particular modes of discourse, legal scholars ought to monitor the way in which market agents—and, no less, legal regimes—effect partial fixations of social meanings and contain the articulatory agencies of others. Otherwise, law may well silence those groups who most need its assistance in speaking difference to power.