Neoliberalism, Property and the Public Domain

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Part One

Must Our Notions of the Public Domain Be Founded on Proprietary Concepts and Discourse?

> If the concept of the public domain is to be most effectively deployed within Canadian life now and in the future, those who wish to invoke it should plainly recognize that, in a pivotal sense, the raison d'etre of the liberal capitalist paradigm and its integral institutions is little other than privatization.

The Present-Day Advance of Neo-Liberalism

Given that the early twenty-first century political climate within Canada, North America as a whole, and indeed, the entire world, is profoundly affected by the ongoing expansion and intensification of neo-liberalism, it seems appropriate to ask, early on, how our efforts at cultivating a fertile public domain should grapple with the challenges posed by neo-liberal doctrine. What is neo-liberalism? It might be characterized as an ideology which holds that it is in the best interests of states, as well as other forms of political community, from the grand-scale to the localized, to allow free markets to function without the ostensible impediment of government intervention. Neo-liberalism maintains that, in this way, the beneficial forces of capitalism are allowed to propel forward with the greatest possible thrust.[1]

Proselytizers of neo-liberalism typically claim that free market principles embody universal truths which, to adapt the assertions of one of the most forceful agents among their ranks, United States President George W. Bush's administration, "are right and true for every person, in every society".[2] Accordingly, neo-liberalism seeks to compel worldwide converts to its economically driven creed. Consistent with this, the global spread of neo-liberalism has proved to be part and parcel of the historical process of globalization. Within this context, the propagation of neo-liberalism proceeds apace in a multiplicity of forms, from the ubiquitous transplantation of US-style consumer culture, to the purported transformation of Iraq from a socialist tyranny into a capitalist haven, to the application of Western intellectual property policy to non-Western, indigenous knowledge.

While its global predominance has been on the rise over the past several decades, especially in the wake of the concluded Cold War and the worldwide ballooning of US hegemony that has followed from this historical development, one can infer that there is, at the foundational level, little that is novel in neo-liberalism. Rather, neo-liberalism might be read as

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a distillation of key tenets of liberal capitalism that have long been intrinsic to the modern Western worldview in which the Canadian public consciousness participates. Therefore, because it is vital for us to envision the public domain as a vehicle for resisting the present-day advance of neo-liberalism, it is necessary first to understand the overwhelmingly proprietary, privatizing, liberal capitalist conception of human life, and existence in general, that neo-liberalism utterly exemplifies.

Canada and the Liberal Capitalist Conception of Property

There is a common assumption that Canadian culture and society – indeed, the Canadian national identity itself – are in some ways typified by their avoidance of the singular intensity of US-modeled, liberal capitalism. Whatever the accuracy of this assumption, the following holds valid: inasmuch as Canada's chief social and political institutions are firmly rooted in the tradition of modern liberalism, it may be expected that the Canadian public consciousness is imbued, to a significant degree, with the individualist, proprietary concepts and discourses that lie at the heart of the liberal enterprise.

Law is a cardinal medium through which liberalism's profound emphasis on property – above all, private property – is manifested. Canada draws on two distinct Western legal traditions that are strongly informed by modern liberalism: the British-derived, common law tradition which holds sway within Anglophone Canada, and the continentally-derived, civil law tradition of Francophone Canada. While the common law and civil law tradition each integrates a theory of property that is, historically and philosophically speaking, peculiar to it, each tradition at the same time shares modern liberalism's overall absorption with the significance of private property. Thus, both traditions have their own ways of expressing liberalism's implicit tenets about the fundamentally proprietary character of life, society, and reality as a whole. These tenets include, for example, the notion that human beings are, in their anthropological essence, individual proprietors of (at least potentially) everything ranging from land, to movable objects, to intangibles such as knowledge, and the individual's own rights and liberties; and, connected with this, the idea that practically everything in existence can be conceived of as an item of property.[3] Moreover, both the common law and civil law (although this trait is exceptionally pronounced in the common law) have helped to foster a public milieu within which the modern convergence of liberalism with capitalism has resulted not merely in the wide-scale proprietarization, but also the commodification, of most things in the world around us.[4]

In sum, if the concept of the public domain is to be most effectively deployed within Canadian life now and in the future, those who wish to invoke it should plainly recognize that, in a pivotal sense, the raison d'etre of the liberal capitalist paradigm and its integral institutions is little other than privatization. Moreover, if the public domain is to be thought of as a truly common realm that serves as a bulwark against, and fundamental alternative to privatization, we must contemplate how the public domain can be envisioned in a way that offers a basic counterpoint to the underlying postulates of liberal capitalism. These postulates assert, for example, that the human individual, as a proprietary being, constitutes the basic building block of society, and that, with this, he or she acts merely as one autonomous unit, whose cobbled-together aggregation with other self-interested actors is what amounts to a public.

Multicultural Canadian Alternatives to the Liberal Capitalist Conception of Property

Before we go on to reveal in a bit more detail the genealogical foundations for the privatizing impulse of liberal capitalism, it should be kept in mind that Canada's distinctly multicultural composition contains the ingredients for various understandings of ownership that pose radical alternatives to what modern liberalism regards as the primacy of private, commodified property. Thus, it behooves proponents of a vigorous, capacious, Canadian public domain to consider how these alternatives, which already are intrinsic to the history of Canadian culture and society (notwithstanding the colonial deformations of non-liberal ideas and institutions that long have marked Canadian history), might enhance our vision for the possibilities of the public domain.

A key issue arising in discussions of the concept, public domain, involves the ambiguous relationship between this idea and that of the commons, to say nothing of the ambiguous meaning of each term, taken on its own. As James Boyle states, "[t]he terms "public domain" and "commons" are used widely, enthusiastically, and inconsistently".[5] Some basic, resulting questions include: Are the public domain and the commons synonymous? Does either the public domain or the commons indicate a realm that somehow remains free from the exercising of competing property interests? Or, if the commons, for its part, simply refers to a sphere that is under public control, as opposed "to individual control", does this form of control necessarily entail a condition of proprietorship?[6]

In imagining the various ways that the public domain and commons could conceivably be envisioned, it is instructive to contemplate traditional understandings of communal control over, for instance, a portion of land, that have been demonstrated by Canada's First Nations. To illustrate, Bruce Ziff cites "an Aboriginal vision of property that is quite different from that found in the common law:"

> [I]f one attempts to trace the Indians' source of title, one will quickly find the original source is the Creator. The Creator, in granting land, did not give the land to human beings only but gave it to all living beings. This includes plants, sometimes rocks, and all animals. In other words, deer have the same type of estate or interest as any human being. This concept of sharing with fellow animals and plants is one that is quite alien to Western society's concept of land…Indian property concepts are [holistic]. Ownership does not rest in any one individual, but belongs to the tribe as a whole, as an entity. The land belongs not only to people presently living, but it belongs to past generations. Past and future generations are as much a part of the tribal entity as the living generations.[7]

In other words, it has long been intuitive for Canadian Aboriginals to imagine control over something, in this instance a parcel of land, as being the proper province of a public – conceived of as a broad, integral community of persons living and non-living, rather than an aggregation of autonomous actors – rather than an individual.

Ziff, together with the person whom he cites, Leroy Little Bear, does suggest that the Aboriginal mode of control to which each man refers constitutes a form of proprietorship or

ownership (albeit not of the modern, Western, individualistic variety). However, as Michael Asch has implied, in a study where he deals with the specific case of cultural artifacts, we must be prepared to fundamentally rethink our existing categories of ownership when conceptualizing Canadian Aboriginal control over something. As Asch explains, while "Canadian legal culture" approaches the matter of control over cultural artifacts (as it approaches, one might venture, the matter of control over most existing things) by "focus[ing] [in typically Western fashion] on *ownership* in the *private property* sense", he would prefer to speak, within the Aboriginal context, of "[o]wnership in the sense…of *jurisdiction*".[8] What Asch means by this is that a preferable way of evaluating the juridical appropriateness of an Aboriginal community's claim to a particular cultural artifact should hinge on an inquiry into whether the community, "in a *collective* and *political* sense", has the "legitimate legislative authority" to control things situated within a particular territorial space.[9] Asch's insight into the inappropriateness of Canadian private property doctrine for an Aboriginal public setting provokes thought as to whether other public spaces could serve as sites for a form of communal control over things that is not dependent for its legitimacy on predominating, privatization-oriented, proprietary concepts and discourse.

Let us take a further example of a multicultural, Canadian alternative to the liberal capitalist conception of property. In the summer of 2005, Ontario Premier Dalton McGuinty halted an initiative calling for Muslims to be able to integrate Islamic law into provincially sanctioned arbitration processes addressing personal status matters, such as the disposition of property pursuant to divorce or inheritance.[10] While some observers, Muslim and non-Muslim alike, hailed McGuinty's decision (which in fact aimed to proscribe the utilization of any religious tradition's peculiar legal strictures in such arbitration cases) as a victory for interests including women's rights and the religious neutrality of the Canadian state, proponents of a healthy public domain should ponder whether the Premier might have done a disservice to their cause. Specifically, within its highly developed body of property jurisprudence, classical Islamic legal doctrine is adamant that, while individuals certainly can assert a valid claim to the holding of private property, "Ultimately, God alone is the owner of the heavens and the earth and all that they contain".[11] Therefore, under the teachings of the Islamic tradition, property is held by humans only in the form of a sacred trust, according to which their responsible, communally conscious use of property must be consistent with the tradition's mandate for the exaltation of the final, divine holder of all property. One need not be a Muslim to recognize that the Islamic tradition, which has come to encompass a significant minority of the Canadian population, thus sets forth a worldview emphasizing the detriments of untrammeled privatization, together with the vital imperative for subsuming individual interests within the public good.

Pivotal Genealogical Foundations for the Liberal Capitalist Conception of Property

Given that discussions of the public domain have tended often to be especially concerned with the relatively intangible phenomenon of intellectual property, an era of particular importance for us in the historical lineage of property theory and jurisprudence is the eighteenth century, from the turn of the 1700s forward, when a truly, market-based society began to emerge, most notably in the Anglo-American world. Before this time, "a man's wealth was thought to consist largely of his 'possessions', of physical property, principally land".[12]

However, as the eighteenth century was ushered in, the commercially-driven rise of "a new form of property", namely, "capital in the form of government stock", signaled a world in which the accumulation of less tangible forms of property was becoming intimately associated with the ascendance of capitalism, and therefore valorized.[13] Following from this, within the context of the culture of privatization, "the rivalry between property in capital", on the one hand, and, on the other, the once unparalleled locus of Western, social and political-economic power, "property in land", "has long since ended" in favor of capital.[14]

Thus, on the outlook of the increasingly capitalistic, eighteenth-century world, the idea of "property as [a person's] individual absolute dominion" "over the external things of the world" that was championed by the legendary English jurist Sir William Blackstone (1723-80) is hardly confined to property in land and chattels. It is rapidly and recklessly generalized to intangibles, then to any type of potentially valuable expectancy, and ultimately to public, political rights as well. As John Reid has exhaustively shown in his study of American Revolutionary rhetoric, liberty itself was property.[15] Reid, for his part, confirms and enriches this point by observing how the rising legal consciousness of Blackstone's era and ilk imagined property in non-corporeal as well as corporeal terms:

> …property, even the concept of property as material accumulation, was not limited to the physical in the eighteenth century. It included constitutional rights that English people counted among the attributes of liberty.[16]

Moreover, within this historical setting, the law was increasingly wont to reify even non-corporeal "abstractions" as material property.[17] A prime example of this involves the literary expression of ideas by an author, which was reified as material property by England's 1710 Statute of Anne. An early landmark in the growth of intellectual property jurisprudence – that field of law which poses such an acute challenge for proponents of the public domain – the Statute of Anne established copyright protection as a property interest, thereby laying a building block for "the formation of…proprietary authorship".[18] As we expand on in Part 2, intellectual property jurisprudence has been rapidly developing, over the past several years, into an ever more potent institutional force for privatization throughout North America, and across the world. This is because such factors as the power of profit-motivated, "[c]orporate legal intimidation", and the fact that a constantly growing proportion of creative expression now occurs within the nebulous domains of cyberspace and various other digital media, are prompting lawmakers to reify an increasing number of manifestations of knowledge and creativity as material, private property.[19]

US laws such as the 1998 Digital Millennium Copyright Act, which increased protection of copyrighted material on the Internet, have stood in the vanguard of the process whereby ever more embodiments of knowledge and creativity are being reified as private property.[20] While Canada does not have a DMCA, "[i]t would [nonetheless] appear that [this nation] is poised to jump onto the stronger copyright bandwagon", with the 2005 introduction into Parliament of Bill C-60, *An Act to Amend the Copyright Act*.[21] As Karen Durell explained in the summer of 2005, "[a]s drafted, the Bill creates a wider scope of copyright protection in Canada and thereby boosts the position of control enjoyed by rightsholders to protect their works against public interference".[22] It is telling that this follows in the wake of a series of decisions by the Supreme Court of Canada which actually had served, on the view of Michael Geist, to try and replace an

overriding emphasis on "compensating…[creative] artists" with "more [of] a balance between the interests on the creators and the interests of users."[23]

The tendency of liberal capitalist legal and political institutions to treat all existing things, corporeal or not, *as if they were* material property and commodities, is predicated on fundamental, modernist ideas about the nature of existence, and humankind's place within the world. To illustrate: throughout the body of writings in which she explicates the intellectual and historical processes by which modern Western civilization has entwined the experience of proprietorship with the essence of "personhood", legal theoretician Margaret Jane Radin traces the rise to predominance of a form of liberalism typified by "universal commodification".[24] Under the commodity-based mode of liberalism identified by Radin, the ability to freely own and trade commodities is prerequisite to the full realization of one's humanness, a realization made all the more possible by the fact that "Universal commodification [construes] freedom as the ability to trade *everything* in free markets…".[25](emphasis added)

Strands of thought emanating both from the English intellectual and historical context that envelops the common law tradition, and the continental European milieu that frames the civil law tradition, have contributed vitally to the construction of the doctrine of "universal commodification" that so helps to animate today's neo-liberal, privatizing impulse. On the English side, one's attention is drawn immediately to the philosopher John Locke (1632-1704). Locke's theory that "God gave the World to Men in Common", only to further bestow on them the right to appropriate, through the power of their labor, the bounty of the world as personal property, has left an incomparably powerful influence on common law property doctrine.[26] On the continental side, few thinkers have left such a mark on liberalism as the German philosopher Immanuel Kant (1724-1804). Kant's understanding that "It is possible for me to have any external object of my choice as mine" effectively suggests, on Radin's reading, that "property should extend to the furthest reaches of all objects in the universe so that we could express our personhood".[27] As such underpinnings of property theory have come to be absorbed into the ethos of neo-liberalism, the resulting implication is that all things are but "appendage[s] of [an all-encompassing] market".[28]

In sum: a paramount historical and institutional factor with which proponents of the public domain must grapple is the way in which law has come to employ the idea of private property as an all-encompassing device for regulating humans' relations with one another, as well as with the surrounding, natural universe. From the perspective of modernist law, the proprietary character of the things of the world extends to the most remarkable things. The air we breathe, it might be thought, belongs to no one; but I can object if the pure and wholesome air around my house is polluted by a neighboring factory or a newly established fish-and-chips shop. The clouds above would seem to be free from such *appropriation* but in times of drought one American state [specifically, Idaho] has brought another [Washington] to court on a charge of "cloud-rustling." Lord Byron once apostrophized the sea with the words:

> Man marks the earth with ruin – his control
> Stops with the shore.

No longer. The law of the sea and modern technology have conjointly seen to that. The history of human endeavor, from man's first hesitant scramblings upon this planet up to his

present dizzy eminence is a history of progressive appropriation, and indeed also of the continuing invention of new things (such as copyrights) that might be appropriated.[29] (Minogue, p.).

It is to such invented "new things" that we now turn, in Part 2, within the specific setting of intellectual property law and policy.

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Endnotes

1. An uncommonly insightful commentator on the nature of neo-liberalism, as well as an invaluable critic of the doctrine, is the scholar and journalist John Gray. See, for example, his following books: *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (London and New York: Routledge, 1995); *False Dawn: The Delusions of Global Capitalism* (New York: The New Press, 1998); *Al Qaeda and What It Means to Be Modern* (London: Faber and Faber, 2003); and *Heresies: Against Progress and Other Illusions* (London: Granta Books, 2004). For a useful account of how "the rise of neoliberal ideology and its associated politics of privatization since the late 1970s" intertwine with global, Western (especially US) imperialism, consult Giovanni Arrighi, 'Hegemony Unravelling', *New Left Review,* no. 32 (2005), pp. 23-80. Not least, on the way in which "neoliberal globalization… apotheosi[zes] [that is, transforms into a divine absolute] and totalize[es]" liberal capitalism's notion of property and commodities, see George Caffentzis, 'A Tale of Two Conferences: Globalization, the Crisis of Neoliberalism and Question of the Commons' (retrieved from <http://www.globaljusticecenter.org/papers/caffentzis.htm>).

2. 'Full Text: Bush's National Security Strategy', <nytimes.com> (September 20, 2002), p. 1.

3. Classic, and still crucial, accounts of how modern liberalism tends to reduce the human individual, in his or her essence, to the status of a proprietor include, for instance, the Canadian political theorist C.B. Macpherson's not-uncontroversial book, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford, UK: Oxford Univ. Press, 1962); and R.H. Tawney's *The Acquisitive Society* (New York: Harvest Books, 1948) [originally published in 1920]. For a *tour de force* of social, political, intellectual, and legal history demonstrating how this proprietary model of the human being resides at the core of the modern, market-based society, see P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, UK: Clarendon Press, 1979).

4. There is a diverse body of literature touching on liberal capitalism's implicit notion that practically everything in existence can be reduced to the form of property and commodities. From among this literature, we especially recommend: Kenneth R. Minogue, 'The Concept of Property and Its Contemporary Significance', pp. 3-27 in J. Roland Pennock and John W. Chapman, eds., *Nomos XXII: Property* (New York: New York Univ. Press, 1980); the work of legal theoretician Margaret Jane Radin, especially her essay, 'Property and Personhood', pp. 53-74 in Elizabeth Mensch and Alan Freeman, eds., *Property Law, Volume I* (New York: New York Univ. Press, 1992) [originally published in 1982 as an article in the *Stanford Law* Review], and her books, *Reinterpreting Property* (Chicago and London: Univ. of Chicago Press, 1993), and *Contested Commodities* (Cambridge, MA and London: Harvard Univ. Press, 1996); Maude Barlow and Tony Clarke, *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* (New York: New Press, 2002); and James Ridgeway, *It's All for Sale: The Control of Global Resources* (Durham, NC and London: Duke Univ. Press, 2004).

5. James Boyle, 'Foreward: The Opposite of Property?', *Law and Contemporary Problems,* vol. 66, nos. 1&2 (2003), pp. 1-32, p. 29. It is difficult to overstate the value of the special collection of papers on 'The Public Domain' that is introduced by this essay of Boyle's. The entire collection is available as a single volume for which Boyle served as Special Editor, entitled *Collected Papers: Duke Conference on the Public Domain.*

6. Boyle, 'Foreward: The Opposite of Property?', pp. 28-32.

7. Bruce Ziff, *Principles of Property Law,* 3rd ed. (Scarborough, ON: Carswell [Thomson Professional Publishing], 2000), pp. 334-335.

8. Michael Asch, 'Cultural Property and the Question of Underlying Title', pp. 266-271 in George P. Nicholas and Thomas D. Andrews, eds., *At a Crossroads: Archaeology and First Peoples in Canada* (Burnaby, BC: Archaeology Press, 1997), p. 266.

9. *Ibid.*

10. Colin Freeze and Karen Howlett, 'McGuinty rules out use of sharia law', *The Globe and Mail,* September 12, 2005, p. A7.

11. Othman Abd-Ar-Rahman Llewellyn, 'The Basis for a Discipline of Islamic Environmental Law', pp. 185-247 in Richard C. Foltz, Frederick M. Denny, and Azizan Baharuddin, eds., *Islam and Ecology: A Bestowed Trust* (Cambridge, MA: Harvard Univ. Press, 2003), p. 198.

12. Atiyah, *The Rise and Fall of Freedom of Contract,* p. 102.

13. J.G.A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge, UK: Cambridge Univ. Press, 1985), pp. 108-09.

14. Tawney, *The Acquisitive Society,* p. 28.

15. William Blackstone, *Commentaries on the Laws of England,* 4 vols., 5th ed. (Oxford, UK: Clarendon Press, 1773) [*Commentaries* originally published between 1765-69], vol. 2, p. 2; Robert W. Gordon, 'Paradoxical property', pp. 95-110 in John Brewer and Susan Staves, eds., *Early Modern Conceptions of Property* (London and New York: Routledge, 1997), p. 95; John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago and London: Univ. of Chicago Press, 1988), *passim.*

16. *Ibid.,* p. 72.

17. John Brewer and Susan Staves, 'Introduction', pp. 1-18 in Brewer and Staves, *Early Modern Conceptions of Property,* p. 10.

18. Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard Univ. Press, 1993), pp. 31-48; Laura J. Rosenthal, '(Re)Writing Lear: Literary property and Dramatic Authorship', pp. 323-28 in Brewer and Staves, *Early Modern Conceptions of Property.*

19. Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York and London: New York Univ. Press, 2001), p. 187.

20. Robert S. Boynton, 'Righting Copyright: Fair Use and "Digital Environmentalism"', *Bookforum,* vol. 11, issue 5 (2005), pp. 16-19, p. 16.

21. Michael A. Geist, quoted in 'Through the Copyright Lens – Nov. 18, 2004', *John Marshall Review of Intellectual Property Law,* no. 4 (2005), p. 230; Karen L. Durell, 'Canadian Copyright on the precipice: Stronger rights and higher fees? Or not?', Centre for Intellectual Property Policy at McGill Faculty of Law (2005) <www.cipp.mcgill.ca/en/news/current/29/> (August 10, 2005).

22. *Ibid.*

23. Geist, from 'Through the Copyright Lens', p. 231.

24. Radin, 'Property and Personhood'; *Contested Commodities; Reinterpreting Property.*

25. Margaret Jane Radin, ‘Market-Inalienability’, pp. 1126-48 in D. Kelly Weisberg, ed., *Applications of Feminist Legal Theory to Women’s Lives: Sex, Violence, Work, and Reproduction* (Philadelphia: Temple Univ. Press, 1996) [comprised of extracts from an article originally published in 1987 in the *Harvard Law Review*], p. 1132.

26. John Locke, ‘The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government’, pp. 265-428 in John Locke, *Two Treatises of Government,* Peter Laslett, ed. (Cambridge, UK: Cambridge Univ. Press, 1991) [Laslett’s revised version of Locke’s text, which was composed in the 1680s and bore the date 1690 on its first edition, was originally published in 1970], p. 291.

27. Immanuel Kant, *The Metaphysics of Morals,* reprinted at pp. 353-603 in Immanuel Kant, *Practical Philosophy,* Mary J. Gregor, trans. and ed. (Cambridge, UK: Cambridge Univ. Press, 1996), p. 404; Margaret Jane Radin, ‘Cloning and Commodification’, *Hastings Law Journal,* vol. 53, no. 5 (2002), pp. 1123-1132 [consisting of transcribed remarks of Radin’s from the symposium, ‘Conceiving a Code for Creation: The Legal Debate Surrounding Human Cloning’], p. 1129.

28. Ulrich Duchrow, *Alternatives to Global Capitalism: Drawn from Biblical History, Designed for Political Action,* Elaine Griffiths, et al., trans. (Utrecht, The Netherlands: International Books, 1998), p. 27.

29. Minogue, ‘The Concept of Property and Its Contemporary Significance’, pp. 11-12, 26.