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Brains, Incorporated: The Cultural Worker in the United States

A dissertation submitted in partial satisfaction of the
requirements for the degree Doctor of Philosophy in History

by

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Abstract

Brains, Incorporated: The Cultural Worker in the United States

Kurt Newman

This dissertation seeks to provide a biography of the cultural worker in modern American thought. The primary modality employed is that of intellectual history, guided by methodologies borrowed from legal, labor, and economic history, Black Studies, literary studies, critical theory, and interdisciplinary cultural studies. Following an extensive introduction that attempts to adequately set the historiographical table, we commence with a detailed examination of nineteenth-century debates regarding the productivity of cultural work, focusing in on the legal intellectuals Oliver Wendell Holmes, Jr. and Eaton Drone, the publisher George Haven Putnam, and the political economist John Bates Clark. Reading these writings closely, we argue that the idea of artistic and intellectual production as forms of productive labor is not as new as is sometimes alleged, and that modern understandings of cultural labor were shaped within the crucible of an emergent corporate capitalism, in which new conceptualizations of intellectual property drove a new discourse on cultural work. We next turn our focus to the African American intellectual James Weldon Johnson, whose writings provide a window into the world of turn-of-the-century African American cultural work and the intersection of cultural work and politics in the years between the end of Reconstruction and World War I. An examination of Joseph Freeman's *An American Testament* reveals a forgotten itinerary of left writings on cultural work in the nineteen teens

and twenties. A careful study of Freeman allows us to reconsider the intellectual history of the Communist left in the United States in the early Soviet era, and to attend to the special significance of cultural work to the young radicals of that moment.

In the dissertation's second half, we investigate several attempts to organize cultural workers in labor organizations in the 1930s: Heywood Broun's American Newspaper Guild, John Howard Lawson's Screen Writers Guild, and a variety of endeavors by musicians to fight technological unemployment. Inspired by the National Recovery Administration's attempt to draft codes of fair competition to govern each industry, cultural workers seized the moment and articulated a variety of novel political projects that might reverse exploitative conditions in white collar industries. While not always successful in the short run, these initiatives are worth studying for the wealth of information they provide regarding the changing status of the cultural worker, the influence of left-wing theory on the mainstream labor movement in the 1930s and 1940s, and for the tensions regarding cultural workers' allegiances to white-collar managerial workers, on the one hand, and to blue-collar proletarians, on the other.

The final section of the dissertation looks at some of the sources of the containment of cultural workers' politics in the 1940s and 1950s. Focusing on legal intellectuals like Zechariah Chafee, Jr., we observe that the Cold War increasingly framed cultural workers' quest for autonomy as both a potential security threat and a fetter on national productivity. In our conclusion, we look at various mutations of the idea of cultural worker in the 1960s and up to the struggles of today's digital laborers and content creators.

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Introduction: The Antinomies of the "Assembly Line Writer"

This dissertation seeks to chronicle the intellectual history of the cultural worker in the United States. It asks: what conceptual moorings underpinned the emergence of a workforce responsible for "crystalizing, disseminating, and perpetuating American culture?" (to borrow a formulation from Lewis Corey's Depression-era tract *Culture and the Crisis*, an "Open Letter to the Intellectual Workers of America").[1] What does the changing status of the cultural worker tell us about the historical dynamics of American capitalism? Why do we seem to find, over and over again, the overlapping histories of cultural work and intellectual property law, mirroring a more general inter-embeddedness of immaterial labor and incorporeal property in corporate and post-industrial capitalism? Why have cultural workers served so reliably as leading characters in the saga of technological unemployment? What do the contradictions of cultural workers—as white-collar employees and ostensible bearers of a Romantic creativity inimical to capitalist labor discipline—tell us about the wider contradictions of capitalist political economy? How ought we narrate the history of African American cultural work and what does the rich archive of debate and reflection regarding the African American cultural worker by African American intellectuals tell us about racial capitalism's regimes of labor and property? What lessons might be learned from these various studies regarding the future of labor organizing by contemporary cultural workers?

[1] League of Professionals for Foster and Ford (Lewis Corey), *Culture and the Crisis*, 1932. On Corey, see Paul Buhle, "Louis C. Fraina/Lewis Corey and The Crisis of the Middle Class," *New Politics*, vol. 5, no. 1 (new series), whole no. 17, Summer 1994.

Since World War II, capitalism has increasingly centered on the valorization of so-called "knowledge capital," and the cultural worker has in turn become an important figure within the discourse of political economy.[2] In the 1960s, the economist William J. Baumol, for example, based his influential theory of service sector "cost disease" (which holds that the costs of "health care, education, the live performing arts, and a number of other economic activities known as the 'personal services' are condemned to rise at a rate significantly greater than the economy's rate of inflation") on a longitudinal study of workers in the performing arts, 1966's *Performing Arts, the Economic Dilemma: A Study of Problems Common to Theater, Opera, Music, and Dance* (that year also saw the publication of the spiritually similar study commissioned by the Rockefeller Fund, entitled *The Performing Arts: Problems and Prospects Rockefeller Panel Report on the Future of Theatre, Dance, Music in America*).[3] What is most striking about Baumol and co-author William G. Bowen's presentation is their treatment of the arts as sites of labor, comparable in every meaningful way to iron smelting or automobile manufacture.[4] That the comparison of the rate of productivity of cultural workers and that of other laborers was even thinkable to Baumol and Bowen suggests some dramatic changes within the discourse of political economy.[5]

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[2] See Shannan Clark. *The Making of the American Creative Class: New York's Culture Workers and Twentieth-Century Consumer Capitalism* (New York NY: Oxford University Press, 2021); and Howard Brick, *Transforming Capitalism: Visions of a New Society in Modern American Thought* (Ithaca: Cornell University Press, 2015).

[3] Rockefeller Brothers Fund, *The Performing Arts: Problems and Prospects: Rockefeller Panel Report on the Future of Theatre Dance Music in America*. 1st ed (New York: McGraw-Hill Book Company, 1965).

[4] William J. Baumol and William G. Bowen, *Performing Arts, the Economic Dilemma: A Study of Problems Common to Theater, Opera, Music, and Dance* (New York: Twentieth Century Fund, 1966).

[5] Fritz Machlup's pioneering *The Production and Distribution of Knowledge in the United States*, the first macroeconomic text to consider cultural work as a decisive factor in political economy appeared only a few years prior. See Fritz Machlup, *The Production and Distribution of Knowledge in the United States* (Princeton: Princeton University Press. 1962).

Hand-wringing about cultural work could be seen everywhere in the 1960s. Dwight Macdonald's famous 1960 polemic "Masscult and Midcult" distinguished between Edgar Allen Poe, a "money-writer" and Erle Stanley Gardner, an "assembly line writer," whose books seem to have been "manufactured" rather than "composed," assembled with the "minimum expenditure of effort from identical parts that are shifted about just enough to allow the title to be changed."[6] Mr. Gardner "has the production problem licked," Macdonald snickered, calling to mind John Kenneth Galbraith's pronouncement of the same year that "the problem of production had been solved."[7] Unlike Poe, a genuine artist, Gardner was "marketing a standard product, like Kleenex, that precisely because it is not related to any individual needs on the part of either the producer or the consumer appeals to the widest possible audience."[8]

In his 1959 essay on the "cultural apparatus," another one-time dissident Trotskyist, C. Wright Mills wrote of society's increasing dependence upon the" observation posts, the presentations depots, which in contemporary society are established by means of what I am going to call the *cultural apparatus*."[9] Earlier, in 1951's *White Collar*, Mills had advanced warnings about the implication of bureaucratized knowledge and aesthetics, the emergent economic sector he called "Brains, Inc."[10] (We have cribbed the title of this dissertation therefrom). Mills's writings are suffused with both a sense of dread—dark premonitions

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[6] Dwight Macdonald*, Masscult and Midcult: Essays Against the American Grain* (New York: New York Review of Books Press, 2011).
[7] John Kenneth Galbraith, *The Affluent Society* (Boston: Houghton Mifflin, 1998 [1958]), 545.
[8] Macdonald, *Masscult and Midcult*.
[9] C. Wright Mills, "The Cultural Apparatus" (1959), was originally published in the BBC publication *The Listener*, March 26, 1959. Citations here are to the essay in C. Wright Mills and Irving Louis Horowitz, ed., *Power, Politics, and People: The Collected Essays of C. Wright Mills* (New York: Oxford University Press, 1963), 405-06, emphasis added. See also Kim Sawchuk, "The Cultural Apparatus: C. Wright Mills's Unfinished Work." *The American Sociologist*, Spring 2001.
[10] C. Wright Mills, *White Collar; The American Middle Classes* (New York: Oxford University Press, 1951), 142.

about the totalitarian consequences of the mass media's army of "hacks" spinning reality at the behest of their paymasters, and a nagging sense that cultural workers might be the vanguard force of political change in a new left.[11] For Mills, a functioning democratic polity requires an independent cultural apparatus: "our standards of credibility, our definitions of reality, our modes of sensibility—as well as our immediate opinions and images—are determined much less by any pristine experience than by our exposure to the output of the cultural apparatus." Here, Mills recalls Adorno and Horkheimer's analysis in *The Dialectic of Enlightenment*: "Kant foretold what Hollywood consciously put into practice: in the very process of production, images are pre-censored according to the norm of the understanding which will later govern their apprehension. Even before its occurrence, the perception which serves to confirm the public judgment is adjusted by that judgment."[12] Anti-democratic regimes had come to rely on cultural workers to grant prestige to the activities of the powerful and transform their power into unchallengeable authority, as the cultural apparatus became a "close adjunct of national authority and a leading agency of nationalist propaganda."[13]

Mills reminds us that investigating the individual political preferences of cultural workers is insufficient. He cautions that we cannot merely examine the "individual workman and his choices," because the cultural apparatus as a whole reflects the desires of "dominant institutional orders." Perhaps the most important sociological fact about cultural workers is their situation of chronic financial insecurity, which determines the character of the cultural apparatus and, per Mills, the "position of cultural workmen." This class dimension comes to

[11] Mills, "The Cultural Apparatus," 419.
[12] Max Horkheimer and Theodor W. Adorno. *Dialectic of Enlightenment* (New York: Herder and Herder, 1972).
[13] Mills, "The Cultural Apparatus," 414.

define the nature of a given order, with the range of political possibilities in any given moment coextensive with the "range of cultural workmen's politics," including those political values embedded in projection, hope, and fantasy. Here the incorporation of cultural apparatuses within state bureaucracies becomes especially threatening to democratic governance.[14] Mills notes that although "a scientist working in a laboratory may honestly conceive of himself as a disembodied spirit does not make any the less real the objective consequences of his discovery for the ultimate ends of bombing the population of a city of which he has never heard." The same held true for artists, as well. Speaking to the highly formalist and apolitical culture of the artistic avant-garde of the Cold War era, Mills cautions that even artists who profess to care about nothing "but the way a certain shade of blue explodes in the eye" may be enlisted into ideological campaigns by "men of nationalist purpose." No matter how abstract or non-literal the work of art, Mills warns, "nowadays any artistic product may well be seized upon in the building of cultural prestige for national authority." Similarly, while social scientists may be completely absorbed in the positivist project of data collection, Mills argues that this position of ostensible innocence does not detract from the "objective function" of their work "helping generals to prod farm boys to kill off more Japanese, or corporation executives to manipulate all the more brightly their sounds and images going out endlessly to 50 million homes in order to increase the sales-volume of a new shade of lipstick of a new presidential face."[15]

The permanent warfare state and the strain of consumer-driven capitalism that it engendered conditioned the particular form of the American cultural apparatus. Popular culture and science both relied on the mass market and the military-industrial complex for

[14] Mills, "The Cultural Apparatus," 421.
[15] Mills, "The Cultural Apparatus," 409.

almost all of their support, and commercial distribution had come to define cultural production itself. The consequence for cultural workers was that they were brought into a "subordinate relation to the dominant institutions of capitalist economy and nationalist state." Their lot was one of chronic insecurity, low social prestige and relative income, and a curious propensity to emulate the "style of the businessman." The cultural worker, once the symbol of freedom for other workers undergoing proletarianization and Taylorization, was now subject to the processes that had deformed work in general over the previous two centuries, as some artists and intellectuals become entrepreneurs and managers of other cultural workers. Mills' memorable phrase for this process is the culture of "hacks and stars." As the cultural apparatus became entirely homologous to industrial capitalism, "innovation" rose as the cardinal value and assumed quasi-theological significance. A small number of "stars" came to dominate the cultural field, while armies of "hacks" labored in the studio, laboratory, research bureau, and writer's factory. The "star system" tended to vitiate autonomy and turn cultural production into a zero-sum game. Mills's conclusion about this situation, not surprisingly, was pessimistic. The exhaustion of the cultural worker as embodiment of Enlightenment freedom and the triumph of the cultural apparatus as a means of persuasion portended for Mills, as it did for Adorno and Horkheimer, a dark future of mass manipulation and consent to authority.[16]

In the years before his death in 1962, however, Mills became increasingly convinced, in Daniel Geary's words, of the "left-wing potential of the intelligentsia."[17] It was with this utopian potential in mind that Mills indexed the "cultural apparatus" in his famous "Letter to

[16] Mills, "The Cultural Apparatus," 421.
[17] Daniel Geary, *Radical Ambition: C. Wright Mills the Left and American Social Thought* (University of California Press, 2009).

the New Left": "I have been studying, for several years, the cultural apparatus, the intellectuals—as a possible, immediate, radical agency of change." For Mills, the "cultural workmen" who perform "artistic, intellectual, and scientific work" might become the vanguard of a new push for anti-capitalist hegemony.[18]

Like Mills, Daniel Bell emphasized the newfound centrality of cultural workers in his writings on the post-industrial situation in the 1970s and 1980s.[19] Arguments for the significance of cultural labor also came to proliferate in economic and management discourse, finding a home in the writings of Peter Drucker, Charles Sabel and Michael Piore, and Robert Reich. This, in turn, laid important groundwork for New Economy meditations of the obsolescence of proletarian labor, with armies of coders and designers, "creatives" and analysts imagined as the new cadre of workers that would replace their hard-hatted progenitors.[20] Interest in the topic of white-collar cognitive labor has exploded over the past 20 years. The rise of Silicon Valley and the digital economy has been accompanied by a swath of texts seeking to explain the new world of cultural work, ranging from Richard Florida's analysis of the "creative class" to the various prophets of "human capital," from the libertarian right to the Marxist left.[21] Strikes by Hollywood above-the-line workers, union

[18] C. Wright Mills, "Letter to the New Left." *New Left Review*, No. 5, September-October 1960.
[19] Daniel Bell, *The Coming of Post-Industrial Society* (New York: Basic Books, 1976).
[20] See Peter F. Drucker, Technology, *Management & Society: Essays* (New York: Harper & Row, 1970) and Stephen P. Waring, *Taylorism Transformed: Scientific Management Theory Since 1945* (Chapel Hill: University of North Carolina Press, 1991); Robert B. Reich, *The Next American Frontier* (New York, N.Y.: Times Books, 1983); Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (New York: Basic Books, 1984). On labor and the "new economy," see Stanley Aronowitz and William DiFazio, *The Jobless Future: Sci-Tech and the Dogma of Work* (Minneapolis: University of Minnesota Press, 1994); Andrew Ross, *No-Collar: The Humane Workplace and Its Hidden Costs* (New York, NY: Basic Books, 2003); Ursula Huws, *The Making of a Cybertariat: Virtual Work in a Real World* (New York: Monthly Review Press, 2003), and André Gorz, *Reclaiming Work: Beyond the Wage-Based Society* (Cambridge, UK: Polity Press, 1999).
[21] Richard Florida, *The Rise of the Creative Class* (New York, Basic Books, 2004); Luca Flabbi, Roberta Gatti, *A Primer on Human Capital* (Washington. D.C.: The World Bank, 2018); Malcolm Harris, *Kids These Days: Human Capital and the Making of Millennials* (New York: Back Bay Books, 2018); Desmond Hesmondhalgh, Sarah Barker, *Creative Labour: Media Work in Three Cultural Industries* (New York: Routledge, 2010); Greg

campaigns by journalists in all sectors of the digital media, organizing drives in museums, by freelance writers, and by musicians seeking to take on Spotify and nightclub merchandise cuts: all point to the rising salience of cultural work as a central node in contemporary labor politics.[22]

Discursive Precursors: "The Case of Authors by Profession or Trade"

As we have inquired into the origins of these transformations, however, we have consistently encountered evidence that prompts us to revise standard narratives. Perhaps the earliest articulation of the modern conception of "cultural work" can be found within the new discourse of Anglo-American intellectual property law that began to blossom in the 18th century. Although legal experts like the British jurist Sir John Dalrymple's scoffed at the very idea of "literary property," the Massachusetts Copyright Statute of 1783 affirmed that "no property more peculiarly a man's own than that which is produced by the labor of his mind."[23] This emphasis on "property" points to one of the key themes of this dissertation: workers in capitalism tend to be defined by the kind of objects that they help to bring into being, which the law understands through the lens of property discourse, itself shaped by long traditions of Roman and Christian legal thought, as well as English common law reaching back to the early middle ages, and the canonical writings of John Locke, William

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Goldberg, *Antisocial Media: Anxious Labor in the Digital Economy* (New York: NYU Press, 2018); Andrew Beck, *Cultural Work: Understanding the Cultural Industries* (London: Routledge, 2002); Hye Jean Chung, *Media Heterotopias: Digital Effects and Material Labor in Global Film Production* (Durham: Duke University Press, 2018); Mark Banks, *The Politics of Cultural Work* (New York: Palgrave Macmillan, 2007); Trebor Scholz, ed. *Digital Labor: The Internet as Playground and Factory* (New York: Routledge, 2013).

[22] Sarah Jaffe, "The Labor Movement Comes to Virtual Reality." *New Labor Forum*, Spring 2019, Vol. 28, No. 2, Millennial Consciousness? (Spring 2019), pp. 36-43.

[23] Dalrymple quoted in Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: University of Chicago Press, 2002).

Blackstone, and the pioneers of Political Economy Adam Smith, David Ricardo, James Mill, and Jeremy Bentham.[24] Legal thinkers in the US have tended to define cultural workers as creators of cultural objects, a definition that has been reasonably efficient even if it is conspicuously teleological or question-begging (given that cultural objects gain that status by virtue of having been created by cultural workers in the same way that cultural workers gain *their* status by virtue of having created cultural objects).

In the field of culture, all commercially created cultural objects are understood as more or less akin to intellectual property law's *Ur-object,* the book. Legal scholar Oren Bracha describes the entire story of modern US intellectual law as a series of evaluative tests of new kinds of creative production against the standard of the book and its author.[25] Copyright law treatises overflow with metaphysical speculation regarding the similarity and difference of a given novel practice to the production of books. A certain pattern tends to emerge, which follows closely Oliver Wendell Holmes, Jr.'s pragmatist description of the common law's characteristic movement. Holmes charts a pattern that originates with the establishment of a new rule of formula that survives over the course of centuries as the "custom, belief, or necessity" that had originally inspired it is forgotten. As legal experts ponder this rule, they adapt it to present needs or desires: the rule then "adapts itself to the new reasons that have

[24] On the intellectual history of property, see Gregory S. Alexander, *Commodity & Propriety Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago, Ill: University of Chicago Press, 1999). C.B. Macpherson, ed. *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 2005); and *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962); Stephen R. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 2007); Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014); Peter Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge: Cambridge University Press, 2007); Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* (Chicago: University of Chicago Press, 1990).

[25] Oren Bracha, "The Ideology of Authorship Revisited." U of Texas Law, Public Law Research Paper No. 82. University of Texas at Austin School of Law. January 1, 2006.

been found for it" and it enters on a new career.[26] Following this pattern, the history of cultural work in the United States has been shaped by attempts by the legal order to circumscribe the field of cultural objects by restricting coverage to literary texts. Legal controversies ensue, wherein these restrictive limits are transcended. The law then assimilates new forms of texts: for example, musical and dramatic performances, photographs, lithographs, newspapers, government reports, dance scores, architectural plans, corporate logos, advertising posters, recordings, radio broadcasts, motion pictures, TV shows, cassette tapes, DVDs, digital downloads, and so on. Along the way, a new juridico-aesthetic order is born that calibrates "authors" and "texts," frequently awarding the title of "author" to the corporate entity that provides the capital for publication. This, in turn, determines, to a significant degree the conditions and remuneration of cultural workers.[27]

Complicating this dialectic is the fact that the text's preeminent commodity form—the book—is not a simple thing. Rather, as Meredith McGill emphasizes, it is an "extraordinary object."[28] To deepen our appreciation of the complexities of the book-as-object, it is instructive to turn to an intriguing piece of evidence unearthed by the literary historian Martha Woodmansee: a description of the object called the "book" in a German dictionary of political economy of 1753. Compared against present norms, this text's attempt at a definition is rather startling. It explains that a book is either "numerous sheets of white paper that have been stitched together in such a way that they can be fitted with writing" or is "a highly useful and convenient instrument" constructed in order to present the truth "in such a

[26] Oliver Wendell Holmes, Jr. *The Common Law* (Cambridge, Mass: Belknap Press, 2009), 7.
[27] Fisk, *Working Knowledge,* 1.
[27] Robert Merges, "One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000," *California Law Review*, (December, 2000), 88 Calif. L. Rev. 2187.
[28] Meredith L. McGill, *American Literature and the Culture of Reprinting, 1834-1853* (Philadelphia: University of Pennsylvania Press, 2003), 2-3.

way that it can be conveniently read and recognized." The identity of the book, in this definition, is inseparable from the labor necessary for its creation. "Many people work on this ware before it is complete and becomes an actual book in this sense," the dictionary proclaims, including the scholar, the writer, the papermaker, the type founder, the typesetter, the printer, the proofreader, the publisher, the bookbinder, and sometimes even the gilder and the brassworker.[29]

The book here is defined as a material object, with almost no reference to the more spiritual or abstract qualities that we today associate with the literary text. The anonymous dictionary writer attends diligently to the circumstances of the book's construction (stitching, binding, gilding), which are accorded the same status as the scholar, writer, proofreader, and publisher. What changes an arrangement of words on paper and raw materials (leather, thread, vellum) into a "book" is the metaphysically significant legal event of "publication." Upon publication, and released into the wilds of the market, the book becomes that specific form of property that we call the commodity. More specifically, it takes on what the legal scholar Margaret Radin calls the "four indicia of commodification": 1) objectification, 2) fungibility, 3) commensurability, and 4) money equivalence.[30] In other words, as the unpublished manuscript becomes a book, it metamorphoses into an object that can be assigned a value and compared to other objects, ranked, and organized against the fixed measure of the "universal equivalent" of money. Unlike most other capitalist commodities, however, the book remains linked to a named creator (or group of creators) who are understood to be responsible for the intellectual labor that brought the text into being and

[29] Woodmansee, *The Author, Art, and the Market*, 35.
[30] Margaret Jane Radin, *Contested Commodities* (Cambridge, Mass: Harvard University Press, 1996), 118.

who may still retain rights thereto: what the law calls *droits d'auteur*.[31] The terms "book" and "publication" are essentially meaningless in the absence of the "author." And the "author," understood to be an "individual who is solely responsible and thus exclusively deserving of credit for the production of a unique, original work," per Woodmansee, is quite a new development. The early modern author was not distinguished as different than other craft specialists because he was understood to share the status of craft specialist.

As the intellectuals of the eighteenth century began to distinguish between works of "mere craftsmanship" and special artistic achievements that transcended it, they reached for a new conception of divinely inspired genius, which famously came to color the aesthetic theory of Romanticism. The Romantic gesture of splitting "genius" from "craftsmanship" would come to structure much of the history of the idea of cultural work.[32] More specifically, it would situate a glaring contradiction at the heart of the very idea of "cultural work" itself. As the Romantic conception of authorship solidified, literary theorists minimized the salience of craftsmanship in favor of a new concentration on aesthetic inspiration. This redrawing of boundaries created, unintentionally or by default, a new category of participants in the production of cultural goods who were not "authors."[33] A crude, if effective, anatomical explanation went along with this new conception of the author: creative *poiesis* was situated in the productive facilities of the "brain." The new speculative neurology built upon a series of key early articulations, the most influential of which was that of Daniel Defoe, who defined the book as the author's property and progeny: "'tis the Child of his Inventions, the

[31] See Martin A. Roeder, "The Doctrine of Moral Right: A Study of the Law of Artists, Authors, and Creators," *Harvard Law Review*, Vol. 53, No. 4 (Feb., 1940), 554-55.
[32] Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship.'" *Duke Law Journal* 455–502. 1991.
[33] See Ian Watt, *The Rise of the Novel: Studies in Defoe, Richardson, and Fielding* (Berkeley: University of California Press, 1957).

Brat of his Brain," which is "as much his own, as his Wife and Children are his own."[34] Regarding this definition, the literary scholar Mark Rose foregrounds its patriarchal coloration, with the author affirmed as the master and owner of his wife and children as well as of the children of his inventive genius. Ironically, as Catherine Fisk observes, Defoe's conceptualization of "the author" as proprietor and *paterfamilias* gained its greatest effectivity as it was put to work by the eighteenth-century booksellers who would, in time, find themselves locked out of the legal and commercial empire of texts, as books became capitalist commodities in the new author-based regime of commercial publication.[35]

James Ralph of New Jersey (expatriate Grub Street hack, writer for the British stage, and onetime friend of Benjamin Franklin) reflected upon this new regime in *The Case of Authors by Profession or Trade* (1758). In that text he lamented that "Authors are still living, who have been as communicative of the Use of Their Parts, as great Men ought to be of their Fortunes" who had "neither receiv'd, nor expected to receive, any other Reward, than the inward Satisfaction arising from the Consciousness of having done a Service."[36] Here, we see an early formulation of the "labor deserts" argument that legal scholars often invoke as a

[34] Daniel Defoe, quoted in Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, Mass: Harvard University Press, 1993), 39.
[35] Mark Rose, *Authors and Owners*; Catherine Fisk, "Authors at Work: The Origins of Work-For-Hire Doctrine*," Yale Journal of Law and the Humanities*, Volume 15:1, 2003; Peter Jaszi and Martha Woodmansee, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham: Duke University Press, 1994); Mario Biagioli, Peter Jaszi, and Martha Woodmansee, *Making and Unmaking Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011); Martha Woodmansee, *The Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1994); Paul K. Saint-Amour*, Modernism and Copyright* (Oxford: Oxford University Press, 2011);); Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: University of Chicago Press, 2002).
[36] James Ralph, *The Case of Authors by Profession or Trade (1758): Together with the Champion (1739-1740*) (Gainesville, Fla: Scholars' Facsimiles & Reprints 1966). See also James Ralph and Robert W. Kenny. "James Ralph: An Eighteenth-Century Philadelphian in Grub Street." *The Pennsylvania Magazine of History and Biography* 64, no. 2 (1940): 218–42.

justification for strong copyright protections[37] We see also an early counter-argument to Romantic visions of aesthetic production as fundamentally external to market relations.[38]

Like Ralph, Adam Smith mused upon the subject of cultural work, and emphasized that it was the domain of both "most frivolous professions" and sublime genius. Smith sought to analyze the economic role of "players, buffoons, musicians, opera-singers, opera-dancers, etc.," and pondered the value of the intellectual's work of "communicating to other people the curious and useful knowledge which he had acquired." Smith stressed the tight connection between technological innovation and cultural production as a source of value, anticipating, perhaps, coming developments. He observed that prior to the invention of the art of printing, the man of letters could survive only as a teacher, or by other one-on-one communication of "the curious and useful knowledge which he had acquired himself." But while the art of printing had given rise to the new occupation of "writing for a bookseller," that work was somehow less honorable and often less profitable than employment as a tutor or lector. Contemplating the political economy of "public diversions," Smith identifies the useful role played by "all those who for their own interest would attempt without scandal or indecency, to amuse and divert the people by painting, poetry, music, dancing." These

[37]"The creator," Eaton Drone would write in the first copyright treatise in the US, "is the first possessor of that which he creates." In "labor," conceived in these creative terms, "is found the origin of the right to property." Labor, for Drone, had always constituted the "fundamental principle" throughout the entire history of property. "The most natural claim to a thing," Drone writes, citing the eighteenth-century English legal authority Thomas Rutherforth, "seems to arise from our having made it; for no one appears to have so peculiar a right in it as he who has been the immediate cause of its existence." Drone, *Treatise*, 5. Locke's "turfs" passage in his *Second Treatise of Government* is often cited as the *locus classicus* of "labor deserts" theory: "The grass my horse has bit, the turfs my servant has cut, and the ore I have digged, in any place where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labor that was mine removing them out of that common state they were in hath fixed my property in them has thereby removed her from the state of nature wherein she was common, and hath begun a property." John Locke, Ian Shapiro, and John Locke. *Two Treatises of Government And a Letter Concerning Toleration* (New Haven, Conn: Yale University Press, 2003). Drone, *Treatise*, 4, emphasis added. On "labor desert" theory, see Alfred Chueh-Chin Yen, "Restoring the Natural Law: Copyright as Labor and Possession" *Ohio State Law Journal*, Vol. 51, pp. 517-559, 1990, Boston College Law School Research Paper No. 1990-04.

[38] See Justin Hughes, "The Philosophy of Intellectual Property" 77 *Geo. L.J.* 287 (1988).

diversions had the salutary effect of dissipating the "melancholy and gloomy humor which is almost always the nurse of popular superstition and enthusiasm," an effect that possessed real value to the state and that contributed to the productivity of its subjects. [39]

This discussion of cultural work is one of the places within which Smith works out his famous distinction between "productive" and "unproductive" labor. If the labor of the cultural worker created no new value, it was, nevertheless, imbued with some form of worth. It could be properly judged as "valuable" to society, and recommended by the political economist as worthy of protection. This value was redistributive. For example, if a mechanic paid for a ticket to "a play of a puppet-show," he thereby contributed to the survival of the puppeteer, who in turn contributed to the survival of the tradesman and farmer. In formal terms, this was no different than the payment of taxes by the mechanic's wealthy counterpart, which helped "to maintain another set, more honorable and useful, indeed, but equally unproductive." Cultural work therefore deserved "its reward as well as that of the productive laborer."[40]

In the United States, the discourse on cultural work developed out of the rich soil of antebellum debates regarding the relative merits of "manual" as compared to "mental" labor. Throughout the ages, most Americans would have understood intuitively what Colonel Harrington—then newly installed as head of the Works Progress Administration in 1939 and contemptuous of what he saw as make-work projects for shiftless artists—meant when he objected to a call for the painters, writers, and actors in the employ of the New Deal arts projects to be put to work building roads or dams: "Many of these people are not physically

[39] Adam Smith and Andrew S. Skinner, *The Wealth of Nations* (Harmondsworth, Middlesex: Penguin Books, 1982), Book II, 9.
[40] Smith, *Wealth of Nations*, 9.

fit for manual labor."[41] Cultural workers, for Harrington, were marked by some mysterious physiological difference that rendered them alien to the rest of the working class.

Literary historian Nick Bromell provides a series of fascinating historical exhibits that testify to the long-running preoccupation with the fine line between "mental" and "manual" labor in US thought. For example, we find Herman Melville describing a ship carpenter's brain having "early oozed into the muscles off his fingers," the Lowell mill girls selecting *Mind Among The Spindles* as the title of their collection of literary work, and the political economist Alonzo Potter observing in 1841 that "by far the most productive labor of all is that of the mind, which is not susceptible of compulsion."[42] As these examples suggest, the line separating "mental" from "manual" labor was always arbitrary and inconsistent, and prone to waver. This mutability had profound implications for class composition and the hierarchical ordering of society. As the historian Jonathan Glickstein observes: "The simplest, most repetitive, and menial manual labor makes some mental demands on the performer, perhaps as much as some forms of clerical work, whereas the most intellectually exacting and creative professions, those drawing upon a large fund of technical knowledge or artistic inspiration such as that of a surgeon or ballet dancer, may require great manual or bodily dexterity as well." Who, then, was to say what was "manual" and what was "mental"? The mind-body distinction within US labor discourse has served mostly as a spur to, rather than resolution of, questions of power and domination within the employment sphere.[43]

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[41] Jerry Mangione, *The Dream and the Deal: The Federal Writers' Project, 1935-1943* (Syracuse: Syracuse University Press, 1996), 17.
[42] Nicholas Knowles Bromell, *By the Sweat of the Brow: Literature and Labor in Antebellum America*. (Chicago: University of Chicago Press, 1993), 9-11; Jonathan A. Glickstein, *Concepts of Free Labor in Antebellum America*. (New Haven: Yale University Press, 1991).
[43] See Michael Zakim "Producing Capitalism The Clerk at Work" in Michael Zakim and Gary John Kornblith, *Capitalism Takes Command: The Social Transformation of Nineteenth-Century America* (Chicago: The University of Chicago Press, 2012).

Antebellum writing on the subject sought aggressively to paper over this indeterminacy. The arbitrariness of the line separating mental from manual labor was rarely acknowledged. According to conventional wisdom, the object produced by the "manual" worker was ontologically different from the object produced by the "mental" worker. For Ralph Waldo Emerson, for example, the "work of art" came into the world not because, but *in spite of*, the intervention of human hands.[44] Glickstein's survey of antebellum arguments for and against the mental/manual labor distinction provides additional context. Even in the ostensibly work-ethic-obsessed golden age of Jeffersonian republicanism, high status in American society remained the prerogative of those wealthy enough to eschew manual labor. Haunting every formulation of the mental/manual labor distinction was the fact of Southern chattel slavery, which grew more brutal and sadistic in the pre-Civil War decades, and which was increasingly justified by demagogues like George Fitzhugh by means of comparison with the mistreatment of Northern manual labor. In pre-Enlightenment thought, manual labor and slavery had frequently been conflated. In many classical texts—texts that were studied diligently by antebellum elites—the compelled labor of slaves constituted the precondition for the uninterrupted mental labor of intellectual elites.[45]

Prior to the Civil War, writing, acting, and painting were often seen as parasitic activities, suited for the time and space of leisure (if permissible at all) and utterly foreign to the arena of productive labor. Colonial America was, after all, heir to a long tradition of performing arts, the "little tradition" of Early Modern Europe that Peter Burke describes vividly in his classic study *Popular Culture in Early Modern Europe*. However, this activity

[44] Bromell, *By The Sweat of the Brow*, 11.
[45] Glickstein, *Concepts of Free Labor,* 25. On Fitzhugh, see Eugene D. Genovese, *The World the Slaveholders Made: Two Essays in Interpretation* (New York: Pantheon Books. 1969).

was largely seen as marginal to economic life, when not castigated as dangerously subversive of it. In the eighteenth and nineteenth centuries, colporteurs distributed thousands of religious tracts condemning actors and theaters, and pulpits shook with screeds against theatrical artifice and insincerity.[46] Property, within this framework, meant the bounded land of the yeoman smallholder, not an intangible bundle of rights to an equally intangible set of semiotic materials congealed in an aesthetic text or artwork.[47]

In the aftermath of the Civil War, many prominent American intellectuals sought to justify cultural work as legitimate and productive forms of labor. As we explore in Chapter One, the jurist Eaton S. Drone, the publisher George Haven Putnam, the economist John Bates Clark, and the judge and legal philosopher Oliver Wendell Holmes, Jr. argued that artists and intellectuals shared with "real" workers the propensity to create new objects imbued with monetary value and intended for sale on the market. Foregrounding this particular economic reading of aesthetic production, they pioneered a materialist approach to cultural analysis that chimes in certain ways with Michael Denning's writings on the "labor theory of culture." Denning's conceptualization draws upon Harry Braverman's *Labor and Monopoly Capital* to argue that human work is the enabling condition for the creation and circulation of cultural commodities.[48] In their efforts to legitimate cultural production, these

[46] Peter Burke*, Popular Culture in Early Modern Europe* (New York: Harper & Row, 1978); Alison Kibler, "Performance and Display" in Karen Halttunen, ed. *A Companion to American Cultural History* (Malden, MA: Blackwell, 2008).
[47] Sir William Blackstone, *Oxford Edition of Blackstone: Commentaries on the Laws of England* (Oxford: Oxford Univ Press, 2016); Matthew Hale and Charles M Gray, *The History of the Common Law of England* (Chicago: University of Chicago Press, 1971).
[48] Michael Denning, *Culture In The Age of Three Worlds*, 94. We should stress, here, the partiality of our borrowing from Denning: Denning's conceptualization of the "labor theory of culture" is complex and nuanced—less a traditional model or metaphor (along the lines of "base and superstructure" or "the mirror and the lamp") than a restatement of Marxist interpretive priorities, inspired by the example of Harry Braverman's landmark text *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (New York: Monthly Review Press, 1975).

intellectuals offered preliminary or anticipatory formulations of the "labor theory of culture," interpreting the exchange of signs and symbols as "work": "goal-directed social activity that mediates between humans and nature, creating specific products in order to satisfy determinate human needs."[49]

Although most of these thinkers were not, by any definition, left-wing (John Bates Clark was, however, sometimes compared by alarmed colleagues to Karl Marx) the thrust of their arguments was radical. To compare acts of literary composition or painting on canvas to the muscular exertions of the farmer or mason constituted, in a real sense, a challenge to the valorization of toil—the possessive individualism and self-fashioning via labor—that had served as a cornerstone of American ideology since well before the Revolution.[50] At the same time, such comparisons proposed a new source of legitimacy for artistic and intellectual endeavors, and augured the possibility of new alliances between "workers by hand" and "workers by brain."[51] Consider, for example, the publisher George Haven Putnam's assertion in a conversation with Cardinal Gibbons, then Archbishop of Baltimore: "Intellectual labor is the highest and noblest occupation of man, and there is no work to the fruit of which a man has a higher claim than to the fruit of mental labor." Putnam pleaded for legal protections for

[49] This definition of "work" is derived from Moishe Postone, *Time, Labor, and Social Domination: A Reinterpretation of Marx's Critical Theory* (Cambridge [England]: Cambridge University Press, 1993).
[50] See C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962); and Gregory S. Alexander, *Commodity & Propriety Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago, Ill: University of Chicago Press, 1999).
[51] The reference here is to the famous Clause IV of the UK Labour Party's Constitution, drafted by Sidney Webb in 1917, and adopted in 1918: "To secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry or service." See Ross McKibbin, *Parties and People: England 1914-1951* (Oxford: Oxford University Press, 2010), 72; and Ian Britain, *Fabianism and Culture: A study in British socialism and the arts, 1884-1918*, (Cambridge: Cambridge University Press, 1982), 106.

writers "who earn their living in whole or in part by their pen."[52] Authors were to be protected not merely because they created works of art but because they were productive workers vulnerable to exploitation. Such an understanding laid the groundworks for developments that would have been unthinkable for much of the nineteenth century.

For example, members of the Authors' League of America in the late Progressive Era vigorously debated joining forces with the American Federation of Labor, with many participants expressing interest in such a merger. [53] The debates on AFL affiliation in 1915 make for fascinating reading. Letters to the *Bulletin of the Author's League of America* run the gamut from John Reed's passionate endorsement ("I am altogether in favor of the Authors' League affiliating with the American Federation of Labor; not only for the reasons which you give, but also because of the vast amount of education that we of the League are sure to get regarding the simpler aspects of the labor question in America") to Hugh Pendexter's wild-eyed rejection ("Is the A.F. of L. with paternal benevolence to see to it that we have laws enacted which will automatically protect the writer?... As the matter now stands in my mind, I am strongly opposed to any such affiliation and can only consider it as a crazy species of a joke"). What stands out most is the general acceptance of the author's status as cultural worker. Consider the language deployed by Harvey O'Higgins in his letter

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[52] "Letters Concerning Affiliation with A.F. of L." *The Bulletin of the Authors' League of America*, Vol. IV, No, 5, August 1916. Among the signers of this petition were: Henry C. Adams, Frances Hodgson Burnett, Louisa May Alcott, George Washington Cable, Mark Twain, Henry Ward Beecher, Richard T. Ely, Washington Gladden, Joel Chandler Harris, Bret Harte, Thomas Wentworth Higginson, Oliver Wendell Holmes, William Dean Howells, Helen Jackson, Sara Orne Jewett, Henry Cabot Lodge, Francis Parkman, David A. Wells, Henry George, Walt Whitman, and George Bancroft.

[53] The Authors' League of America, brainchild of Sir Walter Besant, was formed with the intention of giving the "stability of a profession to the once utterly unorganized liberal art of authorship." In the face of "much ridicule and denunciation," Besant argued that it was "not below an artist's dignity to understand the business side of his work and to insist upon his rights. Authors increasingly understood the literary market as a potential source of endless revenues: "what with serial rights, book rights, second serial and syndicate rights, rights of dramatization, or in the case of playwrights, novelizations, and last but certainly not least, motion-picture rights." The explosion of the silent cinema had resulted in "copyright chaos" which needed to be tamed by an organization of authors. *The Bulletin of the Authors' League of America,* Vol. III, No. 1, April 1915

supporting AFL affiliation: "The author's contribution is *labor*—artistic labor, brainwork, mental effort, but still labor."[54] Continuing in a decidedly Marxist vein, he observes that while the writer "may be as professional and artistic as he pleases in his relations with his art," his "relations with the publisher of that art will, nevertheless, be the relations of labor with capital." In a similar vein, arguing for affiliation, Reginald Wright Kauffman, muses that authorship has been an "art," may again be, and "here and there is." Nevertheless, there is no "true art" that is not "in the fullest and best sense, labor."[55]

The "fruits of creative, intellectual, or aesthetic labor": From the Massachusetts Copyright Statute to *Goldstein v. California*

It is useful to trace a line connecting the Massachusetts Copyright Statute of 1783, and its assertion that "no property more peculiarly a man's own than that which is produced by the labor of his mind," with which we began this chapter, to a legal decision that represents the full concretization of the cultural worker ideal: Justice Burger's ruling in the 1973 Supreme Court case of *Goldstein v. California*.[56] (A mid-way point between the two may be discerned in *The Trade-Mark Cases* [1879], in which Justice Miller emphasized that copyright protection was to be reserved for works "such as are original, and founded in the creative powers of the mind"—in other words, the "fruits of intellectual labor." Trademarks, Miller pointed out, did not "depend upon novelty, invention, discovery, or any *work of the brain*.")[57]

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[54] *The Bulletin of the Authors' League of America,* Vol. IV, No. 5, August 1915. Emphasis added.
[55] *The Bulletin of the Authors' League of America,* Vol. IV, No. 5, August 1915.
[56] *Goldstein v. California*, 412 U.S. 546 (1973). The discussion here does not require a review of the details of the case, which concerned the recording industry and the sale of "pirated" copies of LPs.
[57] *Trade-Mark Cases*, 100 U.S. 82 (1879), (*emphasis added*).

In his decision for the majority in *Goldstein*, Burger interprets federal copyright law as covering "any physical rendering of the fruits of *creative*, *intellectual*, or *aesthetic labor*."[58] By the early 1970s, a series of social and technological revolutions had dramatically changed the meaning of "creative, intellectual, or aesthetic labor."[59] The ground against which cultural work had been measured for centuries—agricultural and industrial labor—was by the late Vietnam Era in apparently terminal decline. "Real work" was disappearing with alarming alacrity, while the sectors that had previously been associated with the "sales effort," such as advertising, much of mass media production, and retail management, were growing in significance. Work in domains that in previous eras had been seen as inherently parasitic—banking, stock market brokerage, real estate and insurance sales, corporate law, and government contracting—was now the cutting edge of capitalism itself.[60]

In the meantime, the various ruptures of the 1960s had lent to cultural work the status of a fantasy occupation, a white-collar job in which the stultifying routine and forced conformity of the office was mitigated by the opportunity to pursue creative fulfillment in a

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[58] *Goldstein v. California*, Note 23, emphasis added. "By Art. I, § 8, cl. 8, of the Constitution, the States granted to Congress the power to protect the "Writings" of "Authors." These terms have not been construed in their narrow literal sense, but rather with the reach necessary to reflect the broad scope of constitutional principles. While an "author" may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an "originator," "he to whom anything owes its origin." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). Similarly, although the word "writings" might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor… Thus, recordings of artistic performances may be within the reach of Clause 8."

[59] Within the world of the music industry, these changes included transformations in the methods of musical creation, performance, transmission, recording, and reproduction. See Reebee Garofalo, "From Music Publishing to MP3: Music and Industry in the Twentieth Century." *American Music*, Vol. 17, No. 3 (Autumn, 1999), pp. 318-354, and Jonathan Sterne, *MP3: The Meaning of a Format* (Durham: Duke University Press 2012).

[60] See Judith Stein, *Pivotal Decade: How the United States Traded Factories for Finance in the Seventies* (New Haven: Yale University Press, 2010). Gabriel Winant, *The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America* (Cambridge: Harvard University Press, 2023). Leo Panitch and Sam Gindin, *The Making of Global Capitalism: The Political Economy of American Empire* (London: Verso 2012). Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Cambridge Mass: Harvard University Press, 2012).

glamorous milieu. Cultural workers had also become important bearers of political meaning in a manner that had not been seen since the 1930s. The art world, meanwhile, buoyed by state investment in Abstract Expressionism, the expansion of the university system, and cheap urban rents, had given rise to a parallel star system of influential figures like Andy Warhol, whose choice of the name "Factory" for his loft studio and party destination was not coincidental.[61] Most of all, the converging forces of demographics, relaxation of legal rules governing film and music content, and the rise of FM radio, the underground press, and arthouse cinema resulted in the generation of enormous profits.[62]

This revolution, however, was very much a sequel to an earlier one, during which the modern cultural worker first arrived on the American scene. The earlier upheaval, the Gilded Age "corporate revolution," was also a conceptual rupture with two centuries of common sense regarding political economy and the moral universe.[63] The reality described by George Haven Putnam in the late nineteenth century was a shocking break with Jeffersonian certitudes, with "nineteen-twentieths" of the existing wealth on the planet existing in incorporeal forms: "the franchises of ferries, railways, telegraph and telephone companies,

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[61] Julia Bryan Wilson, *Art Workers: Radical Practice in the Vietnam War Era* (Berkeley: University of California Press, 2009). David Caute, *The Dancer Defects: The Struggle for Cultural Supremacy during the Cold War* (Oxford: Oxford University Press. 2003). Serge Guilbault and Arthur Goldhammer, *How New York Stole the Idea of Modern Art*: *Abstract Expressionism Freedom and the Cold War* (Chicago: University of Chicago Press. 1983). Penny M. Von Eschen, *Satchmo Blows Up the World*: *Jazz Ambassadors Play the Cold War* (Cambridge Mass: Harvard University Press. 2006); Patrick Iber, *Neither Peace nor Freedom: The Cultural Cold War in Latin America* (Cambridge Massachusetts: Harvard University Press. 2015); Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge Mass: Belknap Press of Harvard University Press, 2005).

[62] Peter Biskind, *Easy Riders Raging Bulls: How the Sex-Drugs-And-Rock-'n'-Roll Generation Saved Hollywood* (New York: Simon & Schuster, 1998).

[63] Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge [Cambridgeshire]: Cambridge University Press, 1988); Alan Trachtenberg and Eric Foner, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982); James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850-1940* (Chapel Hill, N.C.: University of North Carolina Press, 1994).

patents, trade-marks, good-will, shares in incorporated companies, and annuities."[64] The incipient culture of corporate capitalism rested upon a rejection of sturdy economic frameworks that were steeped in the economic theology of Christianity, in which exchange was understood to be "just" only if one tangible object was to be traded for another.[65] The lure of tangibility as a guiding quality of moral economy faded quickly in the post-bellum decades, a process fueled by innovations in the creation of new financial instruments and assets. Perhaps the key project of the era of corporate reconstruction was the creation of a new framework wherein the proliferating array of intangible objects could be covered and managed within the capitalist framework of property relations. Media products were among the most important of the new species of property—invisible, evanescent, spectral, or ephemeral—that fueled the rise of the corporate age.[66]

These tendencies were of grave concern to worried observers of the new order. Thomas Carlyle, for example, bemoaned his moment as a "heyday of Imposture," and called for "the return of mankind to Reality and Fact, now that they were perishing of Semblance and Sham."[67] E.L. Godkin disparaged this age of "Semblance and Sham" as a "chromo-civilization." If, as William Dean Howells would famously conclude, the "man of letters" was destined to mutate into a "man of business" over the course of the nineteenth century, that transition would be accelerated by the assimilation of incorporeal words, thoughts, sounds, and images into the order of capitalist exchange value. Howells captures some of the

[64] George Haven Putnam, *The Question of Copyright: A Summary of the Copyright Laws at Present in Force in the Chief Countries of the World* (New York: G.P. Putnam's Sons, 1891), 123.
[65] See Peter Garnsey, *Thinking About Property: From Antiquity to the Age of Revolution* (Cambridge: Cambridge University Press, 2007); Jeffrey Sklansky, *The Soul's Economy : Market Society and Selfhood in American Thought 1820-1920* (Chapel Hill: University of North Carolina Press 2002).
[66] Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge [Cambridgeshire]: Cambridge University Press, 1988).
[67] See Thomas Carlyle, *Chartism* v. 44, 1839, and *On Heroes* vi. 382, 1841.

tensions inherent in the process: "People feel that there is something profane, something impious, in taking money for a picture, or a poem, or a statue. Most of all, the artist himself feels this." For the artist, Howells muses, "the work which cannot be truly priced in money cannot be truly paid in money."[68] At about the same time, John Bates Clark like Adam Smith before him pushed back against such conventional wisdom, castigated orthodox economists' exclusion from the realm of productive labor "such persons as the actor, the musical performer, the public declaimer or reciter, and the showman."[69]

There were, of course, many diverse precursors to the modern paradigm of popular culture as an industry and site of work, and its reversal of the infamously American Protestant work ethic, which has tended to conceptualize toil as divine punishment: the worker suffers, and his performance of patient suffering serves as the condition of membership in the polity.[70] The Jacksonian Era had witnessed the rise of a new popular culture, embodied in theatre, newspapers, and reprinted novels, as well as the beginnings of exotic new technologies like telegraphy and photography.[71] The advent of P.T. Barnum and the commodification of sensation and bunkum, the rise of popular melodrama, the steady popularization of blackface minstrelsy's vexed economies of attraction and repulsion: all lent

[68] William Dean Howells, "The Man of Letters as a Man of Business." *Scribner's,* October 1893; rpt. in Clara Kirk and Rudolf Kirk, eds., *Criticism and Fiction* (New York, 1959), p. 298.
[69] John Bates Clark, *The Philosophy of Wealth*, 2-3.
[70] See, for example, Joan Campbell, *Joy in Work, German Work: The National Debate, 1800-1945* (Princeton, N.J.: Princeton University Press, 1989); Daniel T. Rodgers, *The Work Ethic in Industrial America, 1850-1920* (Chicago: University of Chicago Press, 1978).
[71] Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge, Mass: Harvard University Press, 1988); David Grimsted, *Melodrama Unveiled: American Theater and Culture, 1800-1850* (Chicago: University of Chicago Press, 1968); Eric Lott, *Love and Theft: Blackface Minstrelsy and the American Working Class* (New York: Oxford University Press, 1993); Nina Baym, *Novels, Readers, and Reviewers: Responses to Fiction in Antebellum America* (Ithaca: Cornell University Press, 1984); Daniel J. Czitrom, *Media and the American Mind: From Morse to McLuhan* (Chapel Hill: University of North Carolina Press, 1982); Michael Schudson, *Discovering the News: A Social History of American Newspapers* (New York: Basic Books, 1978).

to popular entertainment a patina of scandal and danger.[72] After the Civil War, improvements in printing and the production of cheap paper, as well as the spread of the railroad, led to an expansion in the market for mass-produced texts. In tandem with a new vogue for the parlor piano, the market in sheet music grew. The refinement of new techniques of lithographic color printing helped to promote post-bellum proto-cinematic cultures of attraction and sensation.[73] These, in turn, were products of a larger Victorian Era "culture of the copy," in which various technologies of reproduction and doubling—from speed-writing stenographic methods to musical automatons—were endlessly tinkered with and demonstrated.[74]

As these processes accelerated, we encounter, again and again, the question of whether different kinds of cultural workers can be said to perform productive work. It was the very blurring of the line separating "productivity" from its negative counterpart that represented one of the most profound challenges issued by cultural workers to the status quo order over the course of the long 20th century. The appearance of the cultural worker in crucial moments throughout the period under consideration—and the formation of a politics that might be called "cultural workerism"—triggered serious crises for US capitalism's understanding of "productivity" and opened up new avenues of contestation. The response to

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[72] Bluford Adams, *E Pluribus Barnum: The Great Showman and the Making of U.S. Popular Culture* (Minneapolis, Minn: University of Minnesota Press, 1997); Benjamin Reiss, *The Showman and the Slave Race, Death, and Memory in Barnum's America* (Cambridge, Mass: Harvard University Press, 2001); Leo Charney and Vanessa R. Schwartz, *Cinema and the Invention of Modern Life* (Berkeley: University of California Press, 1995); Cedric J. Robinson*, Forgeries of Memory and Meaning Blacks and the Regimes of Race in American Theater and Film Before World War II* (Chapel Hill: The University of North Carolina Press, 2012); Ann Cvetkovich, *Mixed Feelings Feminism, Mass Culture, and Victorian Sensationalism* (New Brunswick, N.J.: Rutgers University Press, 1992); Shelley Streeby*, American Sensations Class, Empire, and the Production of Popular Culture* (Berkeley: University of California Press, 2002).

[73] Russell Sanjek, *American Popular Music and Its Business: The First Four Hundred Years* (New York: Oxford University Press, 1988); Robert Clyde Allen, *Horrible Prettiness Burlesque and American Culture* (Chapel Hill: University of North Carolina Press, 1991); M. Alison Kibler, *Rank Ladies: Gender and Cultural Hierarchy in American Vaudeville* (Chapel Hill: University of North Carolina Press, 1999).

[74] Lisa Gitelman, *Scripts, Grooves, and Writing Machines: Representing Technology in the Edison Era* (Stanford, Calif: Stanford University Press, 1999); Hillel Schwartz, *The Culture of the Copy: Striking Likenesses, Unreasonable Facsimiles* (New York: Zone Books, 1996).

cultural workerism on the part of the capitalist class has typically been hostile: whether in the form of anticommunist countersubversion or in the form of a neoliberal managerial insistence on the exceptionality of the work of programmers, animators, and comedy writers that would render unionization inappropriate.[75] Taking a genealogical approach to intellectual history, we examine certain key moments that allow us to hone in on the logic at work in contests over the legitimacy and legibility of the idea of cultural work.

The old order was displaced by innovations in media of storage and representation, what the philosopher of technology Bernard Stiegler refers to as *mnemotechnics* (technologies of memorization), encompassing all of the material supports of collective memory and the specific methods through which (to paraphrase the sociologist Paul Connerton) societies remember.[76] These are typically mechanisms of informational retention, storage, and spectacularization, ranging from alphabets to printing presses to photography, cinema, and sound recording, to modern silicon chips. *Homo faber*, Stiegler argues, could only come into being by way of the slow and steady accumulation of prosthetic supports of human memory, innovations which come to influence the way we think, create, and communicate. Culture, law, habit, and the composite entity called "the past": all depend on the cultivation and maintenance, from one generation to the next, of technological props. In mnemotechnical terms, the period 1870-1920 witnessed a combined revolution in economic organization, technologies of mimesis and representation, mass consciousness, and epistemology. What was remarkable about these new mnemotechnical industries was the mass production of "temporal objects" that were to be heard or seen simultaneously by

[75] See Ellen Schrecker, *Many Are the Crimes: Mccarthyism in America* (Boston: Little Brown, 1998).
[76] See Bernard Stiegler, *Technics and Time, 1* (Stanford, Calif: Stanford University Press, 1998), *Technics and Time, 2* (Stanford, Calif: Stanford University Press, 1998), and Paul Connerton, *How Societies Remember* (Cambridge [England]: Cambridge University Press, 1989).

thousands and sometimes millions of consciousnesses at once (perhaps billions today). Such temporal objects were uniquely capable of summoning and organizing mass desire, and they could only be produced by way of the streamlined coordination of hundreds of specially trained cultural workers.[77]

African American Cultural Work in the Gilded Age

As these processes took hold, the ranks of professional cultural workers swelled. This expansion was particularly significant within the African American entertainment industry. As we explore in Chapter Two, African American cultural workers understood very well the political stakes of their labor, as exemplified by the life and work of James Weldon Johnson, polymath intellectual, songwriter, novelist, essayist, educator, and civil rights activist. "I do not think it too much to say," Johnson suggested, "that through artistic achievement the Negro has found a means of getting at the very core of the prejudice against him, by challenging the Nordic superiority complex."[78] Johnson's close collaborator Bob Cole captured the spirit of Gilded Age African American cultural workers. In his "Colored Actor's Declaration of Independence of 1898," Cole proclaims: "We are going to have our own shows… We are going to write them ourselves, we are going to have our own stage manager, our own orchestra leader and our own manager out front to count up. No divided houses—

[77] See Bernard Stiegler and Stephen Francis Barker, *Technics and Time, 3: Cinematic Time and the Question of Malaise* (Stanford, Calif: Stanford University Press, 2011). See also Frances A. Yates, *The Art of Memory* (Chicago: University of Chicago Press, 1966); Mary Ann Doane, *The Emergence of Cinematic Time: Modernity, Contingency, the Archive* (Cambridge, Mass: Harvard University Press, 2002); Friedrich A. Kittler, and Hans Ulrich Gumbrecht, *The Truth of the Technological World: Essays on the Genealogy of Presence* (Stanford, Calif: Stanford University Press, 2014).
[78] James Weldon Johnson, "Race Prejudice and the Negro Artist," *Harper's*, November 1928.

our race must be seated from the boxes back."[79] The demands enumerated here encompass a wide range of interconnected concerns: the quest for freedom from white meddling with the form and content of shows, the desire for full employment for African American musicians and theatre workers, the demand that the revenues generated be properly counted and fairly distributed, and the insistence that Jim Crow discrimination against African American patrons in theaters be eliminated. A decade later, African American musician and cultural critic Sylvester Russell wrote a companion piece of sorts in a strong polemic against the then-popular "coon songs," addressing those who might ask: "What harm is there in a mere song?" Russell answers forcefully: plenty of harm had already been done in the form of songs like "All Coons Look Alike To Me," "Coon, Coon, Coon," and "Nigger, Nigger, Never Die." He begs the "ignorant class of colored actors" to "please cut all the self-ridicule out," and implores song publishers to restrict "race insult from comic songs."[80]

The significance of the culture industries for African American workers at the turn of the century was especially heightened because of the intense racism that governed access to labor markets in the North, where the entertainment industry was centered, and in the South, where the majority of African Americans lived prior to the Great Migration. Speaking at the 1893 World's Fair in Chicago, Frederick Douglass railed against the exclusion of African Americans "from every respectable calling, from workshops, manufacturies and from the means of learning trades."[81] That a new employment sector was enjoying a period of rapid growth, and that African-American cultural practices—the cakewalk, ragtime music, and

[79] Paula Marie Seniors, "Bob Cole's 'Colored Actors Declaration of Independence," in Kathy A. Perkins et al, eds. *The Routledge Companion to African American Theatre and Performance* (Abingdon: Routledge, 2019), 88.
[80] Sylvester Russell, "The Faults of Song Publishers." Indianapolis *Freeman*, June 22, 1907.
[81] Quoted in Lynn Abbott and Doug Seroff, *Out of Sight: The Rise of African American Popular Music, 1889-1895* (Jackson: University of Mississippi Press, 2002), 283.

minstrel comedy—were newly in vogue, would necessarily be a fact of considerable political-economic import.[82] Looking back from the 1960s, Harold Cruse would reflect in *Crisis of the Negro Intellectual*: "Since the very beginning of popular music publishing in America, around 1900, publishers have used and exploited the Negro composer unmercifully."[83]

Between the end of Reconstruction and the 1890s, white elites conspired to dramatically narrow employment possibilities for most African Americans in the United States. In the South, where agriculture predominated, business interests worked in concert with white smallholders and cotton intermediaries to dash African American post-slavery dreams of peasant proprietorship. Sharecropping, tenant farming, and debt peonage became the norm by the last decade of the century.[84] African Americans were also locked out of most skilled trades in Southern cities. The unluckiest were kidnapped by agents of the state under the cover of law and forced to build the railroads that would integrate the Southern and Northern markets.[85]

Within this bleak labor scene, one new field of employment for African Americans was, in fact, growing: cultural work. The New Orleans jazz musician Danny Barker observed that it was only after the Civil War that Crescent City musicians became professional cultural workers. "In many instances," Barker noted, "what had once been an avocation or a hobby became the basis for a new and usually precarious occupation. Money brokers became

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[82] See David W. Gilbert, *The Product of Our Souls: Ragtime Race and the Birth of the Manhattan Musical Marketplace* (Chapel Hill: University of North Carolina Press, 2015).
[83] Harold Cruse, *The Crisis of the Negro Intellectual*, 70.
[84] See Cheryl I. Harris, "The Afterlife of Slavery: Markets, Property and Race." https://soundcloud.com/artistsspace/cheryl-i-harris-the-afterlife-of-slavery-markets-property-and-race
[85] Steven Hahn. *A Nation Under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Cambridge Mass: Belknap Press of Harvard University Press); 2005; Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Alfred A. Knopf); 1998; *Been in the Storm so Long: The Aftermath of Slavery* (New York: Knopf, 1979).

laborers, and merchants were transformed into musicians. Now it was necessary to play music in order to earn money."[86] Writers for the independent African American press, including papers such as the Indianapolis *Freeman* and Detroit *Plaindealer*, noted with great interest the vogue for live performance by African American performers on the concert stage. In the world of the performing arts, the public appetite for African American aesthetic labor seemed to be insatiable. Here, some African American intellectuals and show business entrepreneurs wagered, might lurk the seeds of an economic sector less vulnerable to the exclusions and degradations of both agrarian and industrial capitalism. At the same time, working within the entertainment world might provide an opportunity to challenge the regime of representation that had emerged in the late 1880s, and in particular to challenge the revisionist celebration of the new racist culture's primary historico-imaginative space: the Edenic antebellum plantation.[87]

White consumers in the late 19th century, including many European immigrants hungry for membership in the white-identifying national community, were eager to accept without question the veracity of the stories told of plantation Mammies and oversexed chicken thieves. The stage overflowed also with derogatory portrayals of Italians, Jews, and the Irish, and enjoyment of minstrelsy offered confirmation that no matter how despised working-class European immigrants might be, they were yet not so hated as African Americans. By the same token, hardened white bigots were able to find ample confirmation of their deepest suspicions regarding their putative inferiors every time they sat down to the

[86] Jack V. Buerkle and Danny Barker. *Bourbon Street Black; The New Orleans Black Jazzman*. New York: Oxford University Press, 1973, 9. Buerkle and Barker's text has been criticized in recent years for factual inaccuracy. See See Jerah Johnson, "Jim Crow Laws of the 1890s and the Origins of New Orleans Jazz: Correction of an Error*." Popular Music*, Vol. 19, No. 2 (Apr., 2000), pp. 243-251.
[87] Alexander Saxton, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America* (London: Verso. 1990).

piano, went out to see a show, or cranked up the Victrola.[88] Cedric Robinson observes that while the consumers of plantation fantasies were mostly working-class whites, the sources of the new race discourse of the 1890s were members of the elite: men who occupied the commanding heights tiers of American business, science, and government. Their ideological project traversed "museums, scientific journals, newspapers, magazines, amusement parks… circuses, films, popular cartoons, children's toys (puzzles, toy banks, etc.), curios, postcards, and advertisements for cereal, fruit companies, shoe polish, toothpaste, and so on." [89] As John Cell argues, while the racial regime of Jim Crow strove to present itself as normal and natural, it was neither; as such, it required vigorous ideological supports in the realm of popular culture.[90] The project of *fin-de-siecle* racist popular culture was also of ideological utility in the naturalization of imperialist militarism that seemed to many economic thinkers of the 1890s (and later to Hilferding and Lenin) to be a necessary component of capitalism in its corporate form.[91]

It fell to African American cultural workers to counter this nonstop propaganda campaign. Looking back at the previous decades in 1922, Johnson stressed that the fight for civil rights must be grounded in a thoroughgoing understanding of the opposition faced by African Americans: an opposition that had been "thought out and worked out." White supremacists were continuously engaged in the "business of thinking out and working out opposition to the Negroes." Civil rights activists therefore needed to counter both "opposition

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[88] David R. Roediger, *How Race Survived US History: From Settlement and Slavery to the Obama Phenomenon* (London: Verso. 2008); *Colored White: Transcending the Racial Past* (Berkeley: University of California Press. 2002); *Working Toward Whiteness: How America's Immigrants Became White: The Strange Journey from Ellis Island to the Suburbs* (New York: Basic Books. 2005).
[89] Cedric Robinson, *Forgeries of Memory and Meaning*, 80.
[90] John Whitson Cell, *The Highest Stage of White Supremacy*: *The Origins of Segregation in South Africa and the American South* (Cambridge: Cambridge University Press, 1987 [1982]).
[91] Martin J. Sklar, *The United States As a Developing Country: Studies in US History in the Progressive Era and the 1920s* (Cambridge England: Cambridge University Press. 1992).

which was created fifty years ago" and opposition that was being created afresh each day. This necessitated alertness to new libels and insults, which in turn rendered both cultural analysis and cultural creativity particularly urgent.[92]

Several years later, in the midst of a vigorous debate within the hothouse atmosphere of the Harlem Renaissance, Johnson would publish "Race Prejudice and the Negro Artist," an essay that proposes an "art approach to the Negro problem." In "Race Prejudice and the Negro Artist," Johnson suggests that cultural workers would "undermine and overthrow the kind of prejudice which is our main handicap" by establishing the fact of African American creative genius "with sufficient frequency and in sufficient variety." Johnson insists that, for the most part, "prejudice against the Negro is founded in the feeling and the belief that he is mentally and intellectually an inferior being." Thus, "every Negro who accomplishes anything which demonstrates brain power and the ability of energizing with the brain picks a stone out of the wall of prejudice." This includes the artist who "paints a great picture, or composes a great musical work, or writes a great book." What mattered most was the demonstration of African American mastery of "things thought to be in the exclusive domain of things to be accomplished by white men's brains," which would shake down the "wall of prejudice."[93]

Few Gilded Age figures embodied the political promise of African American cultural work more than Frederick Loudin, who led the Fisk Jubilee Singers in the 1880s and 1890s.

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[92] James Weldon Johnson, "How Opinion is Created." New York *Age*, March 4, 1922.

[93] James Weldon Johnson, "Race Prejudice and the Negro Artist." A preview of sorts to this argument can be found in a New York *Age* column of April 8, 1915, entitled "The Proof of Equality." There, Johnson writes that the impact of artistic and intellectual achievements by African Americans was not to be felt in this or that isolated case, but, rather, "the proof must be given so frequently and in so many various ways as to create a general opinion." He points to African American cultural work as a mechanism that might alert "thousands of white readers" to the "startling fact" that "a Negro has brains that can accomplish the same things which are accomplished by brains located in the heads of white men." James Weldon Johnson, "The Proof of Equality." New York *Age*, April 8, 1915.

The group had been founded in 1871 as a fundraising tool to boost the economic fortunes of Nashville, Tennessee's Fisk University. Johnson stresses the significance of Loudin's Jubilee Singers frequently throughout his writings.[94] Writing of their first European tour, Johnson points out that the Jubilee Singers had done more than raise funds for Fisk: "They had to an inestimable degree melted down hostility, had opened the minds and hearts of thousands of people, and changed their attitudes toward the Negro in America."[95] Loudin (born in Ohio in 1842) joined the group in 1875. The looming commercialization of African American music under white control alarmed many in the Jubilee Singers circle and the broader community. Sensitive to preserving his group's political mission, Loudin worked to wrest control of the group from white managers, and by late 1882, Loudin assumed leadership of the Jubilee Singers. Under his direction, the Jubilee Singers became an international phenomenon, and enjoyed an unrivaled position of aesthetic authority in the United States. Throughout the 1870s and 1880s, the Black press lavished attention upon the Jubilee Singers, covering changes in concert programs, reviewing performances, and publicizing Loudin's comments both onstage and off.

This newly autonomous formation launched a six-year-long world tour that began in 1884, with stops in Australia, India and Japan, as well as Europe, South America, and the Caribbean. Loudin ascended his perch as perhaps the most politically outspoken African American entertainer of the nineteenth century. First during 1879-1882, and then during the 1880s and 1890s, Loudin used his visibility as the public face of the Jubilee Singers to agitate

[94] James Weldon Johnson, "How to Understand and Enjoy Negro Spirituals," draft, typescript carbon. JWJ MSS 49. Box 68, folder 317, undated. Radio broadcast on the Fisk Jubilee Singer. Draft, typescript JWJ MSS 49 Box 81, folder 601 James Weldon Johnson and Grace Naill Johnson Papers Series II: Writings.
[95] Radio broadcast on the Fisk Jubilee Singer. Draft, typescript, undated. JWJ MSS 49. Box 81, Folder 601. James Weldon Johnson and Grace Naill Johnson Papers, Series II: Writings, 6.

for civil rights. Loudin was particularly effective in drawing public attention to discrimination in lodging and restaurants, and he would fulminate against such injustices from the stage, guaranteeing news reports on the topic the next day. The hardening of the Jim Crow regime in the intervening years struck the musicians with great force. Immediately upon returning from successful tours abroad, the company faced regular refusals from hotels as they crisscrossed the United States, even in non-Southern states. Newspaper coverage of the racist treatment of the Jubilee Singers upon their return to the United States—abuse they had not encountered stateside only a few years earlier—helped readers organize a collective historical timeline of events as the end of Reconstruction gave way to the catastrophe of the 1890s.[96]

An article in the Detroit *Plaindealer* of March 11, 1892, described Loudin as having returned to the United States "bereft of all his patriotism and love for the American flag." Loudin had had "more indignities heaped upon him in one day in the land of his birth than in all the six years that he… spent abroad," and insisted that African Americans could not "appreciate or measure the feelings of true manhood" until they left their native land and journeyed "among people who recognize worth under a black skin without effort." Having traveled throughout Europe, Asia, Australia, Loudin could report with confidence that it was only in the United States "where he may get a meal without insult, where he may go to church without reproof."[97] At a Milwaukee, Wisconsin concert of May 2, 1890, the Fisk Jubilee Singers had directly addressed civil rights issues from the stage, earning praise from the Detroit *Plaindealer* for Loudin's refusal to be "insulted and oppressed."[98] Loudin gave a

[96] Abbott and Seroff, *Out of Sight*, 19.
[97] "Mr. Loudin's Observations." Detroit *Plaindealer*, March 11, 1892, 6.
[98] "Milwaukee." Detroit *Plaindealer*, May 6, 1892, 2.

speech from the stage at a concert in Cleveland about the refusal of the local American House hotel to offer the group accommodations, which elicited the "hearty approval of every person present."[99] On November 25, 1890, the Columbus *Dispatch* reported on a white theatrical company that protested the presence in the hotel of the Fisk Jubilee group, who were insulted as "niggers." A similar incident was reported on in Fort Wayne, Indiana on May 24, 1892.[100]

Publicization of such racist abuse served to build a common understanding of the changing nature of the American racial regime in the Gilded Age and emergent Progressive Era. James Weldon Johnson would, himself, write letters of this sort to the New York *Age* while on tour in Europe with his brother Rosamond and Bob Cole in 1905, drawing a contrast between their gracious reception at Paris hotels and the abuse they suffered in Utah. At The Hotel Continental in Paris, Johnson recalled, his entourage felt immediately like welcome guests: "the porters rushed for our bags, the clerk met us with a respectful bow and a pleasant smile, and I knew that I was not in my native land." In a Salt Lake City hotel six months prior, by way of contrast, the clerk became "dreadfully nervous" as Johnson and his party approached the desk, fidgeting about until, when at last he could avoid them no longer, "he came with the shame of the lie he was to utter already upon his face, and told us there was no room in the house." This contrast provides Johnson with a unique platform to wax philosophical in what might otherwise be a lighthearted travel diary. Like Loudin, Johnson seizes upon the opportunities provided by cultural work for travel to authoritatively demonstrate the ugliness of the Jim Crow regime: "I sometimes feel that the corruption and the deterioration of many of our white fellow-citizens will be indirectly charged against us.

[99] "Items of the Age." New York *Age*, July 12, 1890, 2.
[100] Quoted in Abbott and Seroff, *Out of Sight*, 81.

Have you ever though how we daily make of them liars, oppressors, murderers, and brutes?"[101]

A new phase in the history of that racial regime had been launched by the 1893 Chicago World's Fair/World's Columbian Exposition, at which a young James Weldon Johnson served as one of hundreds of "chair boys" pushing attendees around the grounds. The Fair's anthropological and amusement departments were carnivals of racist and imperialist fantasy, sadism, and kitsch. It had received financial backing from the nation's wealthiest industrialists: Philip Armour, Gustavus Swift, and Cyrus McCormick. As Cedric Robinson observes, this coalition represented "an extraordinary synergy between commerce and public culture."[102] In the period immediately preceding the Fair, the firms of Armour, Swift, and McCormick had seized control of the postbellum Southern economy in league with the white supremacist politicians who rode with the Ku Klux Klan into southern statehouses after the betrayal of Reconstruction. In her polemics against the Fair, Ida B. Wells highlighted the significance of the collaboration of "railroad corporations and the World's fair" who "thought no Negro good enough for an official position among them."[103]

Racism was central to the railroad industrialists' plan of building out and integrating the national rail system on the cheap.[104] The antebellum railroad in the South had been built by slaves, including many skilled workers. The railroad magnates' turn to aggressive collusion with the new apparatus of Jim Crow racism dovetailed with their effort to

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[101] James Weldon Johnson, "Cole & Johnson Abroad." New York *Age*, July 12, 1905. JWJ MSS 89, 1894-1937. Clippings file of the James Weldon Johnson Memorial Collection, Box 98, Folder 1. General, 1894-1918.
[102] Cedric Robinson, *Forgeries of Memory and Meaning*, 73.
[103] Ida B. Wells, *The Reason Why the Colored American is Not in the World's Columbian Exposition* (Pamphlet. Chicago: privately printed, 1893).
[104] See Scott Reynolds Nelson, *Iron Confederacies: Southern Railways Klan Violence and Reconstruction* (Chapel Hill: University of North Carolina Press, 1999); Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1995).

consolidate a new inexpensive labor force that could be subjected to the often-deadly rigors of the work of clearing forests and swamps and laying rail through dangerous tracts of land. Railroad magnates forged alliances with racist Southern politicians to gain access to teams of convict laborers and acquire monopoly control over the state railways. The railroads also purchased Southern newspapers, such as the Raleigh *News*, the Richmond *Enquirer*, the Memphis *Commercial Appeal*, and the Atlanta *Constitution*, which would serve as key sources of legitimation for lynching, disfranchisement, debt peonage, and Jim Crow writ large.[105]

The World's Fair/World's Columbian Exposition was also a moment during which African American cultural workers came to understand the urgency of the political tasks that awaited them as the nineteenth century gave way to the twentieth. Civil rights activists viewed the upcoming Fair as an opportunity for agitation and consciousness raising, particularly in light of the recent rise in the incidence of lynchings in the South, which had been greeted by deafening silence outside of the African American community. Loudin, in a letter published on February 25, 1893, in the Cleveland *Gazette* protested that he and his community had been "boycotted by the World's Fair in that no Negro is permitted to fill any position of honor or profit." Adding insult to injury, the management had arranged for accommodations at the Fair to be "in accord with the jim crow legislation of the southern states," with African American guests consigned to "nigger quarters" even though Chicago hotels did not otherwise thus discriminate. Loudin proposed for a pamphlet to be distributed at the Fair that compiled "the accounts of the lynchings, the shootings, the flogging alive, the

[105] Cedric Robinson, *Forgeries of Memory and Meaning*, 73.

burnings at the stake, and all the kindred barbarous acts" of recent years.[106] Ida B. Wells was thus inspired to compose exactly such a "World's Fair Pamphlet," alerting readers to the more than one hundred lynching victims who had been murdered that year. The "World's Fair Pamphlet" took the Fair and President Benjamin Harrison to task for the absence of any African American voices within the leadership of the Fair. It protested also the Fair's "cowardly tribute to the Southern demand 'to keep the Negro in his place.'"[107]

As the "World's Fair Pamphlet" idea was being developed, another cultural initiative was proposed as a means to combat the racism of the Fair. The young African American composer Will Marion Cook penned a public letter to the event's organizers. Published by the Detroit *Plaindealer*, Cook added his voice to Loudin and Wells's complaints regarding the omission of the story of the African American freedom struggle from the Fair's program. "Although for two hundred and fifty years in the most abject state of bondage, closely following which subject to barriers of prejudice, and oppression that tended to retard his advancement," Cook protested, "the Negro has made most wonderful strides in the progress of civilization." Such an omission represented a "great injustice" to a "hitherto inferior and oppressed people." Cook proposed a plan to remedy this affront. Sounding a theme that James Weldon Johnson would later adopt as his own, Cook stressed that because the "Negro's greatest achievements have been in art, literature and music," the Fair should provide a display of these talents, and in particular a "Negro Opera," to be composed by Cook from the source text of *Uncle Tom's Cabin*. Gathering together the finest African American musical performers (including Loudin and the celebrity soprano Siseretta Jones)

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[106] "Mr. Loudin's Open Letter," Cleveland *Gazette*, February 25, 1893, 2. Frederick Loudin, "Indorses A Good Idea," Cleveland *Gazette*, February 25, 1893, 2.
[107] Ida B. Wells, *The Reason Why the Colored American is Not in the World's Columbian Exposition* (Urbana: University of Illinois Press, 1999 [1893]).

Cook would also present a selection of well-loved European operas, as well as "Plantation Concert nights" at which "Jubilee music" would be sung. "In this way," Cook concluded, "the great progress and ability of the Negro can be seen and better appreciated."[108]

Sissieretta Jones was barred from performance at the Fair, however, and soon would be Jim Crowed out of the art music world entirely, after which she would take on the persona of "Black Patti" and work the minstrel circuit for several decades. On May 20, 1892, a foresighted commentator was quoted in the Detroit *Plaindealer*: "It is rather pitiful to think of the way [Sissieretta Jones's] career might be hampered because of her race—not because of prejudice exactly, but she certainly cannot appear in opera . . . unless one was especially written for her."[109] Now, an opera had been written for her by Will Marion Cook, but that opera was fated to never see the light of day. In early 1893, Jones performed a series of well-attended fundraisers for Cook's World's Fair opera at Carnegie Hall, raising thousands of dollars. Her manager, Major James B. Pond, was enraged by Jones's display of independence (and perhaps by her decision to position herself as a civil rights activist), and successfully sued her. Newspapers reported that on June 27, 1893, Jones received a "severe lecture" from Judge McAdam of the Superior Court "on the evils of ingratitude," and was enjoined from singing except under Pond's management.[110] As the summer of 1893 approached, World's Fair officials had quickly gotten to work turning Cook's politically charged concert program into a neutered "Colored Folks Day." Well aware of the story of the rejection of Cook's *Uncle Tom's Cabin* opera via months of reporting by the African American press, civil rights advocates roundly rejected any form of "Colored Folks Day," which was ultimately

[108] "A Great Scheme." Cleveland *Gazette*, January 21, 1893, 2.
[109] "A Patti With A Soul." Detroit *Plaindealer*, May 20, 1892, 5.
[110] "Lectured the 'Black Patti': Judge McAdam Says She is Ungrateful to Major Pond, Must Sing For Him Alone" New York *Times*, Jun 27, 1893, p. 8.

scheduled for August 25, 1893. This opposition became acute when rumors spread that Fair officials were planning to spread watermelons around the fairgrounds as decoration.[111]

This spirit of the Fair continued to pervade popular culture, constraining the creative lives of African American writers and performers while opening up a number of lucrative avenues of employment. By 1902, Loudin was permanently off the road, hospitalized at the Border Hydropathic sanitarium in Peebles, Scotland, and suffering from "nervous prostration" or "rheumatism of the nerves."[112] He had become increasingly troubled by the trend that was already visible by the late 1880s. White business interests had begun to seize control of the African American music circuit, forming the major touring companies: McCabe and Young's Minstrels, Richards and Pringle's Georgia Minstrels, Cleveland's Colored Minstrels, and Mahara's Minstrels.

Some of these entrepreneurs, like O.E. Richards and C.W. Pringle, built their troupes around a single star performer (in their case, Billy Kersands, who performed as "Old Aunt Jemima"). Similarly, W.S. Cleveland built his fortune around the talents of the beloved

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[111] Wells wrote of the pamphlet: "It will be especially needed to offset the effects of 'Colored Folks' Day' at the World's fair, which will be August 25. Some colored men have promised to get two hundred thousand colored excursionists here that day and the officials of the exposition have been published as highly in favor of the idea. The horticultural department has already pledged itself to put plenty of watermelons around on the grounds with permission to the brother in black to appropriate them. The secret of the kindness (?) of the World's fair commissioners is that the attendance at the fair has been very poor all along, and the colored brother has been especially conspicuous by his absence. This Colored Folks' Day is to be an extra inducement to have him come. He has been shut out of any other participation in the fair except to spend his money there, and as he has not been doing that very freely, a cordial invitation to do so is given at the eleventh hour. The self-respect of the race is sold for a mess of pottage and the spectacle of the class of our people which will come on that excursion roaming around the grounds munching watermelons, will do more to lower the race in the estimation of the world than anything else. The sight of the horde that would be attracted there by the dazzling prospect of plenty of free watermelons to eat, will give our enemies all the illustration they wish us to excuse for not treating the Afro-Americans with the equality of other citizens." Ida B. Wells, "Afro-Americans At The Fair. The Race At Chicago Opposed To Colored Folks' Day Aug. 25" (Special correspondence of the New York *Age*). Reprinted in the Topeka *Call*, July 15, 1893. Colored Folks' Day was held on August 25, and featured a well-attended speech by Douglass.

[112] A new iteration of the Fisk Jubilee Singers had been organized by John W. Work II in 1899, renewing the original vision of the Singers as a fundraising tool for Fisk University. Loudin died in Ravenna, Ohio, on November 3, 1904.

African American minstrel performer Tom McIntosh. Cleveland was inspired by the Gilded Age's "new methods of corporate consolidation" and dreamt publicly about forming a "gigantic burnt cork trust," featuring "nearly all the best colored artists in the universe."[113] Mahara's Minstrels, run by the white businessmen E.H. McCoy and W.A. Mahara, did not have the marquee power of the Cleveland or Richards and Pringle concerns, but they did launch the career of W.C. Handy, self-proclaimed "father of the blues" who joined the troupe in 1896. Along with Handy, a number of other musical innovators who would go on to play foundational roles in the creation of the blues and jazz genres came up through the Mahara's organization.[114]

Another white entrepreneur named Al G. Field had found success in the early 1890s with a white blackface minstrel troupe and branched out in 1894 with a new company, composed of "genuine negroes," which he called "Darkest America." By 1895, newspapers were reporting on the "Al G. Field Real Negro Minstrels and Troupe of Arabs," consisting of 40 performers and staff who traveled in private trains. Hype for the show foregrounded Field's pseudo-anthropological methods of recruitment. Field leased the Darkest America Company to John W. Vogel, another white minstrel-show entrepreneur, in 1897. Some accounts of the Darkest America Company in the period after Vogel assumed ownership suggest a sharp turn towards more hateful strains of minstrelsy, providing "glimpses" of the "natural state of old-time laborers of the South."[115]

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[113] Abbott and Seroff, *Out of Sight*, 112.
[114] David Robertson, *W.C. Handy: The Life and Times of the Man Who Made the Blues* (Tuscaloosa: University of Alabama Press, 2011).
[115] "The actors are in the main colored people, and from the fidelity which the scenes of the plantation in slavery times are produced, one would be justified in imagining that they had all served at least a liberal apprenticeship among the slaves of the past. The illusion however is broken by the fact that, while they make up as perfect representations of the 'old field niggers,' they are all too young to have had such an experience. It is their art therefore, that aids the natural powers of song and mimicry to reproduce scenes that must come, to most of them

The crucial historical point, here, pertains to the periodization of shifts in African American minstrel show content. Minstrel shows had always been steeped in the values of white racism, but that racism became much more vulgar and acute over the course of the 1890s. The historical record reflects a steady accretion of racist material within the white-owned, African American-staffed touring minstrel companies over the course of the 1890s. In November of 1893, a set piece entitled "A Game of Craps" was added to the program (gambling skits were among the most popular vehicles for packing in comic stereotypes in the 1890s).[116] A Cleveland *Gazette* article of March 29, 1890, notes with alarm that the Cleveland *Leader* (a mainstream white newspaper) had begun to replace references to the "Negro" with "darky," a consequence, perhaps, of the popularity of minstrel entertainment.[117]

Out of the contradictory sources that proliferated during the 1870s and 1880s, a modern African American show business culture had begun to cohere. Driving the commercialization of African American popular culture were a series of crazes: for the "cakewalk," for "ragtime," and for the "coon song."[118] From the beginning, the African American press was anxiously mapping both the relations of production and the hypocrisy

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at least, only through tradition… All through the program there were glimpses of this natural state of old-time laborers of the South. Even in the more studied music selections which exhibited a perfection of culture impossible to people not naturally gifted." Review in the [Pottsville, Pennsylvania] *Miners Journal*, reprinted in "The Stage," *Freeman*, December 4, 1897. Reproduced in Abbott and Seroff, *Out of Sight*, 334-35.

[116] Abbott and Seroff, *Out of Sight*, 128.

[117] "Has the Cleveland Leader stopped using the word Negro (spelled with a capital 'N') and begun the use of the word 'darky?' Read the following from its Sunday issue: 'George Washington, a *darky*, who has been employed for some time at the Carleton Hotel, Memphis, Tenn., has a fortune in his mouth. Yesterday he attracted a large crowd by whistling a beautiful *darky* melody, making perfect harmony in first and second at the same time." Cleveland *Gazette*, March 29, 1890.

[118] See Daphne A. Brooks, *Bodies in Dissent: Spectacular Performances of Race and Freedom, 1850–1910* (Durham: Duke University Press, 2006); David Suisman, *Selling Sounds: The Commercial Revolution in American Music* (Cambridge, Mass: Harvard University Press, 2009); Kathy A. Perkins et al, eds. *The Routledge Companion to African American Theatre and Performance* (Abingdon: Routledge, 2019), 88; Megan Pugh, *American Dancing: From the Cakewalk to the Moonwalk* (New Haven: Yale University Press, 2015).

subtending the popular cultural wing of Jim Crow. "The colored man writes the 'coon' song, the colored singer sings the 'coon' song, the colored race is compelled to stand for the belittling and ignominy of the 'coon' song," lamented a columnist in 1901, "but the money from the 'coon' song flows with ceaseless activity into the white man's pockets."[119] The African American press had become increasingly responsive to the compounding effects of commodity capitalism on the spread of the Nadir's racist-imperialist *weltanschauung*. To observe conditions in the beginning years of a fad is fundamentally different than to write from beneath a decade's accretion of endlessly multiplying commodities.

Domestic white and international audiences did not always understand the differences between ragtime music and the degrading "coon songs" that were the leading sellers in sheet music shops. In this vexed situation, Abbot and Seroff emphasize, a torrent of creativity was unleashed that "swept thousands of black writers, performers, musicians, and entrepreneurs into the professional ranks."[120] Three show business domains predominated in this moment of inception: musical comedy in traditional theatres, circus sideshow annexes, and the broad vaudevillian entertainments of the tented minstrel shows (most famously, Allen's New Orleans Minstrels, the Rabbit's Foot Company, the Florida Blossom Minstrels, and Silas Green from New Orleans). African American newspapers began to employ professional cultural critics, such as Russell and Salem Tutt Whitney, who reported diligently not only on the new shows and songs but also on professional conditions on the road. It was during this moment, too, that the modern African American show business celebrity came of age, as typified by Bert Williams, George Walker, Bob Cole, and Ernest Hogan—internationally

[119] "Tom the Tattler," Indianapolis *Freeman*, August 24, 1901.
[120] Lynn Abbott and Doug Seroff, *Ragged but Right: Black Traveling Shows, "Coon Songs," and the Dark Pathway to Blues and Jazz* (Jackson: University Press of Mississippi, 2007), 3-4.

known figures who commanded high salaries and could more or less guarantee large and enthusiastic audiences.[121]

By the early years of the twentieth century, an ad hoc division of labor had emerged within the songwriting industry, bolstered by the new legal regime of intellectual property. African American writers mined the rich vein of colloquial creativity of the communities they inhabited or visited, selected and fixed a given phrase within a song title, and then shopped the song (or had it shopped by Tin Pan Alley middlemen) to a popular white artist. Abbott and Seroff discover a "coon song" advertisement from 1902 adorned with fascinating copy: "Seems hard—but people will have coon songs—we must supply their needs and demands" and letting the reader know that a new "coon song" had recently received twelve encores at Keith's vaudeville theatre.[122] Here, the industrial, if not assembly-line character of the African American vernacular songwriting business was exposed for all to see, and even to provide some comfort to the consumer of that mainstay of popular music history, the "guilty pleasure." The odds against fair remuneration were stacked against the aspiring African American songwriter, as exemplified by the experience of Sidney Perrin, one of the major tunesmiths of the period, who complained in 1904: "If I had been paid for a number of my songs in proportion to the amount made by them I should now be retired and enjoying a fortune." Perrin received five dollars in compensation for the hit "coon song" "Mammy's Little Pumpkin Colored Coons," and reports having been "tickled at the time to get the

[121] Louis Chude-Sokei, *The Last "Darky": Bert Williams, Black-on-Black Minstrelsy, and the African Diaspora* (Durham: Duke University Press, 2006); Pearl Bowser et al. *Oscar Micheaux and His Circle: African-American Filmmaking and Race Cinema of the Silent Era* (Bloomington: Indiana University Press, 2001).
[122] Abbott and Seroff, *Ragged But Right*, 34.

money," while Perrin's 1902 megahit "That's the Way to Spell Chicken" was transferred to a publishing company for fifteen dollars.[123]

Some of the Indianapolis *Freeman* notices illustrate the political stakes of the African American minstrel show at the close of the 19th century. On February 6, 1889, the paper celebrated the McCabe and Young Minstrels for refusing to yield to the demands of some white patrons who had urged the company not to reserve any "parquette seats" for African American audience members on pain of a white boycott of the show. McCabe and Young informed the committee that had advanced this request: "We will take the risk of financial loss, as we value our principle. Any colored lady or gentleman will have the equal right of any white lady or gentleman at our performances in this or any other city." In early January of 1891, the Detroit *Plaindealer* reported on a racist incident that had taken place at the Philadelphia Musical Academy. Ida Mae Yeocum, one of the earliest African American woman composers to commercially publish her works was refused admission "on account of her color." A suit in equity against the institution was promised to follow.[124]

By 1890, African American performers had established durable touring circuits within the heart of Jim Crow country. A number of infrastructural innovations contributed to their success. Traveling mostly by rail, the minstrel companies developed their own transportation and lodging facilities, skirting the potential violence that loomed at each tour stop when it came time to check into hotels. The touring companies cultivated loyal fan bases among the African American communities of the South, laying the seeds for the eventual

[123] Abbott and Seroff, *Ragged But Right*, 28-29.
[124] "About Persons And Things." Detroit *Plaindealer*, January 17, 1890, 2.

emergence of the "chitlin circuit," and building up a series of well-traveled routes that would come to play in an important role during the Civil Rights Movement.[125]

Intellectual Property Law and Cultural Work

As we explore further in Chapter Two, the emergence of new intellectual property law doctrines formed part of the material basis upon which the commercialization of African American popular culture would develop, which is reflected in many places in Johnson's writings. Changes to copyright law, codified in a landmark revised Copyright Act of 1909, helped to usher in the revolutionary transformations of 1870-1920, dramatically reshaping the legal context of American show business.[126] The cultural worker served as intellectual property jurisprudence's core ideological support: facilitating its veneration of artistic originality, fueling its distinction between "mere" manual labor and higher-order mental production, and justifying the state's ostensibly non-commercial patriotic interest in incentivizing the cultivation of national culture.

Most importantly, the 1909 revisions enshrined a new order based on the doctrine of "work-for-hire." Peter Jaszi writes of the Romantic moorings of "work-for-hire" doctrine, which "disassociates creative workers from a legal interest in their creations": "Where the doctrine applies, the firm or individual who paid to have a work created, rather than the

[125] Preston Lauterbach, *The Chitlin' Circuit: And the Road to Rock 'n' Roll* (New York: WW Norton, 2011); Marcus Anthony Hunter and Zandria F. Robinson, *Chocolate Cities: The Black Map of American Life* (Oakland: University of California Press, 2018); Gerald Early, et al. "Black Humor: Reflections on an American Tradition." *Bulletin of the American Academy of Arts and Sciences*, vol. 63, no. 4, 2010, pp. 29–41 Henry Louis Gates, Jr. "The Chitlin Circuit." *The New Yorker*, Jan 26, 1997.
[126] Catherine L. Fisk, *Working Knowledge Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (Chapel Hill: University of North Carolina Press, 2009).

person who created it, is regarded as the 'author' for purposes of copyright ownership."[127] The intellectual foundations of "work-for-hire" are of relatively recent vintage. Jaszi notes that prior to the 1909 Copyright Act, copyright statutes in the US did not address the issue of employed authors, leaving courts to deal with the matter on an *ad hoc* basis. The debates and discussions leading up to 1909, "which first included language stating that the employer was the 'author' in cases of 'works made for hire,' there was no substantive discussion of this definitional innovation." Notwithstanding the evident labor of employees in the creation of artistic works, the employer was to assume authorship as the work's "motivating factor" and "inspiration."[128]

In a careful study of the origins of the "work-for-hire" doctrine, Catherine Fisk highlights the fact that in antebellum America, the law presumed that a playwright or composer hired to pen fresh material for the theatre retained copyright in his or her creations. In *Atwill v. Ferrett* (1846), for example, the court established the rule that the writer of a commissioned opera was its author.[129] *Atwill* rejected English legal principle that employers were entitled to copyright in works created by employees.[130] Over the course of the late nineteenth century, judges began to shift to an emphasis on "work-for-hire" reasoning to establish theatrical employers as default authors. Judge Nelson, ruling in the 1850 case of *Jollie v. Jaques*, was one such jurist. Nelson's ruling in the case, concerning a conflict over the authorship of a piece of music called "The Serious Family Polka," reflects strong

[127] Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of `Authorship'" 1991 Duke L.J. 455, 485-91
[128] Jaszi, "Toward a Theory of Copyright," discussing the case *Picture Music, Inc. v. Bourne, Inc.,* 457 F.2d 1213, 1214 (2d. Cir.), cert. denied, 409 U.S. 997 (1972).
[129] F. Cas. 195 (1846).
[130] The decision in *Atwill* included a decisive wrinkle: employers might be considered owners of the ideas created by their employees provided that it could be proved that managerial action substantially contributed to the final product.

commitments to a class-bound and pro-employer aesthetic philosophy. While an "original air" required "genius" for its construction, a "mere mechanic" could prepare an *adaptation* of that air.[131] Nelson argued that copyright was meant for a "substantially… new and original work." Ostensibly trifling additions and variation—the stuff of so much demotic cultural innovation—did not deserve the law's protections. A year later Nelson introduced a germinal "non-obviousness requirement" into US patent law, arguing that, in order to be patentable, an invention must be recognizable as a work of a genius and not simply the result of the tinkering of an "ordinary mechanic."[132]

The case *Keene v. Wheatley* (1861) served to tilt copyright jurisprudence towards the presumptive rights of the employer. Keene successfully sought to gain legal recognition of the proposition that the employer becomes "the proprietor" of additions and amendments that were products of the employee's "intellectual exertion." This, for Fisk, was the foundational moment of the formulation of the "general principle of employer ownership of employee knowledge or creative works." What needs to be emphasized is that the court articulated a vision of the employer-employee relation in the realm of technological invention and drew parallels to the case of cultural work: "Where an inventor, in the course of his experimental essays, employs an assistant who suggests, and adapts, a subordinate improvement, it is, in law, an incident, or part, of the employer's main invention." This adumbration of "work-for-hire" was amplified in the 1869 case of *Lawrence v. Dana*, a Massachusetts case involving the posthumous publications of Supreme Court reporter Henry Wheaton, which gave a

[131] We recall, with Michael Denning's *Mechanic Accents*, that "mechanic" was the preferred term for "proletarian worker" in the nineteenth century vernacular. Michael Denning, *Mechanic Accents: Dime Novels and Working-Class Culture in America* (London: Verso, 1987).
[132] Bracha, "Ideology of Authorship," N. 57. The case in question was *Hotchkiss v. Greenwood*, 52 U.S. 248 [1851]) (204).

further boost to the notion that absent a contractual agreement regarding intellectual property, copyright was vested in the employer.[133]

Copyright historians often point to the publication of newspaper attorney Eaton Drone's influential 1879 *Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States* as a watershed moment. Drone and his treatise are central characters in Chapter One of this dissertation. The protected text, for Drone, is a "literary production" that belongs to "the author who has created it" as his property. Nevertheless, Drone makes allowances for employer-authorship: "When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author." The new language of cultural labor appears in Drone's prose as fully naturalized common sense: "The produce of labor may become the property of him who has employed and paid the laborer." Literary labor, Drone wagers, is no exception to this universal rule: "When an author is employed on condition that what he produces shall belong to the employer, the absolute property in such production vests in the employer by virtue of such employment and by operation of law."[134]

The general acceptance of the principle of employer ownership of copyrights in employee works was cemented in the first decade of the twentieth century, culminating in its consecration in the 1909 Copyright Act. In contrast to earlier cases wherein judges attempted to sift through the facts of a given case in order to determine authorship, modern courts assumed as a matter of course that the employment agreement automatically vested copyright in employee-created work performed during the scope employment. For our purposes, it is crucial to keep in mind that while employees lost out on legal property protections, the

[133] 15 F. Cas. 26 (C.C.D. Mass. 1869).
[134] Drone, *Treatise*, 243.

fiction of "corporate authorship" also served as a determining condition of modern cultural work, as well as a wall against cultural workers' labor campaigns would seek to push (sometimes successfully). From the perspective of corporate capitalism's investors and managers, assembly lines of art would be unthinkable if every worker on the line might lay claim at any moment to the status of "author." At the same time, the public secret subtending the whole order was not difficult to discern. Line-workers on art's assembly lines were authors at least as deserving as corporate employers of property rights in their creations. This understanding provides one explanation for the militancy, at certain historical moments, of organized cultural workers working in industries governed by "work-for-hire."[135]

Culture in the Age of Work-for-Hire

Legal scholar Zechariah Chafee, Jr. began his detailed 1945 study of changes to IP law over the course of the prior thirty-five years with a survey of epochal transformations: among other marvels, the transmission of the voice by wireless, the coming to maturity of the motion-picture industry, the development of the offset process and microfilms, and other new printing methods. Scientific inventions were not the only recent "startling changes" of which Chafee takes note. "Vast organizations" had been formed in the "entertainment industry" (itself a new formulation), and new kinds of agreements between authors and cultural industries had become common. The balance of international trade in aesthetic commodities had been reversed. Long a net importer of intellectual and artistic material, by 1945 the American culture industries dominated the market in aesthetic commodities. By the end of

[135] Catherine L. Fisk, *Working Knowledge : Employee Innovation and the Rise of Corporate Intellectual Property 1800-1930* (Chapel Hill: University of North Carolina Press. 2009).

World War II, American movies had flooded the world and American radio performers could be heard all over the world.[136]

It is useful to keep Chafee's reflections in mind as we survey the history of both media technologies and their attending "vast organizations." The first projected motion picture show was commercially exhibited in 1896. Douglas Gomery notes that between 1896 and 1908, the film business was decentralized and fairly open to small-capital entrepreneurs. Films were treated mainly as a novelty and sold by the foot.[137] Tom Gunning argues that prior to 1908, the cinema was not primarily oriented towards telling stories, but was rather attuned to the display of curiosities.[138] After 1909's significant revisions of the Copyright Act, Hollywood emerged as the symbolic center of cultural production in the American imagination. The years 1908-09 witnessed a radical reorganization of the American film industry. Gunning writes that changes in the film industry "brought new conceptions of the film as commodity and of the sort of audience for whom these films were made."[139]

As the studio system developed, the content of films became the subject of intense debate, with East Coast finance angling for control of California studios and the Hays Commission imposing arbitrary expressive limits with its notorious Code.[140] Efforts to centralize control came early to Hollywood. Early film mogul Thomas Ince pioneered a

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[136] Zechariah Chafee, Jr., "Reflections on the Law of Copyright."
[137] Douglas Gomery, *The Hollywood Studio System*: *A History* (London: BFI, 2005), 3.
[138] Tom Gunning, *D.W. Griffith & The Origins Of American Narrative Film* (Urbana: University of Illinois Press, 1994), 6.
[139] Gunning, *D.W. Griffith*, 7.
[140] Steven J. Ross, *Working-Class Hollywood: Silent Film and the Shaping of Class in America* (Princeton N.J: Princeton University Press, 1998). Stephen Vaughn, "Morality and Entertainment: The Origins of the Motion Picture Production Code." *The Journal of American History*, vol. 77, no. 1, 1990, pp. 39–65. Geoffrey Shurlock, "The Motion Picture Production Code," *The Annals of the American Academy of Political and Social Science*, Nov., 1947, Vol. 254, pp. 140-146. Richard Maltby, "The Standard Exhibition Contract and the Unwritten History of the Classical Hollywood Cinema." *Film History*, Vol. 25, No. 1-2, "Inquiries, Speculations, Provocations" (2013), pp. 138-153. Gregory D. Black, "Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930-1940." *Film History*, 1989, Vol. 3, No. 3 (1989), pp. 167-189.

division of labor in Hollywood, developing the crucial tool of the "continuity script": a shot-by-shot, detailed outline of the film prepared prior to shooting.[141] By 1913, Ince had perfected the continuity-script procedure, and by 1916 it had built a $500,000 studio on 43 acres of land with concrete buildings and assembled a staff of 1,000 employees, inventing the Hollywood studio structure.[142]

Janet Staiger suggests that Ince developed the continuity script in the manner described by Harry Braverman as characteristic of capitalist management: close analysis and study of the labor process, and separation of conception and production into two separate stages. By working out a method to control production remotely, Ince doubled the productivity of his studio, allowing him to maintain control of films shot by other directors (for example, comedies shot by Francis Ford, older brother of director John Ford) while he was shooting dramas. As this division of labor accelerated, Ince amalgamated with other film studios, joining forces with Mack Sennett and D.W. Griffith in 1915. The emergence of the star system at around this time served as a fulcrum of the standardization of this factory-production model. Studios cultivated actors and actresses, whose loyalty they attempted to purchase with high salaries. In exchange, a studio would gain stars whose unique charisma audiences associated with its films. Staiger notes that although the star was a "worker," she

[141] Janet Staiger, "Dividing Labor for Production Control: Thomas Ince and the Rise of the Studio System," in Gorham Kindem, ed. *The American Movie Industry: The Business of Motion Pictures*, 97. Joyce, Simon, and Jennifer Putzi. "'Greatest Combination in Motion Pictures': Film History and the Division of Labor in the New York Motion Picture Company." *Film History*, vol. 21, no. 3, 2009, pp. 189–207. Brian R. Jacobson, "Fantastic Functionality: Studio Architecture and the Visual Rhetoric of Early Hollywood." *Film History*, vol. 26, no. 2, 2014, pp. 52–81. Nancy J. Rosenbloom, "Toward a Middle-Class Cinema: Thomas Ince and the Social Problem Film, 1914-1920." *The Journal of the Gilded Age and Progressive Era*, vol. 8, no. 4, 2009, pp. 545–72. Ronny Regev, *Working in Hollywood: How the Studio System Turned Creativity into Labor* (Chapel Hill: University of North Carolina Press, 2018).
[142] Staiger, "Dividing Labor for Production Control," 94.

was "also a quality or substance in the product itself" that "fulfilled the function of a means to differentiate the pictures of one company from another."[143]

Along with pioneering innovations in the division of labor, early film moguls experimented with cartelization as a way to maximize profits. The first such experiment was carried out by film equipment manufacturers, who formed the Motion Picture Patents Company (MPCC) in 1908. In Gomery's words, MPCC tried to use its monopoly over equipment to "extort fees from producers and exhibitors." It also formed its own distribution company, the General Film Company, but was undermined by internal disunity and federal anti-trust actions, burning out as an effective cartel by 1914.[144] Despite the failure of the General Film Company, the attractions of cartelization and other forms of market control were too great for others to resist. Political economist David Prindle emphasizes that because most films "flop," the movie business is inherently risky. Prindle describes the rise of vertical integration ("the combination of production, distribution, and exhibition into one corporate whole") in the movie business as means of reducing risk and gaining some control or protection from a "treacherous market."[145]

Film companies were attracted to vertical integration because it gave them great advantage in amortizing losses from "flops" and maximizing the success of "hit" films. [146]

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[143] Staiger, "Dividing Labor for Production Control," 102. Jennifer Petersen, "Can Moving Pictures Speak? Film, Speech, and Social Science in Early Twentieth Century Law." *Cinema Journal*, Spring 2014, Vol. 53, No. 3 (Spring 2014), pp. 76-99

[144] Gomery, *The Hollywood Studio System,* 4. Simon Joyce and Jennifer Putzi, "Greatest Combination in Motion Pictures": Film History and the Division of Labor in the New York Motion Picture Company." *Film History*, 2009, Vol. 21, No. 3, Producers and Directors (2009), pp. 189-207. Rob King, 'Uproarious Inventions': The Keystone Film Company, Modernity, and the Art of the Motor." *Film History*, 2007, Vol. 19, No. 3, Movie Business (2007), pp. 271-291

[145] David F. Prindle, *Risky Business: The Political Economy of Hollywood*. Boulder: Westview, 1993, 18. David Pierce, "The Legion of the Condemned—Why American Silent Films Perished." *Film History*, 1997, Vol. 9, No. 1, Silent Cinema (1997), pp. 5-22

[146] See William T. Bielby and Denise D. Bielby, "'All Hits Are Flukes': Institutionalized Decision Making and the Rhetoric of Network Prime-Time Program Development" *American Journal of Sociology* Vol. 99, No. 5 (Mar., 1994), pp. 1287-1313.

Movie studios could guarantee that all of their films would be shown in many theaters and freeze out films from competing studios or independents. The prevalence of vertical integration led to government investigation of antirust practices in Hollywood, resulting in 1948's "Paramount decree," which forced the studios to sell their theater chains.[147] In addition to vertical integration, film studios developed other means to control the market, ranging from "the perfectly respectable to the marginally sleazy to the outright illegal." The two most common techniques were "block booking" (making supply of a hit film contingent on rental of a group of less desirable movies) and "blind bidding" (making exhibitors choose films without having seen them). Prindle includes audience research in his discussion on studio resources for market control, and notes that the movie industry developed "many different institutions that enable companies to share, avoid, or postpone financial risk."[148] Some studios worked with "completion guarantors" who, like insurance companies, guarantee the money necessary to finish production in the event that financing runs out. Studios also developed contractual forms like "negative pickup," in which they agree to pay the cost of an independent production upon delivery of the negative. In the wake of widespread unionization of the film industry and the antitrust suits of the late 1940s, studios pioneered a variety of ways to hide profits: "creative accounting" and "cross-collaterization."[149]

The star system itself has also worked to management's advantage by stratifying the labor of actors. The origins of this system lie in producer Adolph Zukor's 1916 decision to merge the production company Famous Players-Lasky with Paramount, a distribution firm.

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[147] Timothy R. White, "Life after Divorce: The Corporate Strategy of Paramount Pictures Corporation in the 1950s." *Film History*, Jun.-Jul., 1988, Vol. 2, No. 2, pp. 99-119.
[148] Prindle, *Risky Business*, 18-20.
[149] Prindle, *Risky Business*, 21-25.

(Famous Players added theaters in 1919.) Zukor pioneered a "three-part" strategy that allowed Famous Players to dominate the market by 1921. This strategy was comprised of product differentiation, the development of national (later international) distribution networks, and the domination of exhibition through ownership of a small number of first-run theaters.[150] In order to make each motion picture a "unique good," Famous Players "heralded certain players who seemed to guarantee high box office revenues." It acquired a stable of actors and actresses (most famously, Mary Pickford) who would attract audiences to their films. It was unimportant whether audiences "knew" that they preferred Famous Players films; as long as they faithfully attended every Mary Pickford or Douglas Fairbanks vehicle, the end result of brand loyalty was achieved. Famous Players' innovations in distribution networks primarily concerned reaping the benefits of economies of scale and the barriers to new entrants represented by its formidable distribution networks. To compete, new firms would have to be well-capitalized and willing to forego profits as they invested in infrastructure sufficiently elaborate to challenge that of Famous Players, which had focused on buying up all of the nation's first-run houses, and some of the second-run ones. This gave Famous Players (which later changed its name to Paramount) an enormous measure of control over exhibition, and leverage in regard to pricing, the length of runs, and the conditions for gaining access to "hit" films.[151]

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[150] Douglas Gomery, "What Was Adolph Zukor Doing in 1927?" *Film History*, vol. 17, no. 2/3, 2005, pp. 205–16. Michael J. Quinn, "Paramount and Early Feature Distribution: 1914-1921" *Film History*, Vol. 11, No. 1, Film Technology (1999), pp. 98-113. Darlene C. Chisholm, "Asset Specificity and Long-Term Contracts: The Case of the Motion-Pictures Industry." *Eastern Economic Journal*, vol. 19, no. 2, 1993, pp. 143–55. Lary L. May and Elaine Tyler May. "Why Jewish Movie Moguls: An Exploration in American Culture." *American Jewish History*, vol. 72, no. 1, 1982, pp. 6–25. Eric Hoyt, "Chicago Takes New York: The Consolidation of the Nationals" in *Ink-Stained Hollywood: The Triumph of American Cinema's Trade Press* (Berkeley: University of California Press, 2022)

[151] Gomery, *The Hollywood Studio System*, 5.

Under these conditions, actors' unions struggled to gain a foothold in Hollywood in the 1920s. Many Hollywood actors had spent time on the New York stage, and had fresh memories of the 1919 strike that shuttered Broadway for a time and eventually won a Minimum Basic Agreement between Actors Equity and the Managers Protective Association, covering the labor rights of performers.[152] Hollywood proved more intransigent. Stymied by aggressive studios and a company union, the Academy of Motion Picture Arts and Sciences, the East Coast theatrical actors' guild—Actors' Equity—had little success until the arrival of sound films in 1929. Silent screen stars feared obsolescence, and producers capitalized on this panic, cutting salaries and fomenting discord between stage and screen actors.[153] Danae Clark notes that the arrival of sound also opened the door to subversion. Of the twelve hundred stage players who migrated to Hollywood to appear in talking pictures, nearly all were Equity members. As a consequence, by 1929, 70 percent of actors in sound films were Equity members. This shift encouraged Equity to launch another campaign in Hollywood. Clark identifies the key issue dividing actors as a prevailing "hierarchical notion of actors' labor." Equity members defined themselves as workers, and the organization itself was structured along trade union lines. Stars by and large resisted the definition of actors as "workers." Because their support was crucial for any successful union drive, producers resorted to "every conceivable device to break the spirit of the actors," including blacklist, antiunion propaganda in the local press, and pressure from pro-Academy conservative stars.[154]

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[152] Fine, *James M. Cain*, 68-69. A second strike completed the victory with the achievement of the closed shop for theatrical productions.
[153] Danae Clark, *Negotiating Hollywood: The Cultural Politics of Actors' Labor* (Minneapolis: University of Minnesota Press, 1995), 33.
[154] Clark, *Negotiating Hollywood*, 35.

Screenwriters were somewhat late to organizing the film industry. In large part, this was due to the comparatively limited role of the writer in the silent era, and to the traditional difficulties of corralling individual scribblers into a mass organization (as compared to the somewhat more straightforward business of organizing actors who were accustomed to seeing themselves as members of larger aggregates). The labor history of professional writers began, in an important sense, with the creation by the Authors League 1912. The group split into two branches in 1921: the Authors Guild would serve those whose incomes derived from contributions to books and magazines, while the Dramatists Guild sought to protect theatrical scribes.[155] The latter body fought back against a host of hated practices, enumerated by Richard Fine: theatrical managers holding scripts hostage for months and years before arriving at the decision to option them; fluctuating royalty rates; difficulty collecting royalties; arbitrary meddling with the texts of plays; and the confiscation of subsidiary rights.[156] Writers were alarmed, also, to learn of a pattern of collusion between producers of Broadway plays and the Hollywood studios, such as a 1925 agreement between the Fox Film Corporation and seven Great White Way firms which would see the motion picture industry underwrite theatrical productions in exchange for film rights on favorable terms. In such a set-up, writers stood to lose their most valuable assets—intellectual property rights vis-à-vis derivative works—and the Dramatist Guild immediately began to organize to counter this threat to the playwright's livelihood. After a few clandestine meetings, the Dramatist Guild happened upon a novel strategy, agreeing to withdraw all of their plays under consideration by producers and submit no new material until the achievement of a satisfactory contract with Broadway's producers. In April 1926, the playwrights won a five-year Minimum Basic

[155] Richard D. Fine, *James M. Cain*, 68.
[156] Fine, *James M. Cain*, 68.

Agreement that established royalty scales, limited the ability of managers to sit on unproduced scripts, limited managers to a maximum of 50 percent of subsidiary rights, and stipulated that managers could make no "additions, omissions, or any alterations whatsoever" in scripts "without consent of the Author." Crucially, the MBA created an arbitration process to oversee the optioning of plays by film studios, and established a closed shop.[157]

In addition to continuities between the stage and screen, the rise of writer-dependent narrative forms in the sound era derived in large part from developments in commercial radio, which underwent significant technological upgrades as the 1920s gave way to the 1930s. Radio thus bears careful study as a laboratory also of the culture industry's "hacks and stars" system. Radio was not originally designed to be an advertisement-driven, commercial medium; even many pro-market intellectuals worried about the consequences of such a transformation. Producers were late to the game of producing what we would now call "content" for broadcast, leaving that task to advertising agencies. By the mid-1930s, Michele Hilmes explains, most of the radio networks' evening and daytime schedules were occupied by programs, many of which serial in form, supplied by agencies on behalf of sponsors.[158] Once sold, the clients' agencies typically took over production duties, contracting with talent bureaus for writers and stars, and remaining mostly independent of network creative control, with the important exception of submitting written content to network censors for approval.

Writers for radio soap operas were thus in the forefront of the Taylorized American cultural apparatus. Most were employed by the Chicago firm Blackett-Sample-Hummert (BSH), which housed the famous "Hummert mill," a "soap opera factory" that churned out

[157] Fine, *James M. Cain*, 70
[158] Michele Hilmes, *Radio Voices: American Broadcasting 1922-1952* (Minneapolis MN: University of Minnesota Press, 1997), 118-19; *Hollywood and Broadcasting: From Radio to Cable* (Urbana: University of Illinois Press, 1990).

daytime serials for sponsors like Procter & Gamble, under the watchful eye of advertising executive Frank Hummert (and his wife Anne, whom he married in 1935). Hummert began working on radio serials as a means of advertisement in 1927. In 1930, he hired writer Robert Hardy Andrews to create BSH's original serials: *Judy and Jane*, sponsored by Folger, *Betty and Bob*, sponsored by General Mills, and *Just Plain Bill*, sponsored by Kolynos toothpaste, all of which debuted in the fall of 1932. As BSH's radio serials became increasingly successful, Hummert began to push for new efficiencies in the production process.[159] The networks' pricing policies shaped the character of the "soap opera factory." Networks retained their practice of carving up daytime slots in 15-minute segments, and offered incentives to buyers who purchased blocks of time in bulk. Because of these incentives, advertisers were drawn to the serial form. The Hummerts employed a stable of fourteen to twenty writers, supplemented by freelancers. The popular press was drawn to report on the novelty of the Hummert operation, and delighted in using industrial terms like "factory," "mill," and "assembly line" in descriptions of the soap opera production process.[160]

As we explore in Chapters Four, Five, and Six, these varied developments—technological, managerial, legal, and aesthetic—would come to shape the terrain of labor conflict between organized cultural workers and their employers. Before turning to those

[159] Hilmes, *Radio Voices*, 165-69. Cynthia B. Meyers, *A Word from Our Sponsor: Admen, Advertising, and the Golden Age of Radio* (New York: Fordham University Press, 2013); Marilyn Lavin, "Creating Consumers in the 1930s: Irna Phillips and the Radio Soap Opera." *Journal of Consumer Research*, vol. 22, no. 1, 1995, pp. 75–89.

[160] The Hummert process began with the purchase of an existing property or the solicitation of an original idea for a serial. Over the course of a four to six weeks, the Hummerts sketched out the major plotlines at "high-level sessions" conducted at their home in Greenwich, Connecticut. These sessions generated outlines for the serials' plots, which they dictated to stenographers. Teams of two or three "ghost writers" on the Hummert "assembly line" took these outlines and "fleshed out the action with dialogue and stage directions." "Script readers" coordinated efforts among dialogue writers and actors, directors, and producers. Hilmes, *Radio Voices*, 165-69. C. B. Meyers, "Frank and Anne Hummert's soap opera empire: 'Reason-why' advertising strategies in early radio programming. *Quarterly Review of Film and Video*, 16(2), 1997, 113–132.

stories, however, it is vital to fill in the intellectual history of the growth of new visions of cultural work within the US left in the years between the World War I and New Deal Eras. These novel understandings of the role, function, and political salience of cultural work would come to have a determining influence upon the character of the art, literature, and music of the Popular Front period and upon the forms of labor organizing that would take root in the nation's film studios, newsrooms, nightclubs, and radio stations.

Left-Wing Theories of Cultural Work: 1917 to World War II

In Chapter Three, we focus on the writings of Joseph Freeman, a key figure in the left's transformation from the small coterie surrounding Max Eastman's *Masses* to the wide proletarian public to which the *New Masses* would address itself. Freeman was a brilliant thinker as well as a true believer, and traversing the intellectual history of this period with him as a guide is helpful in capturing the nuance and inflection of its arguments and debates. Waldo Frank wrote that because he had a better mind than most, Joseph Freeman's case was graver than those of his fellow leftists. Frank saw Freeman as too clever not to bristle at the contradictions inherent in maintaining the Communist line, but also as too close to the political apparatus to buck it. Thus, while "small fish swam comfortably in the aquarium of Communist orthodoxy," Freeman's "larger and more generous mind got hurt by collisions."[161]

A close reading of Freeman's long and detailed memoir *An American Testament* allows us to trace some of the sources of the intellectual synthesis that would consolidate in a

[161] Waldo David Frank, *Memoirs of Waldo Frank* (Amherst: University of Massachusetts Press, 1973), 189.

virtual cult of cultural work in the 1930s. This was cult of cultural work organized a common self-understanding regarding cultural workers' crucial labor in the collective production of a new society, and also organized the wider left into a consensus that cultural workers were the logical bearers of revolutionary authenticity, to whom leftists would turn for moral instruction, political guidance, and affective affirmation. As importantly, and inspired to a large degree by reports from Soviet Russia, this cult of cultural work venerated the more anonymous clusters of cultural workers in Hollywood and on Broadway: sources of hope that the nation might be turned away from militarism and capitalism's destructive drives, and towards a new radical if not revolutionary consciousness. Among the key figures in this scene were the more established Floyd Dell, V.F. Calverton, Upton Sinclair, and Max Eastman, women writer-activists Clarissa Ware, Rose Pastor Stokes, Mother Bloor, Rose Wortis, and Genevieve Taggard, and the writers and artists Mike Gold, Claude McKay, William Gropper, Robert Minor, Lydia Gibson, Arturo Giovannitti, Hugo Gellert, and Stuart Chase, as well as political leaders Bill Dunne, William Z. Foster, and C.E. Ruthenberg.[162]

This new valorization of cultural work emerged out of the specific conjuncture of the late 1910s. The World War I Era witnessed profound transformations in US capitalism and the culture industry. These transformations could be seen in new crises of profitability in many sectors of mass production and agriculture, the continued enlargement of the agencies responsible for the sales effort, and the steady rise to dominance of financial speculation.

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[162] See Joseph Anthony Gahn, *The America of William Gropper, Radical Cartoonist* (PhD Dissertation), Syracuse University, 1966; Patricia Phagan, *William Gropper and 'Freiheit': A Study of his Political Cartoons, 1924-1935* (PhD Dissertation), City University of New York, 2000; Vernon L. Pedersen, "The Most Dangerous Man in Montana: Corruption, Communism, and Bill Dunne" *Montana: The Magazine of Western History*, 67 (2), Summer 2017; Edward P. Johanningsmeier, *Forging American Communism: The Life of William Z. Foster* (Princeton: Princeton University Press, 1994); James R. Barrett, *William Z. Foster and the Tragedy of American Radicalism* (Urbana: University of Illinois Press, 1999); Oakley C. Johnson, *The Day is Coming: Life and Work of Charles E. Ruthenberg, 1882–1927* (New York: International Publishers, 1957).

Young leftists regarded the war as the panicked response of capitalist imperialism in response to decreasing rates of profit. Freeman recalls the cynicism that set in among his peers as their professors became "new priests" who "blessed the war for the benefit of George Creel's propaganda bureau." If there was to be a new role within the United States for people who wrote books, taught students, and created works of art, it would necessarily be developed in contradistinction to this treason of the clerics.[163] When Freeman graduated from Columbia in spring of 1919, he landed an interview with the head of a large publishing house who asked him: "Why do you want to be a writer? It doesn't pay. An executive in my house can earn ten times as much, and buy all the writers he wants." The upwardly mobile Jewish families to which Freeman and his peers belonged were not sympathetic to dreams of the writer's life. While a decade earlier, these families "might have been glad to see us earn thirty dollars a week as reporters or school teachers" they "now they felt that we would be failures with less than ten thousand a year." Repudiating the "money culture of middle-class America," Freeman and company "wanted art and revolution, neither of which was a paying proposition."[164]

The solution to this crisis came in the form of a new vision of radical cultural work. They would build upon critical writings on the role of the artist and intellectual within the capitalist order, improvising an ad hoc canon out of the works of Karl Marx, John Ruskin, William Morris, Leo Tolstoy and writings from the Soviet Union detailing emergent projects aimed at forging a new relationship between artists and intellectuals and the broad working class. More immediate inspiration was provided by an array of figures: *Masses* editor Max

[163] Joseph Freeman, *An American Testament: A Narrative of Rebels and Romantics* (London: Victor Gollancz, Ltd., 1938), 133.
[164] Freeman, *An American Testament*, 133.

Eastman (prior to his rightward turn in the 1920s), martyred journalist John Reed, and the radical cartoonist Robert Minor, whose art and personal example suggested new possibilities of revolutionary commitment. Reed, for Freeman and his friends, represented the golden boy who might have easily earned every form of "success, profit and applause which the bourgeois world had in its power to bestow upon a writer," but chose to revolt, in Max Eastman's words, "against bourgeois literature because it apologized for the capitalist system of exploitation."[165] More ambiguously, however, Reed loomed as a model for Freeman as a warning that the dedication of one's life to the left might easily dampen the creative spirit. "In John Reed," Freeman laments, "the man of action had triumphed more or less over the artist."[166]

Robert Minor, the other iconic left cultural worker revered by the young leftists of Freeman's circle, was a "Texas giant, towering over six feet, with a massive bald head and broad shoulders." Waldo Frank described him as "a cartoonist of genius who gave up his art to become a Party functionary," who was convinced that his "faith in Marx was objective and precise as mathematics."[167] Early in his career, Minor had revolutionized the cartoon industry by introducing the use of grease crayon on paper, a technological innovation soon adopted by most other American newspapers. He gained fame as an editorial cartoonist working for the St. Louis *Post-Dispatch*. In 1911, was hired by the New York *World*, and soon became the

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[165] Freeman, *An American Testament*, 274.
[166] Freeman, *An American Testament*, 274. See Max Fraser and Christopher Phelps, "The Labor Beat—An Introduction." *Labor: Studies in Working-Class History*, Volume 15, Issue 1, 2018. A certain posthumous balance was achieved with Communist Party's famous decision to name its local agencies for the promotion of cultural education the "John Reed Clubs." On the John Reed Clubs, see Bill V. Mullen, *Popular Fronts: Chicago and African-American Cultural Politics* (Urbana: University of Illinois Press, 1999).
[167] Waldo Frank, *Memoirs*, 188. See Rachel L. Schreiber, "The Graphic Satire of Robert Minor and Art Young: Text and Image in Political Cartoons" *The Journal of Modern Periodical Studies*. Penn State University Press. Volume 13, Number 1, 2022; and *Gender and Activism in a Little Magazine: The Modern Figures of* The Masses (Farnham: Ashgate Pub, 2011).

highest-paid cartoonist in the nation. Identifying as an anarchist, Minor had been a trade unionist since 1902, and joined the Socialist Party in 1910. After the Bolshevik Revolution, Minor turned leftward. In Freeman's account, Minor came to communism slowly and painfully even as the "diverse elements of his being, his versatile gifts were unified by the proletarian revolution."[168]

"At first," Freeman muses, Reed was "compelled to face John Reed's dilemma—how to co-ordinate art and revolution." Minor's immediate solution was to abandon drawing altogether and devote himself exclusively to Party work, only to have the Party ask him to return to his drawing-board. Minor pioneered the visual style that would become dominant in the iconography of the 1920s and 1930s left: energetic lines, exaggerated angles, muscular workers, allegorical composition favoring clear moral messaging: "those vast massive black-and-white figures full of muscle, action and an internal spiritual power which marked itself indelibly on all who saw them." There was in Minor's cartoons something which his "imitators in the bourgeois Press" could not grasp and which only the new left-wing cartoonists could assimilate: their "revolutionary content." Minor inspired a reconsideration of the conventional distaste of intellectuals of the time for mass-produced popular culture, speaking of the "filth factories" in Hollywood which had cut off the potential development of a great artform. Minor's significance, for Freeman, lay in his moral example: "A giant in the world of graphic art, a success in the capitalist newspapers by every prevailing standard, he renounced all this, all the money and all the glory which the bourgeois world offered him, to place his gifts at the service of the revolutionary working class."[169]

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[168] Freeman, *An American Testament*, 305. See also, "John Reed Clubs Greet Minor on Anniversary," *Daily Worker*, Thursday, August 30, 1934, p. 5
[169] Freeman, *An American Testament*, 276.

Both Reed and Minor had, in the final analysis, had failed to solve the problem of reconciling cultural work and political commitment. Faced with this impasse, writers like Freeman were inspired to develop a radical historiography and bibliography of the cultural worker. In *An American Testament*, Freeman takes pains to sketch out a canon of writings that buoyed the writers and intellectuals in the United States in the 1920s who clustered around the magazine *The New Masses*, of which Freeman was a founding editor. Prominent within this canon were writings by the figures we might anticipate would assume pride of place (Karl Marx, John Ruskin and William Morris), as well as recently translated texts by Bolshevik luminaries (Lenin, Gorky, Tretyakov, and Mayakovsky), as well as works that have largely been forgotten, such as Eden and Cedar Paul's *Proletcult*, Algie M. Simons' *The Economic Foundations of Art*, and Upton Sinclair's *Mammonart*.[170]

Much of the inspiration for the emergent cult of cultural work was Soviet in origin. Prior to the stultification and banalization of Soviet culture under the banner of Stalinism, the Soviet Union served, as the art historian Andrew Hemingway argues, as a stimulus to creative thought across the globe. Hemingway reminds us that Stalinism was not created overnight, and points out throughout the 1920s, numerous artistic groupings competed for dominance within the USSR. [171] Freeman writes: "The October Revolution created not only a

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[170] See Karl Marx and Friedrich Engels, Lee Baxandall and Stefan Morawski, *Marx & Engels on Literature and Art: A Selection of Writings* (St. Louis: Telos Press, 1973); John Ruskin, *The Stones of Venice: Introductory Chapters and Local Indices (Printed Separately) for the Use of Travellers While Staying in Venice and Verona: Selections*. New York: Merrill and Baker, 1879. William Morris, "The Aims of Art" (1886) in *The Collected Works of William Morris, Volume 23* (Cambridge: Cambridge University Press, 2012). The best collection of early Soviet writings on Marxism and art in English germane to US intellectual history is Jon-Christian Suggs, ed., *Dictionary of Literary Biography Documentary Series, Vol. 11: American Proletarian Culture: The Twenties and the Thirties* (Detroit: Gale Research, 1993). Upton Sinclair, *Mammonart: an essay in economic interpretation* (Pasadena, California, self-published, 1925); Eden and Cedar Paul, *Proletcult* (London: Leonard Parsons Devonshire Street, 1921); Algie M. Simons, *The Economic Foundations of Art* (Chicago: Charles H. Kerr, 1912).

[171] Andrew Hemingway, *Artists on the Left: American Artists and the Communist Movement 1926-1956* (New Haven: Yale University Press, 2002).

new literature, but a host of new literary schools, whose theories affected all the arts, and whose programs became the center of sharp debates on revolution and culture." The Russian Futurists, led by the poet Vladimir Mayakovsky "issued manifestoes proclaiming the need for a complete break with the bourgeois art of the past, and declaring that Futurism was proletarian art." In spirit and political tilt, the Russian Futurists were radically unlike their counterparts in Italy, like F.A. Marinetti, who celebrated the nihilistic qualities of technological modernity. In Russia, the Futurists urged the constructive creation of a "living factory of the human mind," a living art that was everywhere: "in the streets, the tramways, the factories, and in workers' homes."[172] The Futurist investment in the figure of the cultural worker can be seen in their choice of magazine title: *Artistic Work in Industry*.

The Futurists were soon challenged for leadership by other groups. The Writers' Club, formed in 1920, quickly becoming "the meeting place of all revolutionary artistic forces, which discussed every phase of the new culture—literature, psychoanalysis, the new theatre, the new music, the cinema, Communism, style."[173] Different groups competed: Imagists, Classicists, Dadaists, Symbolists, and Constructivists, typically launching their movements with manifestos that attempted to address a series of fundamental questions: "What should be the attitude of the Revolution toward the classic? Should the new era reject the old art? Shall the Revolution reject only the old themes or all the old principles of creation?"[174]

The winning school was that of "Proletcult." It was largely the brainchild of A.A. Bogdanov, who founded the magazine *Proletarian Culture* (1918-21) and wrote most of its

[172] Freeman, *Voices of October*, 28-29.
[173] Freeman, *Voices of October*, 31.
[174] Freeman, *Voices of October*, 32.

articles. Its roots, in turn, lie in the Vpered (Forward) movement (1905-1917), in which Bogdanov had participated alongside Anatoly Lunacharsky, Maxim Gorky, and others. In Freeman's summary, Bogdanov saw the struggle for the "cultural emancipation of the proletariat" as coextensive with the larger struggle for the proletariat's "real and complete emancipation." These were united efforts for the "control of all the results and methods of bourgeois science, technique, and art; i.e., branches of knowledge."[175] In the final analysis, per Freeman, Proletcult "did in fact seek to dominate all fields of Soviet culture, but failed to control any." Bogdanov was attacked for attempting to maintain independence from Bolshevik leadership and seeking to create proletarian culture in a laboratory. The formal end to Proletcult, however, did not dampen its broader influence, particularly outside of the Soviet Union.[176] In one form or another "proletarianism" would be the lodestar of Communist aesthetics throughout the 1920s and through 1934, when it would be supplanted by the more famous call for "socialist realism" at the Soviet Writers' Congress of 1934. In the US, it would continue to shape left-wing visions of cultural work for decades.[177]

Techniques of Proletarian Aesthetics

Within the broad project of aesthetic proletarianism, Freeman and his fellow pioneering left cultural workers came to converge upon one central theme: that of

[175] Freeman, *Voices of October*, 34, emphasis added.
[176] Freeman, *Voices of October*, 36.
[177] Andrew Hemingway, ed. *Marxism and the History of Art: From William Morris to the New Left* (London: Pluto Press, 2006), 5.

"technique."[178] Trotsky's statement on Russian Futurism sounds the theme: "Futurism is against mysticism, against the passive deification of nature, against the aristocratic and every other kind of laziness, against dreaminess, and against lachrymosity—and stands for *technique*, for scientific organization, for the machine, for planfulness, for will power, for courage, for speed, for precision, and for the new man, who is armed with all these things."[179]

The medium of film provided a particularly resonant example and quasi-allegorical demonstration of the cult of technique: the complexity of the technique (montage, special effects, etc) the sophistication of the apparatus (camera, lighting, film, editing, reproduction, dissemination, projection), requiring a coordinated complex workforce. Film technique—montage, mise en scene, the closeup, special effects—also mirrored the complexity of contemporary reality and allowed for the creation of new values, types of experience, needs and desires. The cinema required a professionalized workforce who exerted virtual monopoly control over the productive apparatus. This provided a key point of departure from the traditional authorial conceptualizations of cultural work rooted in the singular creator towards a more collectivized, cooperative, and corporate vision.[180]

In testimony before Congress in 1936, John Howard Lawson, who would publish his treatise *Theory and Technique of Playwriting* that same year, describes the period "from

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[178] Non-specialist English speakers have long been confused by European texts that speak of "technique": for example, in French, "la technique," or in German, "Technik." Continental writers often use these terms to differentiate between various aspects of what in English is lumped together as "science and technology." Because American academics traditionally trained in Germany, we find abundant references to "technique" in late-nineteenth and early-twentieth-century journals. But it was only with the advent of the post-1917 left in the US that we begin to see a wider discourse on "technique," stateside. "Technique" talk on the left would be revived in the 1960s under the inspiration of the French Christian Anarchist philosopher Jacques Ellul, whose 1954 study *The Technological Society* was translated and published in the US in 1965.
[179] Trotsky, *Literature and Revolution* (Ann Arbor: University of Michigan Press, 1960), 145, emphasis added.
[180] See Ronny Regev, *Working in Hollywood: How the Studio System Turned Creativity into Labor* (Chapel Hill: University of California Press, 2018).

1928 to the present day" as a "period when the big motion-picture companies, facing the depression, have been forced necessarily to introduce large-scale business methods and more or less machine methods into the industry." This era, the Age of the Executive, suffered from the boss's ignorance of "creative values" and "technique." While this period might have been a historical necessity, "in the course of the reorganization and the business development of the motion-picture field," the next step was surely the Age of the Creator: "the creator, the man who knows his job, who knows how to create material and produce entertainment for millions of our people, shall have the right to do that job according to the *technique* method that he has learned."[181]

In a representative text—1925's *Mammonart*—Upton Sinclair wrote that instead of slavishly following classical methods, the "vital artists" of the day were creating their own resources. Sinclair declared: "present-day technique is far and away superior to the *technique* of any art period preceding."[182] Eden and Cedar Paul's influential 1921 text *Proletcult* similarly captures the thrust of the larger understanding of the vital importance of technique as a keyword in the discourse of the late 1910s and 1920s: "Developing industrial *technique* brings about a development of proletarian consciousness," which in turn gives rise to a proletarian culture.[183] Freeman writes in his preface to *Voices of October*: "In the cultural field, the Communists proceed on the conviction that the struggle of economic classes determines not only the nature of political and social institutions, but also philosophy, literature, and art." Art, therefore, "has its roots in the social structure of a given period, in its

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[181] "Statement of John Howard Lawson, playwright" in *Revision of Copyright Laws. Hearings Before the Committee on Patents House of Representatives Seventy-Fourth Congress Second Session. Revised Copy for Use of the Committee on Patents. Washington D.C. February 25, 26, 27, March 3, 4, 5, 10, 11, 12, 17, 18, 19, 24, 25, 26, 27, 31, and April 1, 2, 3, 7, 8, 9, 10, 13, 14, 15, 1936* (Washington: U.S. Govt. Print. Off. United States, 1936). Emphasis added.
[182] Upton Sinclair, *Mammonart*, 41, emphasis added.
[183] Eden and Cedar Paul, *Proletcult*, emphasis added.

technique, in its class relations."[184] This dimension of "technique" was already a key theme in the works of Karl Marx, Friedrich Engels, and V.I. Lenin that were most available in English translation in the early decades of the century. It signified to Marxists of that era a broad conception of the "tool" as the basic unit of technology, and thus of economic life, itself. In Victorian Marxist discourse, "level of technique" held the key to determining the mode of production, with the hand mill explaining feudalism just as the steam mill explained capitalism. It should be noted that this discourse on "technique" on the left ranged from the agnostic to the avowedly pro-technological. Technique, as the fundamental unit of technological change, could be a force for good or evil, progress or domination. What mattered was the intelligent capture of technique by experts and the direction of its implementation according to revolutionary ends.

Because technique is defined by constant change, this cult of technique was necessarily rooted in a pragmatic spirit of experimentation, adaptation, and mastery of new (and constantly evolving) means of expression and communication. The pragmatic spirit of the times can be seen in the language of the Kharkov Conference of 1930, which describes the proletarian writer as a "very special type of artist," who "cannot remain a passive observer of reality" and whose art must be dynamic, "leading to action."[185] In "Eisenstein's Holy Grail," a section of *An American Testament* that serves as the book's climax, Freeman recalls meeting the famous film director Sergei Eisenstein in the Soviet Union in 1926. Eisenstein rhapsodizes about the new industrial milk separator that he was planning to situate

[184] Joseph Freeman, *Voices of October*, 15-16, emphasis added.
[185] "Resolution on Political and Creative Questions of International Proletarian and Revolutionary Literature." *Literature of the World Revolution*, special issue (Nov 1931), 85-93. See also Joseph Freeman, writing of Soviet art: "The Communist philosophy is essentially active and practical." *Voices of October*, 18.

as the heroic object at the center of his film in progress, *Old and New* (1929).[186] Eisenstein, the great innovator of film technique, particularly in the use of the camera and the technique of montage, was himself in thrall to advances in industrial technique in agriculture, plotting out for Freeman the plan for a new film that would lead the audience to recognize the arrival of the milk separator in the village as a rapturous moment of fulfilment and beatification. Soon enough, Eisenstein would be in Hollywood, having been beckoned by studio moguls to bring his advanced cinematic technique to the United States.

Soviet cultural workers like Eisenstein foregrounded technique in order to highlight the mechanical infrastructure subtending culture. They spoke of technique in order to facilitate comparison between the creative act and every other sort of skilled labor. Like William Morris and his followers, they wished to honor the importance of the transmission, cultivation, and improvement of artistic skills that cultural workers brought to the project of reflecting and shaping reality.[187] In contradistinction to Lewis Mumford, who would organize his *Technics and Civilization* (1934) around anxious appraisals of humanity's interface with machinery, Freeman was well-positioned to embrace technique and technology.[188] He recalls being unable to "romanticize the impoverished, drab life of the pre-industrial world" of the Ukrainian shtetl when he read leftist tracts glorifying the Edenic countryside. Instead, from an early age he and his leftist friends "romanticized the machine." Marxism provided them with the critical distinction between the machine in and of itself and the nefarious uses to which capitalism had put it to use. Leninism and the Bolshevik experiment provided them

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[186] Sergei Eisenstein and Sovkino dirs. *The General Line: Old and New*. 1929.
[187] E.P. Thompson, *William Morris* (New York: Pantheon Books, 1977).
[188] Lewis Mumford, *Technics and Civilization* (London: Routledge & Kegan Paul, 1934). George Orwell was perhaps the most famous left-wing enemy of technology writing in English during the period. See *Road to Wigan Pier* (London: Penguin, 1989). On the right, Oswald Spengler's 1931 anti-technological treatise *Man and Technics* served as a key text. See Oswald Spengler and Charles Francis Atkinson, *Man and Technics: A Contribution to a Philosophy of Life* (New York: Alfred A. Knopf, 1932).

with a new basis upon which to venerate technology as a potentially liberatory force: "While bohemians were burning candles in New York, Lenin was calling in Moscow for the electrification of his country." Machinery, Freeman came to believe, was "indispensable for a higher standard of living, for universal leisure, for the development and spread of art, for the free development of the individual."[189] Freeman's close collaborator Louis Lozowik wrote in 1931: "The American worker inevitably lives and works with cities and machines. But instead of painting the apocalyptic city of the German expressionists… the American revolutionary artist pictures it more as a prognostication than a fact. He departs from realistic appearance and paints the city as a product of that rationalization and economy which must prove allies of the working class in the building of socialism."[190] For Freeman, the greatest potential for technique/technology as a positive force resided in the artistic meaning of processes for achieving certain aesthetic ends. Technique, in this sense, was integrated into a broader vision of the ways in which cultural production could be put in service of the education of the masses and the cultivation of working-class solidarity. What was new about this synthesis was its pragmatic openness to novelty, experimentation, artistic innovation as guiding values of left cultural work.[191]

"The Professionals Suffer, Too": The Cultural Worker in the Pre-New Deal 1930s

By the time the 1930s arrived, leftist theorizations of cultural work had been sufficiently developed to appreciate the power of two new forces: the rise of a culture

[189] Freeman, *An American Testament*, 289.
[190] Louis Lozowick, "Art in the Service of the Proletariat," *Literature of the World Revolution*, no. 4 (1931)
[191] Freeman, *An American Testament*, 221.

industry of leisure and entertainment built on the new technologies of motion pictures, recorded sound, and broadcasting, and on the other, the emergence of a state cultural bureaucracy more robust than the US had ever known. Michael Denning observes that because of the size of the mass audiences and the capital invested in production, the popular arts achieved a theretofore impossible technical brilliance.[192] The very popularity of these productions eroded (but did not erase) distinctions of high, middlebrow, and low culture, which would never recover their purchase on the American cultural imagination. The rise of broadcasting in the 1920s and 1930s made the American culture industries "an elaborate front for the advertisements of national corporations," which encouraged the development of a pro-capitalist entertainment industry that celebrated the values of business and "free enterprise."[193] Denning draws on C.L.R. James's analysis of the inherently contradictory nature of American mass entertainment to explain that most Hollywood films, comic strips, and popular songs maintained a hostility to the worldview and core values of big business even while functioning as market commodities. Capitalists reluctantly tolerated this abuse because the populist, Leftist, and urban-ethnic cultural workers produced works more profitable than pro-business alternatives.[194]

As the modern cultural apparatus created a new mass audience, it also generated a new labor force. Cultural workers were not merely artisans working in centuries-old traditions, but rather occupants of a new professional stratum operating under entirely novel

[192] Michael Denning, *The Cultural Front: The Laboring of American Culture in the Twentieth Century* (London: Verso, 1997), 42.
[193] Michael Denning, *The Cultural Front*, 43. Lawrence B. Glickman, *Free Enterprise: An American History* (New Haven: Yale University Press. 2019); Victoria Grieve, *The Federal Art Project and the Creation of Middlebrow Culture* (Urbana: University of Illinois Press, 2009); Lawrence W. Levine, *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (Cambridge, Mass: Harvard University Press, 1988); Andrew Ross, *No Respect: Intellectuals & Popular Culture* (New York: Routledge. 1989).
[194] C.L.R. James, Anna Grimshaw and Keith Hart*, American Civilization* (Cambridge Mass: Blackwell, 1993).

conditions. By the 1920s and 1930s, it had become increasingly possible for a white-collar cultural worker to make a living as a popular artist within the large industrial studios of the capitalist culture industry.[195] We can return now to Lewis Corey's description of the rise of a new workforce responsible for "crystalizing, disseminating, and perpetuating American culture" that we invoked at the start of this introduction with an appreciation of the historical developments that subtended this shift.[196]

Constructed as "An Open Letter to the Intellectual Workers of America," Corey proclaims, in one subsection title: "The Professionals Suffer, Too." He stresses that the "brain workers who give technical or educational services" had not been spared the ravages of the Depression.[197] "There are teachers on the bread lines," Corey observed, "engineers patching the sheet-iron shacks in the "Hoovervilles," musicians fiddling in the "jungles."[198] Educational workers had suffered enormous job losses, with over 8,000 unemployed teachers in New York City alone. Colleges were closing classes for adults and schools were doubling class sizes, and Dean Williamson of the Columbia University School of Library Service had declared that new students should not be admitted because the nation already had "too many" librarians. In one New Jersey town, Corey laments, "more than 100 white collar workers" had "turned to ditch-digging, competing with underpaid workers for their jobs." Architects, engineers, draftsmen, trained chemists, and doctors had all begun to feel the sting of mass

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[195] Shannan Clark, *The Making of the American Creative Class: New York's Culture Workers and Twentieth-Century Consumer Capitalism* (New York NY: Oxford University Press, 2021).
[196] League of Professionals for Foster and Ford (Lewis Corey), *Culture and the Crisis* (1932). Signatories included Sherwood Anderson, Erskine Caldwell, Robert Cantwell, Henry Cowell, Malcolm Cowley, Countee Cullen, John Dos Passos, Waldo Frank, Granville Hicks, Sidney Hook, Langston Hughes, Matthew Josephson, Louis Lozowick, Grace Lumpkin, Samuel Ornitz, James Rorty, Lincoln Steffens, and Edmund Wilson. On Corey, see Paul Buhle, "Louis C. Fraina/Lewis Corey and The Crisis of the Middle Class" *New Politics*, vol. 5, no. 1 (new series), whole no. 17, Summer 1994.
[197] *Culture and the Crisis*, 9-10.
[198] *Culture and the Crisis*, 28,

unemployment. “Theaters close,” Corey reflects, “and playwrights starve.” Musicians experienced both cyclical and secular unemployment: suffering “permanently from technological unemployment through the development of radio, talking-movies, and the like.”

We discern here an echo of the communiqués of the Workers Music League (a branch of the Workers Cultural Federation of the CPUSA). For example, in December 1932, an editorial in the first issue of *Worker Musician* laments the “introduction of labor-saving machines” and other technological improvements.[199] “The introduction of the mechanized film and the radio resulted in the unemployment of thousands of skilled musicians,” the editorial continues, “long before the deepening of the crisis.” After the stock market crash of 1929, the effect of this crisis upon music had become “disastrous,” with “symphony orchestras that had grown during the period of ‘prosperity’ either dropped from existence or “merged,” throwing hundreds of performers into the ranks of the unemployed.” Additionally, the “theatre orchestra ceased to exist” as “the concert stage, due to mass radio production, was no longer profitable.” In tandem with these catastrophes for musical labor, the editorial insists, the musical field had suffered a decline in quality—“[t]he artistic level of music was tremendously lowered”—sounding a rather elitist theme familiar from vulgar Marxist aesthetics of the early 1930s.“With the worsening of conditions, the stimulation of the masses became a necessity,” the editorial proclaims, lamenting the turn of the bourgeoisie to “Tin Pan Alley.” Popular music had rendered obsolete “artists and skilled performers,” as the “charlatans of the ‘alley’ croon and shout through the radio and ‘talkie’ (the most powerful cultural weapon of the ruling classes today) ‘Happy days are here again.’” Herbert Hoover,

[199] “15 Years,” *Worker Musician*, 1 (December 1932).

"engineering the capitalist offensive against the 'living standards' of the workers" had realized the "importance of music as a weapon" and called upon crooner Rudy Vallee to pacify the masses. The "great number of unemployed musicians" had led to musical stagnation, while the "commercial composer, with only a few publishers remaining in business, and with no market for his work, joins the ranks of the starving unemployed workers."[200]

Artists found no market for their wares, while writers were forced to accept "miserable terms." Department stores had their pick of "Ph.D.'s at $12.00 a week."[201] Corey concludes this section with a thoughtful reflection on the fundamental illogic of these developments at the level of supply and demand: "All this unemployment and misery, all this training and talent thrown away, not because there are too many doctors, teachers, artists, writers, and the like, but despite the fact that this country has never yet been able to provide its population with a sufficiently large body of trained intellectuals and professionals to satisfy its cultural needs." Thus the "cultural crisis" of the 1930s grew "directly out of the economic crisis." Corey addressed his fellow intellectuals who now found themselves "superfluous." Was this newfound status a by-product of the overproduction of culture? "No," Corey answers: "it is because there is not enough."[202]

As Corey highlights, the mnemotechnical revolutions in popular culture often signaled impending loss of work for an earlier generation of cultural workers. The twin forces of sound film and network radio that began their ascent in the 1920s were harbingers

[200] At the same time, under the inspiration of the Soviet Union, newly militant "proletarian music" could be found in the "thick of the fighting, shoulder to shoulder with the working class movement." "15 Years," *Worker Musician*.
[201] *Culture and the Crisis,* 10-11.
[202] *Culture and the Crisis*, 28-29.

of the Depression's more general crisis of unemployment. Technological unemployment hit hard, with musicians losing gigs playing in movie theatres by the thousands and being replaced in the studio by phonograph recordings. Thus, while trade unionism had found "little favor" among most "white-collar employments," as Vern Countryman would note in 1948, the American Federation of Musicians (AFM) had been actively strategizing for years to combat displacement by machines.[203] Musicians understood relatively early that new technologies posed a threat to their livelihoods. The advent of commercial motion pictures and the commercialization of radio beginning in 1920 steadily undermined employment opportunities for musicians. As Countryman observes, radio station managers immediately began to experiment with using phonograph records to fill out the broadcasting day. The introduction of sound film, with 1927's *The Jazz Singer* leading the way, saw the swift conversion of movie theatres into venues equipped to present "talkies" to the viewing public.[204] Almost immediately, 18,000 members of the American Federation of Musicians who had worked in cinemas providing musical accompaniment to silent films found themselves out of work. Countryman suggests that this development "caught the Federation completely unprepared." AFM President Weber initially dismissed the innovations as posing no "general danger to employment." As his members began to receive pink slips, he assured them that "mechanical music" would eventually fail to "give satisfaction in any theater as a substitute for the appearance of artists in person." The 1929 AFM convention authorized a

[203] Vern Countryman, "The Organized Musicians: I" *The University of Chicago Law Review*, Vol. 16, No. 1 (Autumn, 1948), 56.
[204] Jonathan D. Tankel, "The Impact of The Jazz Singer on the Conversion to Sound." *Journal of the University Film Association*, vol. 30, no. 1, 1978, pp. 21–25. Michael Rogin, "Blackface, White Noise: The Jewish Jazz Singer Finds His Voice." *Critical Inquiry*, vol. 18, no. 3, 1992, pp. 417–53.

new advertising campaign that would feature dystopian images of robot musicians in order to discourage the public from attending sound movies.[205]

In Hollywood in the early 1930s, the "entire creative talent of the screen—whose fabulous incomes have long distinguished them from all other employees," had begun to establish guilds and to bargain collectively, as Murray Ross would reflect in 1941.[206] A major spur to this unionization wave was the advent of the National Recovery Administration (NRA). As we explore in Chapters Four and Five, the NRA galvanized cultural worker organizing in the years between 1933 and 1935. Formed June 16, 1933, under the auspices of the National Industrial Recovery Act, the NRA code-drafting process of the First New Deal provided the major impetus to organizing within the spheres of cultural work in the United States, stimulating the growth of guilds of newspaper editorial workers, screen writers, directors, and actors, theatre workers, radio artists, and musicians. Ruled unconstitutional by the May 27, 1935, *Schechter* decision, the NRA nevertheless had stimulated a flurry of organizing that prepared the groundwork for the mobilization of cultural workers during the Second New Deal, wherein the plight of their unemployed colleagues would take center stage.[207]

Cultural workers rushed to understand the NRA framework and to identify opportunities to take advantage of its central corporatist mechanism: the hashing out of codes of fair competition by "5 and 5" committees representing capital and labor. Rather

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[205] Countryman, "The Organized Musicians: II," 245.
[206] Murray Ross, *Stars and Strikes* (New York: Columbia University Press, 1941), vi.
[207] Key works on the NRA include Arthur M. Schlesinger, Jr.'s *The Age of Roosevelt, Volume II: The Coming of the New Deal, 1933-1935* (Boston: Houghton Mifflin, 2003 [1958]), Ellis Hawley's *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (New York: Fordham University Press, 1995[1966]), Robert Himmelberg's T*he Origins of the National Recovery Administration: Business, Government, and the Trade Association Issue, 1921-1933* (New York: Fordham University Press, 1976) Alan Brinkley's *The End of Reform: New Deal Liberalism in Recession in War* (New York: Vintage, 1985) and Colin Gordon's *New Deals: Business, Labor, and Politics in America, 1920-1935* (Cambridge: Cambridge University Press, 1994).

paradoxically, the NRA code-drafting process, which might have been expected to serve as a Michelsian guarantor of the "iron law of oligarchy," instead pushed cultural workers to identify as proletarian workers rather than as white-collar professionals. Consider the response of Hollywood screenwriters to Franklin Roosevelt's landmark 1933 declaration affirming that writers are "artistic creators."[208] Many of the professional "scribblers" on the East Coast—creators of commercial fiction, prose, and dramatic works—regarded this public recognition as an important victory. The Authors' League and Dramatists' Guild celebrated Roosevelt's statement as an affirmation of the value of their cultural work as aesthetically legitimate. In Hollywood, on the other hand, many writers were disappointed with Roosevelt's statement. In particular, those writers who were members of the newly formed union, the Screen Writers Guild (SWG) interpreted Roosevelt's statement to mean that composers of motion picture scripts would have a more difficult time getting adequate protection as workers under New Deal industrial regulation. Many Hollywood screenwriters felt that identifying as "artists" was out of sync with the anti-elitist politics of the 1930s. Like many other left-wing artist-intellectuals in the 1930s, screenwriters rejected identification with the idealized image of the romantic artist, preferring instead to see themselves as industrial workers.[209]

A similar process could be witnessed among metropolitan journalists who began to unionize the news industry in 1933. As the NRA Newspaper Code was being debated, Newspaper Guild code committee member Edward Angly of the New York *Herald Tribune*

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[208] Nancy Lynn Schwartz, *The Hollywood Writers' Wars* (New York: McGraw Hill, 1982), 28.
[209] Schwartz, *The Hollywood Writers' Wars*. Gerald Horne, *The Final Victim of the Blacklist: John Howard Lawson Dean of the Hollywood Ten* (Berkeley: University of California Press, 2006); *Screen Writer*; Catherine L. Fisk, *Writing for Hire: Unions Hollywood and Madison Avenue* (Cambridge Massachusetts: Harvard University Press, 2016).

objected to Code language that described editorial workers as "professionals." Angly sent an audience into laughter, the *Times* reported, when he declared in September 1933: "We would much prefer to be classified simply as craftsmen and taken up to the nest of the Blue Eagle rather than left down in the valley of rugged individualism."[210]

Ideologies of Cultural Work in the Popular Front Era

With the creation of the Works Progress Administration (WPA) on May 6, 1935, and the passage of the Wagner Act on July 5, 1935, new visions of state-supported cultural worker unionism began to flourish.[211] Interestingly, the left cultural workers of Joseph Freeman's generation were not initially sold on the idea of government sponsorship of the arts. The militant art workers of New York City who founded the newsletter *Art Front* warned of the dangers emanating from Federal One for months before warming to the potentials of state support of artists.[212] In 1932, Jack Conroy and Lewis Corey cautioned that

[210] "News Writers Form Guild Under the NRA," New York *Times*, Sept 18, 1933, p. 4.
[211] On the WPA see. On the Wagner Act, see Susan Quinn, *Furious Improvisation : How the WPA and a Cast of Thousands Made High Art Out of Desperate Times* (New York: Walker & Co., 2008); Jerry Mangione, *The Dream and the Deal: The Federal Writers' Project, 1935-1943* (Syracuse: Syracuse University Press, 1996); Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works* (New York: Cambridge University Press, 2006); John E. Vacha, "The Federal Theatre's Living Newspapers: New York's Docudramas of the Thirties." *New York History*, January 1986, Vol. 67, No. 1, pp. 66-88; Rania Karoula, *The Federal Theatre Project, 1935–1939: Engagement and Experimentation* (Edinburgh: Edinburgh University Press, 2021); Elizabeth A. Osborne, *Staging the People: Community and Identity in the Federal Theatre Project* (New York: Palgrave, 2011); Jane De Hart Mathews, "Arts and the People: The New Deal Quest for a Cultural Democracy." *The Journal of American History*, Sep., 1975, Vol. 62, No. 2 (Sep., 1975), pp. 316-339; Roy Rosenzweig and Barbara Melosh, "Government and the Arts: Voices from the New Deal Era." *The Journal of American History*, Sep., 1990, Vol. 77, No. 2 (Sep., 1990), pp. 596-608; Cedric Larson, "The Cultural Projects of the WPA." *The Public Opinion Quarterly*, Jul., 1939, Vol. 3, No. 3 (Jul., 1939), pp. 491-496; Lauren Rebecca Sklaroff, *Black Culture and the New Deal: The Quest for Civil Rights in the Roosevelt Era* (Chapel Hill, University of North Carolina Press, 2009).
[212] See Gerald M. Monroe, "Art Front." *Archives of American Art Journal*, 1973, Vol. 13, No. 3 (1973), pp. 13-19.

Roosevelt and the New Deal represented the friendly face of authoritarianism.[213] Like the *Art Front* activists, they would not change their tune until the arrival of the Second New Deal and the adoption of the Popular Front strategy by the CP, but like many leftists they always retained a certain level of suspicion regarding FDR, which would be confirmed by the Little Steel fiasco, the "Roosevelt recession" of 1938, and rumblings of preparation for entry into the next world war. While the WPA programs did not survive the United States' entry into World War II, the organizational structures of the New Deal cultural apparatus were transformed into wartime propaganda agencies and then into the "vastly expanded post-war university system," which would prove decisive in the dramatic transformation of intellectual and artistic life in the United States.[214]

Parallel to the organizing opportunities opened up by the Second New Deal, a variety of different visions of the cultural worker began to consolidate themselves. Three would prove especially salient: 1) the cultural worker as both white-collar professional and proletarian-identified labor unionist (we have explored in the paragraphs above many of the dimensions of this vision of cultural work); 2) the figure of the "worker-correspondent," which encompassed the autobiographical writings of factory hands contributing to left journals and the self-fashioning of figures like Leadbelly, Woody Guthrie, and Richard

[213] Jack Conroy, "American Proletarian Writers and the New Deal" *International Literature*, no. 4 (October 1933); Corey, "Culture and the Crisis."

[214] Denning charts the steady growth of the cultural apparatus: "From 1920 to 1950, the number of teachers almost doubled (29,000 to 56,000). Artists and art teachers increased by 137 percent (from 35,000 to 83,000), editors and reporters by 138 percent (from 39,000 to 93,000), athletes, dancers, and entertainers by 140 percent (from 48,000 to 115,000), and authors by 143 percent (from 7,000 to 17,000). Librarians and college professors almost quadrupled, and miscellaneous intellectuals multiplied by 15 (from 20,000 to 302,000). The only group of cultural workers that did not grow at this scale was musicians and music teachers, whose numbers increased from 130,000 to 166,000 (28 percent). As a consequence of this growth, roughly two million Americans were employed in the cultural apparatus by 1950." Denning, *The Cultural Front*, 49.

Wright, among many others, and 3) the cultural worker as educator. We will examine the second and third iterations in turn.

The "worker-correspondent" ideal came into vogue as the daily newspaper reached its peak of cultural influence. As Walter Benjamin observes in his essay "The Author as Producer" (1934), many intellectuals had for decades been lamenting the decline in the literary quality of the bourgeois press and had been impressed by the apparent reversal of this trend in the Soviet Union, with the disappearance of the "conventional distinction between author and public." In the Soviet Union, Benjamin suggests, "the reader is at all times ready to become a writer—that is, a describer, or even a prescriber. As an expert—not perhaps in a discipline but perhaps in a post that he holds—he gains access to authorship. Work itself has its turn to speak."[215]

A look at the American Writers' Congress of 1935 further reveals the popularity of the "worker-correspondent" model of cultural work. Jack Conroy's "The Worker as Writer," presented at the Congress, was in many ways the most lucid presentation of this model. Conroy's essay proposed the hyphenated "worker-writer" as both a vocational category and an ethical position for the committed intellectual. [216] Freeman takes pains to trace the history

[215] Walter Benjamin, "The Author as Producer," 772.

[216] The American Writers' Congress was convened by one of the signal cultural workers' coalitions of the Popular Front era, the League of American Writers, which would replace the John Reed Clubs in 1936. In retrospect, the most remarkable fact about the Congress was that it happened, as it did, in the first place. Bringing together the CP faithful (Earl Browder on "Communism and Literature," and Alexander Trachtenberg on "Publishing Revolutionary Literture") Trotskyist dissidents (James T. Farrell on "The Short Story," and Edward Dahlberg on "Fascism and Writers"), radical Midwesterners Jack Conroy and Meridel LeSueur, the great African American writer Langston Hughes, European avant-gardist Louis Aragon, and philosopher Kenneth Burke, among others, the Second American Writers' Congress represented the wide spectrum of politically committed literary activity in Popular Front-era United States. Such an assembly would have been unthinkable a decade (and probably even two or three years) earlier, given both the mutual distrust characteristic of Third Period-era left intellectuals on different sides of various factional divides, and the fact that it was only the cumulative effect of the events of the 1930s (the Gastonia strike, Angelo Herndon and Scottsboro Boys cases, and Spanish Civil War, and more generally the continuing global economic crisis and the rise of Fascism in Europe) that spurred many writers to political action.

of the "worker-correspondent" in the early Soviet period.[217] He quotes Lenin's call from 1904: "We ask everybody to write us, especially the workers. Give the workers a greater possibility of writing to our paper—to write about everything, as much as possible about their daily life, their interests, their work." Thousands of "class-conscious workers" were enlisted as correspondents to the Bolshevik newspapers and "asked to write about their lives, their struggles, their political experiences, their economic difficulties."[218] After the October Revolution, Freeman notes, these correspondents "became one of the Soviet government's direct links with the masses. Thousands of worker and peasant correspondents, now organized in special groups, inform the press every day about events in factory, office, and farm." "The Soviet regime looks upon the worker and peasant correspondents as part of the mechanism by which the workers and peasants control the life of the country, act as a check on the bureaucracy, and voice their complaints, needs, achievements and aspirations. It also considers them rich soil for cultural development, since they create a conscious and alert audience and keep the Soviet writers acutely aware of the real life around them."[219] At the Thirteenth Congress of the Communist Party in 1924, a resolution was adopted to extend the movement for worker- and peasant-correspondents, calling them the "barometer of daily life," which led to the expansion of their ranks to as many as 200,000.[220]

The third vision of the cultural worker as educator centered on the institution of the "workers' school." The movement for workers' night schools was a key fixture of the emerging world of the left cultural worker. These schools provided a space for both young

[217] Bolshevik discourse distinguished between the worker-correspondent (*rabkor*) and the peasant-correspondent (*selkor*). Jeremy Hicks, "Worker Correspondents: Between Journalism and Literature." *The Russian Review*. Vol. 66, No. 4 (Oct., 2007), pp. 568-585.
[218] Freeman, *Voices of October*, 25.
[219] Freeman, *Voices of October*, 25-26.
[220] Joseph Freeman, "Past and Present," in *Voices of October*, 26.

and seasoned radical artists and intellectuals to hone their arguments, assemble curricula, and engage with proletarian workers on the most urgent issues of the day. Jon-Christian Suggs emphasizes that a wide variety of workers' schools all around the US were founded in 1920s, and some emphasized cooperative living as well as left education, such as Commonwealth College, in Mena, Arkansas.[221] In the 1920s, the CPUSA established a number of schools in urban areas, carrying on the tradition of the Socialist Party's Rand School of Social Science in New York.[222] The Party's Workers School opened in October 1923, with a teaching consisting mostly of Party staffers, and promising that it would advance "true proletarian education" and train workers for effective leadership in the labor movement. Standard pay was $12 per week, with a teaching of load of 10 to 15 seminars. Like many of his peers, Freeman regarded the Party's Workers' School, founded toward the close of 1923, as a medium equally as important as the Party press in "circulating communist ideas among the workers." He taught classes in journalism at the Workers' School throughout the 1920s. Earlier, he had lectured at evening classes offered by the Amalgamated Clothing Workers, taught literary history at the Rand School, and provided a class in elementary English to foreign-born workers in Brownsville, using the *Communist Manifesto* as a textbook. Freeman also spent time teaching at an experimental school at the Stelton Colony in New Jersey.[223]

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[221] William H. Cobb, "Commonwealth College Comes to Arkansas, 1923-1925" *The Arkansas Historical Quarterly*, Vol. 23, No. 2 (Summer, 1964), pp. 99-122; James W. Robinson, "The Expulsion of Brookwood Labor College from the Workers' Education Bureau." *Labour History*, No. 15 (Nov., 1968), pp. 64-69; Rachel Cutler Schwartz, "The Rand School of Social Science, 1906-1924" Dissertation. SUNY Buffalo, 1984. Frederic Cornell, "A History of the Rand School of Social Science 1906 to 1956." Dissertation, Teachers College Columbia University, 1976.

[222] Marvin Gettleman, "Workers Schools," in Mary Jo Buhle and Paul Buhle, *Encyclopedia of the American Left* (New York: Oxford University Press, 1990), 854.

[223] The Ferrer Center and Stelton Colony were experimental schools inspired by the radical educational theorist Francisco Ferrer. A Ferrer Association and Ferrer Center was founded in New York City in 1910. The Center functioned as a hub of avant-garde artistic and political activities, with an emphasis on radical pedagogy. Political pressure (including a bomb plot and police harassment) forced the school to move to Stelton, New Jersey, 30 miles outside New York City, in 1914. See Jon-Christian Suggs, ed., *Dictionary of Literary*

In 1924, the Workers' School advertised courses that had been designed "to give workers that knowledge of revolutionary theory and tactics, and labor history, which is essential for militant activity in the struggle against capitalism." Its core course was "Fundamentals of Communism," and as its enrollments rose, pedagogical offerings became more varied: from Earl Browder's class on the Chinese Revolution to William Z. Foster's on "trade union problems," from future anticommunist Whittaker Chambers' class on journalism to Mike Gold's seminar on "proletarian writing." From the start, the CPUSA's night schools stressed antiracist education and sought out African American students. Many radical African American writers and intellectuals of the Popular Front period spoke fondly of their time studying in and teaching at these schools, many of which, like New York's Jefferson School of Social Science under the leadership of Doxey A. Wilkerson, became centers of civil rights organizing and Black studies in the 1940s.[224]

Zechariah Chafee, Jr. and Changing Social Property Relations in Mass Media

The New Deal period was marked by certain conceptual shifts within the collective imagination that worked in the favor of cultural workers. Among the key transformations was a new conceptualization of corporations as "quasi-public" institutions. Adolf Berle and Gardiner Means would later describe this situation as the "surrender of control over their wealth by investors" which had "effectively broken the old property relationships" and had

Biography Documentary Series, Vol. 11: American Proletarian Culture: The Twenties and the Thirties (Detroit: Gale Research, 1993).

[224] See Andy Hines, *Outside Literary Studies: Black Criticism and the University* (Chicago: University of Chicago Press, 2022).

"raised the problem of defining these relationships anew."[225] Many consequences flowed from this severing of the old property relationships and the swaddling of media corporations with the "clothing of public interest," to cite the favorite metaphor of the lawyer and free speech expert Zechariah Chafee, Jr. Over the course of the 1930s, a series of rulings established that the mass media provided the public with news and entertainment, engaged in interstate commerce, and had responsibilities that superseded the proprietary interests of the infamously dictatorial and hot-headed bosses of papers and studios, from Louis B. Mayer to Cyrus McCormick. As the New Deal gave way to World War II and then the Cold War, this "public interest" theory of the media would come to have paradoxical effects on the organizing efforts of cultural workers: providing them with significant victories against corporate owners while lining many of them up as "sitting ducks" when the Dies Committee or HUAC came to investigate their political affiliations.[226] "Public interest" provided the theoretical grounding for corporate compliance with the New Deal regulatory apparatus, but it also provided an excuse for mainstream legal experts to fret over the dangers of a press and movie industry controlled by left-wing unions.

In Chapter Seven, we focus upon the writings of Chafee, who pioneered the "public interest" theory of the press, and also participated in a number of initiatives aimed at sizing up the relationship between the organized white-collar cultural workers, corporate capitalism, and the liberal state.[227] In a published debate with lawyer and University of Illinois

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[225] Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New Brunswick, NJ: Transaction Publishers, 1991 (1932), 4, 7. See also, Thurman Arnold, *The Folklore of Capitalism* (New Haven: Yale University Press, 1937), 121; Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988), 55-56.

[226] Ellen Schrecker, *Many Are the Crimes: Mccarthyism in America* (Boston: Little Brown, 1998).

[227] John Wertheimer, "Review: *Freedom of Speech*: Zechariah Chafee and Free-Speech History," *Reviews in American History*, Vol. 22, No. 2 (Jun., 1994). See also Chapter Four of Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991.

journalism professor Fredrick S. Siebert, Chafee sketched out one major implication of his "public interest" theory of the press: that the state might play an assertive role in regard to "prices, quality, wages paid, conditions of employment, etc."[228] Second Circuit Court Judge Learned Hand adopted a version of Chafee's argument in his dissenting opinion in the 1943 *AP* antitrust case, writing that the state had a vital interest in keeping the press open to a "multitude of tongues."[229] That implied robust protections of cultural workers' autonomy, as against the wills or wishes of the owner-publisher or studio head or record label executive.

At the same time that Chafee elaborated his "public interest" theory of the press, he also wrote extensively about IP, including two lengthy essays on the history of copyright for the *Columbia Law Review* seeking to draft sensible principles that might guide legal rulings on new technologies of mass media.[230] Both the "public interest" theory of the press and Chafee's reflection on the evolution of IP law spoke to the novel emergence of the unionized white-collar cultural worker. The two concerns were interrelated: Chafee's primary aim was to show that the modern culture-industrial firm was uniquely "clothed with a public interest." In the most extreme distillation of the "public interest" theory, the news reporter, artist, and Hollywood performer might be seen as a virtual public servant. Furthermore, no one could deny that the corporations that produced popular culture were inextricably embedded in the New Deal and warfare state apparatus. Chafee agreed with Hand that the Associated Press "should regard itself as a public service open to all who will pay the price."[231]

Chafee was also deeply involved in the work of the Hutchins Commission, serving its

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[228] Smith, *Zechariah Chafee,* 98. See *GMC*, II, 542-63. Original cite: Chafee, statement on the *AP* case, *Chicago Sunday Tribune*, 18 April 1943.
[229] *United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943)
[230] Zechariah Chafee, Jr., "Reflections on the Law of Copyright: I" *Columbia Law Review*, Vol. 45, No. 4 (Jul., 1945); "Reflections on the Law of Copyright: II. III. Some Specific Problems," *Columbia Law Review*, Vol. 45, No. 5 (Sep., 1945).
[231] Smith, *Zechariah Chafee*, 96.

the Vice-Chairman and de facto leader. The Hutchins Commission was formed in response to a request issued by Henry Luce in December of 1942 to stage an "inquiry into the present state and future prospects of the freedom of the press." Originally financed by grants of $200,000 from Time, Inc., and later supplemented with $15,000 from Encyclopedia Britannica, Inc.,[232] the Commission on Freedom of the Press quickly assembled an impressive membership.[233] The research group was named for University of Chicago Chancellor Robert M. Hutchins, and operated from 1942 to 1947.[234] The Hutchins Commission focused much of its attention on art and media in the age of professionalizing cultural workers, who were organized, in increasing numbers, in new white-collar unions and talent guilds.

From the ranks of leading academics, the Commission lured John M. Clark (Professor of Economics, Columbia University), John Dickinson (Professor of Law, University of Pennsylvania and General Counsel, Pennsylvania Railroad), William E. Hocking (Professor of Philosophy, Harvard), Harold D. Lasswell (Professor of Law, Yale), Archibald MacLeish (Formerly Assistant Secretary of State), Charles E. Merriam (Professor of Political Science, University of Chicago), Reinhold Niebuhr (Professor of Ethics and Philosophy of Religion,

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[232] The committees' reports took pains to stress that neither *Time* nor *Encyclopedia Britannica* "has had any control over or assumed any responsibility for the progress or the conclusions of the inquiry."

[233] As it happens, Luce was ultimately disappointed in the Commission's reports, authored by Chafee, dismissing the project as "philosophically uninteresting."[233] It is probably no accident that the dangers about which the Hutchins Commission warned were soon to find note-perfect expression in the Luce publications themselves, as Whittaker Chambers launched his campaign against Alger Hiss, and Luce pushed a "loss of China" line with increasing fervor. In a valuable monograph on the Hutchins Commission, Margaret A. Blanchard writes that the reaction of newspaper publishers to its report *A Free And Responsible Press* was consistently harsh. Some felt that newspapers had played a heroic role in World War II and deserved something "better" than a "heavily biased" view of their shortcomings. Margaret A. Blanchard "The Hutchins Commission, The Press and Responsibility Concept," Journalism Monographs No. 49. Association for Education in Journalism. May 1977.

[234] The official title of the Hutchins Commission was The Commission on the Future of the Free Press. Smith describes the commission was the brainchild of Hutchins's friend and fellow Yale alumnus Henry B. Luce, who, as head of the Time-Life magazine empire in a period of mounting press problems, wished to have produced a substantial restatement of the importance of a free press in America." Smith, *Zechariah Chafee*, 99.

Union Theological Seminary), Robert Redfield (Professor of Anthropology, The University of Chicago), Beardsley Ruml (Chairman of the Board, R. H. Macy & Co), Arthur M. Schlesinger (Professor of History, Harvard), and George N. Shuster (President, Hunter College). The Commission also invited four foreign advisors: John Grierson (Former General Manager, Wartime Information Board, Canada), Hu Shih (Former Chinese Ambassador to the United States), Jacques Maritain (President, Free French School for Advanced Studies), and Kurt Riezler (Professor of Philosophy, New School for Social Research).

Formally dedicated to the study of "the press," the Hutchins Commission defined its object broadly, including within its scope "the major agencies of mass communication: the radio, newspapers, motion pictures, magazines, and books." Over the course of seventeen intensive meetings two-day or three-day meetings, the Hutchins Commission heard testimony from 55 "men and women of the press" and 225 members of "industries, government, and private agencies concerned with the press."[235] The scope of the Hutchins Commission's research is laid out in Hutchins's introduction to its published report, *For a Free and Responsible Press* (1946). "People make decisions in large part in terms of favorable or unfavorable images," he observes, pointing to the influence of the motion picture, the radio, the book, the magazine, the newspaper, and the comic strip, "principal agents in creating and perpetuating these conventional conceptions." Inaccurate representations could easily pervert judgment. [236] Hutchins sketches out the contours of the Commission's project of studying the role of the agencies of mass communication in the education of the people in public affairs. Lamenting that the Commission had been unable to

[235] *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago: University of Chicago Press, 1947), v.
[236] Robert M. Hutchins, "Preface" to *A Free and Responsible* Press, 26.

delve deeply into the question of the "interrelationship between the American press and American culture," Hutchins emphasizes that recent history had seen "dramatic changes" through which "agencies of mass communication" had become a "part of the American environment, affecting the thought and feeling of every citizen in every department of his life." Mass communication industries, taken together, constituted "probably the most powerful single influence today."[237] Hutchins situates the problem of the press as one concerning "the flow of ideas." In fact, citizens faced a "terrifying flood of words" courtesy of the agencies of mass communication, and struggled to gain an audience for ideas that ran counter to those of "owners, editors, opposing pressure groups, or popular prejudice." Hutchins describes "civilized society" as a "working system of ideas." He stresses the importance of diversity in the presentation of dissenting and unpopular views, and asserts that the "tremendous influence of the modern press" required regulations that compelled the "great agencies of mass communication show hospitality to ideas which their owners do not share."[238] The new industrial and technological reality of the mass media had necessitated a "serious and continuing concern for the moral relation of the press to society"[239]

In his writings for the Commission, Chafee notes that the various arms of the communications industry are obliged (like all businesses) "to help support the government" and "comply with minimum standards of decent behavior." While the First Amendment protected the culture industries from some government interference, these firms could not "hide behind the First Amendment and do as they please." It was precisely in regard to labor

[237] *Free and Responsible Press*, vi, vii.
[238] Blanchard writes that the reaction of newspaper publishers to *A Free And Responsible Press* was consistently harsh. Some felt that newspapers had played a heroic role in World War II and deserved something "better" than a "heavily biased" view of their shortcomings. Blanchard "The Hutchins Commission, The Press and Responsibility Concept," 6.
[239] *Free and Responsible Press*, viii.

questions that the cultural worker became the pivot on which the often contradictory forces of free speech doctrine, IP law, and antitrust regulation found temporary balance. Liberals and reactionaries alike had what to fear from a new historical formation in which "intellectual workers," to return again to Corey's words, had begun to question their loyalty to "the ruling class which frustrates them, stultifies them, patronizes them, makes their work ridiculous, and now starves them."[240]

The African American Cultural Worker from World War II to the Black Power Era

In Margaret Walker's poem "For My People" (1942), the continuing political import of African American cultural work is visible in strong relief. In the writings of Walker, an important left-wing African American writer and educator, can be seen some of the ways in which the activism and aesthetic experimentation of the 1930s bolstered and clarified the premises with which James Weldon Johnson had been consumed in an earlier moment. Tying the ancient singing of slave songs and "dirges and ditties and jubilees" to the work of "washing ironing cooking scrubbing sewing mending hoeing plowing digging planting pruning patching" as well as "baptizing and preaching and doctor and jail and soldier and school and mama and cooking and playhouse and concert and store and hair," Walker offers an update of Johnson's vision of an aesthetic politics rooted in African American cultural work. This aesthetic politics envisioned a dialectical relationship between cultural workers and their audiences, the masses "thronging 47th Street in Chicago and Lenox Avenue in New

[240] *Culture and the Crisis*, 28.

York and Rampart Street in New Orleans." These "lost disinherited dispossessed and happy people filling the cabarets and taverns and other people's pockets" expressed the growing need for "something all our own" beyond the obviously essential "bread and shoes and milk and land and money." The popular arts, sustained by a fleet of cultural workers, might provide the ground upon which a "second generation full of courage" would take root, encouraging a "people loving freedom" who "rise and take control." Over the course of the next decades, this vision steadily came to fruition, sustained during the Red Scare years by figures like Paul Robeson, Ossie Davis, Ruby Dee, and musicians of the bebop era like Thelonious Monk and Max Roach.[241]

The American popular music industry enjoyed phenomenal growth in the post-World War II years, buoyed by technological advances in recording, broadcasting, and amplification. During the War years, a combination of factors—including the AFM recording ban, protests against the song publishing agency ASCAP, and the military's desire to boost the morale troops—led to a rise in corporate interest in African American rhythm and blues and southern white "hillbilly" music. The increasing popularity of these forms, and their many generic offshoots, forced a gradual reorientation of the music industry away from the featured vocalist with orchestra model that had come to predominate. At the same time, the radical experiments in cultural worker syndicalism that went under the names of bebop, hard bop, cool jazz (and often, simply, "jazz") mapped out new parameters of expressive

[241] Margaret Walker, "For My People," (1942) https://www.poetryfoundation.org/poetrymagazine/poems/21850/for-my-people; Richard Iton, *In Search of the Black Fantastic: Politics and Popular Culture in the Post-Civil Rights Era* (Oxford: Oxford University Press, 2008); Saul Scott, *Freedom Is Freedom Ain't: Jazz and the Making of the Sixties* (Cambridge MA: Harvard University Press, 2003); George Lewis, *A Power Stronger Than Itself : The Aacm and American Experimental Music* (Chicago: University of Chicago Press, 2008); A. B. Spellman, *Four Lives in the Bebop Business* (New York: Pantheon Books, 1966); Nelson George, *The Death of Rhythm & Blues*. 1st ed. (New York: Pantheon Books, 1988).

autonomy and political engagement while continuing to operate broadly within the norms of the professional nightclub musician.[242]

Over the course of the 1940s and 1950s, nightlife itself underwent a series of transformations. A certain unmistakable flood of libidinal energy accompanied the first years of nocturnal popular culture that followed Prohibition, Depression, and World War II, amplified by new technological capacities in electrical sound reinforcement and lighting. The defense industry boom and continuing exodus of Southerners to California and Midwest witnessed the proliferation of honky tonks and dancehalls in places like Fort Bend, Indiana, and Bakersfield, with regional artists sometimes able to gain national fame via radio play and jukeboxes, and by the mid-1950s, on television. Nashville beat out several contenders, including Dallas and Atlanta, to become the center of the country and western industry, while Chicago, New York, Detroit, and several other cities established themselves as rhythm and blues hubs.[243]

From the perspective of the history of cultural work, this period between the end of the war and the rise of the commercialized youth culture of the late 1950s and 1960s represented a key moment of consolidation. Along with the thousands of tuxedoed professionals who played in recording studios, nightclubs, hotel lounges, and in the casinos

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[242] George Lipsitz, *Rainbow at Midnight: Labor and Culture in the 1940s* (Urbana: University of Illinois Press, 1994); *Footsteps in the Dark: The Hidden Histories of Popular Music* (Minneapolis: University of Minnesota Press, 2007); Burton W. Peretti, *The Creation of Jazz : Music Race and Culture in Urban America* (Urbana: University of Illinois Press, 1992); Scott Saul, *Freedom Is Freedom Ain't: Jazz and the Making of the Sixties* (Cambridge MA: Harvard University Press, 2003); Eric Porter, *What Is This Thing Called Jazz?: African American Musicians As Artists Critics and Activists* (Berkeley Calif: University of California Press, 2002); Thomas David Brothers, *Louis Armstrong's New Orleans*. 1st ed. (New York: W.W. Norton, 2006); Robin D.G. Kelley, *Thelonious Monk: The Life and Times of an American Original* (New York: Free Press, 2009); George Lewis, *A Power Stronger Than Itself: The AACM and American Experimental Music* (Chicago: University of Chicago Press, 2008); Tyler Mahan Coe (Creator) Cocaine and Rhinestones Podcast. On ASCAP-BMI, see https://www.history-of-rock.com/ascap-bmi-war.htm; Don Cusic, "The Emergence of the Country Music Business: 1945-1955," *Studies in Popular Culture*, Vol. 17, No. 2 (April 1995).

[243] Nelson George, *The Death of Rhythm & Blues*.

of Las Vegas, many more leagues of blue-collar musical proletarians began to eke out livings by providing entertainment for their erstwhile comrades from the assembly line. Meanwhile, thousands of white-collar cultural workers found employment in recording studios and in orchestras and big bands on contract with film, television, and radio corporations. Prior to the concretization of branding strategies aimed at segmenting niche markets within a monopoly monoculture—the key desideratum of the music industry in the 1960s—there was a good deal of slippage between the African American and white proletarian musics of the 1940s and 1950s. A certain solidarity linked musical professionals across the color line. They played, with certain exceptions, the same instruments, many of them novel electrical creations that encouraged bonding over technical know-how and fixes. They shared the same highways and the same experiences of living out of suitcases and in cheap hotels. They wore the same stagey matching uniforms. They played, to a large degree, the same syncopated, high-energy music optimized for dancing and keyed to novel sound effects and catchy turns of phrase, though it must be stressed that this more typically involved uncompensated borrowing by white musicians of African American innovations than the other way around. In a booming full-employment economy (albeit one flecked with periodic downturns and recessions), it was possible to imagine that every town might have a large interracial workforce of professional musicians who kept the nightclubs full, backed up visiting celebrities, performed at weddings, and taught music to children or staffed the local music store.[244]

[244] See John Corbett, *Pick Up the Pieces: Excursions in Seventies Music* (Chicago: University of Chicago Press, 2019); Peter Shapiro, *Turn the Beat Around: The Secret History of Disco* (New York: Faber and Faber, 2005); Jack Ryan, *Recollections the Detroit Years: The Motown Sound by the People Who Made It* (Whitmore Lake: Glendower Media, 2012); Robert Gordon, *Respect Yourself: Stax Records and the Soul Explosion* (New York: Bloomsbury, 2013); Kent Hartman, *The Wrecking Crew: The Inside Story of Rock and Roll's Best-Kept Secret* (New York: St. Martin's Press, 2012); Travis D. Stimeling, *Nashville Cats: Record Production in Music City* (New York NY: Oxford University Press, 2020).

In the 1960s, the cultural worker, and in particular the professional musician, would assume heroic status within the emerging Black Arts Movement (BAM). Recent scholarship has broadened our understanding of the BAM as a national movement that stitched together a host of local communities and encompassed a wide variety of articulations of aesthetic politics. What united these different articulations, beyond the embrace of the BAM banner, was a shared belief in the central importance of the African American cultural worker in both the history of the civil rights struggle and the future of militant protest.[245] Perhaps the most forceful articulation of African American cultural workerism in the 1960s is to be found in Harold Cruse's *The Crisis of the Negro Intellectual*, published in 1968.[246]

Cruse was born in 1916 in Petersburg, Virginia and moved to New York City as a teenager. Following service in World War II, he was able to use his GI Bill benefits to study at one of the nation's premiere left-wing institutions of higher learning: the George Washington Carver School in Harlem. At Carver, Cruse became immersed in the world of the New York left, joining the CPUSA and participating vigorously as a rank-and-file member until he abandoned the Party in 1952. Over the course of the late 1950s, he came to write about African American cultural work as part of a broad movement to reconsider political priorities shared by the post-Bandung international New Left, working with key

[245] See Komozi Woodard, *A Nation Within a Nation: Amiri Baraka (Leroi Jones) and Black Power Politics* (Chapel Hill N.C: University of North Carolina Press, 1999); James Edward Smethurst, Sonia Sanchez and John H Bracey, *SOS/Calling All Black People: A Black Arts Movement Reader* (Amherst: University of Massachusetts Press, 2014); and James Edward Smethurst, *The Black Arts Movement: Literary Nationalism in the 1960s and 1970s* (Chapel Hill: University of North Carolina Press, 2005).
[246] Harold Cruse, *The Crisis of the Negro Intellectual: A Historical Analysis of the Failure of Black Leadership* (New York: New York Review Books, 2005).

organizations like the American Society for African Culture, the Fair Play for Cuba Committee, the Freedom Now Party, and *Liberator* magazine.[247]

Cruse composed the *Crisis* over years of solitary writing while working at a Macy's on 34th Street. At the same time, Cruse also drafted popular material that he hoped would help to sustain him financially, but encountered consistent rejection from publishing houses and movie studios. He also became active in the Committee on the Negro in the Arts (CNA), working with Harry Belafonte, Sidney Poitier, Ossie Davis and Ruby Dee, in a film club, and with the Acme Theatre Company and its journal, the *Negro Theatre Spotlight*. As Van Gosse observes, disappointment with various aspects of these experiences helped to refine Cruse's belief in the need for a coherent African American cultural politics that stressed autonomy, the cultivation of separate spaces for the development of African American cultural resources, and resistance to white encroachment, major themes in *Crisis*. Gosse finds the roots of much of the polemical fire of the *Crisis* in Cruse's 1950s-era work with the American Negro Cultural Society and with the Productive Artists New Developments Association (PANDA)'s Dramatic and Fine Arts Center, which aimed at educating Harlem youth in the arts. These initiatives foreshadowed the BAM's Black Arts Repertory Theatre and School (BARTS), at which Cruse would accept a teaching position in 1965, leading a class on "Cultural Philosophy." In these classes, Cruse attempted to refine an "Afro-American Cultural Philosophy in the Creative Arts," focusing upon Harlem as a "base of cultural movement" and "nationalist reorganization along political, economic and cultural lines." A devoted reader of C. Wright Mills, Cruse argued in his class sessions for African

[247]Van Gosse, "More Than Just a Politician: Notes Towards a Life and Times of Harold Cruse," in Jerry Gafio Watts and Harold Cruse, *Harold Cruse's the Crisis of the Negro Intellectual Reconsidered* (New York: Routledge, 2004).

American "control of the cultural apparatus," envisioning the creation of revolutionary "Political, Economic, and Cultural Bureaus" staffed by "specialists" and "experts."[248] Mills had died some years earlier, but his legacy continued to loom large in some of the circles in which Cruse traveled: among veterans of the Fair Play for Cuba committee, in the world of intellectuals in Wisconsin and New York clustered around *Studies on the Left*, and within certain heterodox Trotskyist groups. Gosse notes that Cruse often refers to "men of power" and the "power elite," and wrote in *Crisis*: "For me, the emergence of C. Wright Mills, with his critique of the policies, dogmas and vanities of the old Marxist leftwing, was a landmark in American social theory."[249]

Like Mills, Cruse believed that the "development in America of mass cultural communications media—radio, films, recording industry, and ultimately, television" had "drastically altered the classic character of capitalism as described by Karl Marx." Political activists had been too slow to recognize the "added range and persuasiveness, the augmented class power, the enhanced political control and prerogatives of decision making that result from the new mass communications industry." He worried about the fate of popular democracy in an era wherein a "new technological-electronic apparatus spreads throughout the land" capable of "bombarding the collective mind with controlled images." Cruse enthused over the political possibilities of the capture of this apparatus by the "opposing class-force of radical creative intellectuals," redeeming potentials unseen by the "Negro intellectuals of the Harlem Renaissance" and taking advantage of the manifold "implications of cultural revolution as a political demand growing out of the advent of mass communication media." White Marxists, Cruse laments, had not taken account the "serious

[248] Gosse, "More Than Just a Politician."
[249] Cruse, *Crisis*, 466.

consequences of the introduction of the mass media into American capitalism."[250] Alone among left intellectuals, Cruse argues, Mills had attempted to understand a mass media that had come to filter our experience of external realities and shape our "very experience of our own selves."[251]

Cruse had become friendly with Amiri Baraka (then named LeRoi Jones) during a trip to Cuba sponsored by the Fair Play for Cuba delegation in July 1960. In Greenwich Village, Jones had begun trying to organize young African American intellectuals, and Cruse was a frequent participant in high-octane late-night debates with Archie Shepp, Steve Cannon, Leroy McLucas, Walter Bowie, Calvin Hicks, and A.B. Spellman, among others, during which many germinal BAM theses were forged. Cruse was also involved in the historic visit of Fidel Castro to the Theresa Hotel in Harlem in September 1960, and served as a bridge between the emerging BAM formation and Malcolm X, who admired Cruse's analysis and directed Nation of Islam bookstores to carry his early published writings. The most significant of these was "Revolutionary Nationalism and the Afro-American," a 1961 essay in *Studies on the Left*. This essay prepared the ground for the more developed analysis refined in *Crisis*, introducing certain key heterodox arguments: that the CP had served as a throttle on African American cultural politics, that white Marxist historians had illegitimately memorialized the debate between W.E.B. Du Bois and Booker T. Washington, against the protest model of the NAACP and for the significance of the Marcus Garvey movement, and that a decolonial perspective was necessary for a proper understanding of African Americans in the United States.

[250] Cruse, *Crisis*, 66
[251] Cruse, *Crisis*, 67.

Cruse writes of Harlem as having introduced him to the "exciting and impressionable black vaudeville world of the local theaters" and to "great personalities" like Duke Ellington, Cab Calloway, Earl "Fatha" Hines, and Count Basie, as well as to a "black theatrical art… not only unique but inimitable."[252] In *Crisis*, Cruse focused on Harlem's African American show business culture as the fulcrum of a militant politics of resistance to both mainstream white racism and to the paternalism of the CP left, and elevate the figure of the African American cultural worker as the vehicle through which a militant agenda of self-determination might be achieved.

Cruse often tangles with James Weldon Johnson in the *Crisis of the Negro Intellectual*. Harlem looms large in the imagination of both writers. "The truth of the matter," Cruse insists, "is that Harlem has, in this century, become the most strategically important community in black America."[253] Against calls to "break up the ghetto," Cruse maps out a vision of strengthening Harlem as a base from which African Americans might fight. Cruse hails Johnson's "insight into Negro cultural forms" and praises *Black Manhattan* as correct in its choice of cultural analysis as a method from a sociological point of view, and praises *Black Manhattan* and *Along This Way* as providing "practically the entire panorama of Negro cultural history."[254] Of particular interest to Cruse was Johnson's argument in *Black Manhattan* that Harlem was not merely a community, but rather a "large-scale laboratory experiment in the race problem" through which a "good many facts" had been found, and his insistence that through "artistic efforts" more "immemorial stereotypes" had been smashed faster than had been achieved through any other methods. Cruse faults Johnson, however, for

[252] Harold Cruse, *Rebellion or Revolution?* (Minneapolis: University of Minnesota Press, 2009).
[253] Cruse, *Crisis*, 12.
[254] Cruse, *Crisis*, 16.

failing to ground his consideration of African American cultural history in a materialist analysis of property relations, and concludes that Johnson "could transcend neither the limits of his times nor his own class background."[255] While the artistic achievements of African Americans might publicize their creative genius, Cruse alleges that Johnson was too inattentive to the appropriation of the "Negro's spiritual and aesthetic materials" by many white artists "who used them allegedly to advance the Negro artistically but actually more for their own self-glorification." This was not entirely fair. As we shall see in Chapter Two, Johnson devoted considerable attention to this topic, including, it might be argued, much of his novel *Autobiography of an Ex-Colored Man*.[256]

Cruse, like the narrator of the *Autobiography*, identifies the uniqueness of Harlem's hothouse atmosphere of aesthetic fecundity to the presence of cultural workers: "Negro creative artists" who had come to Harlem "seeking creative fulfillment of whatever terms offered to them." The BAM's resurgent cultural renaissance might complete the political project initiated at the turn of the century, enhancing African American "cultural autonomy," and "artistic and creative development of… group consciousness." In order to avoid the failings of the Harlem Renaissance, Cruse writes, African American activists needed to comprehend the cultural apparatus as a professional sphere within an advanced capitalist media industry (located, in Harlem's case, within the world capital of international business. He faults the CP-led left of the 1940s, for example, for promoting toothless protests of a screening of the ostensibly "anti-Soviet" film *Ninotchka* (in reality, a gently mocking Popular Front valentine to Bolshevism) at the Apollo Theatre while failing to ask: "What were the

[255] Cruse, *Crisis,* 35.
[256] Cruse, *Crisis,* 35.

real inside relationships between the Apollo management and the variety, musicians' and theatrical craft unions?"[257]

Without firm control of the infrastructure of popular culture, African American cultural workers had been unable to fight the "corruption and banalization" wrought by the mass media revolution. Cruse blames a number of interrelated factors for this failure: 1) the embourgeoisement of the African American intelligentsia; 2) white ownership of the cultural apparatus ("cultural arts expressions in Harlem are controlled, discouraged, negated, or otherwise stifled; the direct result of white ownership of properties and sites suitable for the housing, cultivation, and encouragement of cultural expressions," with white "ownership of property rights" conspiring to "control and restrict the growth, range, and emergence of talent, the avenues for its cultivation within as well as without Harlem"; 3) and an integrationist political philosophy that "leads to the participation of Negro artists in the cultural arts either on the basis of white middle-class standards, or as stepping stones to middle-class status using Negro art expressions." "It is the Negro creative intellectual who must take seriously the idea that culture and art belong to the people—with all the revolutionary implications of that idea. But the superficial Negro creative intelligentsia, who have become so removed from their meaningful traditions, cannot see things in this way, so blindly obsessed are they with the modern mania for instant integration."

With the exception of jazz, Cruse concludes, every creative field had retrogressed over the previous decades. Non-jazz popular music had been corrupted by "fraud, exploitation, banality, plagiarism, corruption, and race bias." Harlem had suffered the disappearance of four major live entertainment theaters. Cruse laments also the

[257] Cruse, *Crisis,* 15.

disappearance of countless amateur and semi-professional groups, the demise of repertory and stock companies, and the closing of nightclubs "which gave employment to thousands of people."

The antidote, according to *Crisis of the Negro Intellectual*, could be found in a combined movement guided by certain organizational objectives: 1) the formation of community-wide citizens' planning groups overseeing a "complete overhaul and reorganization of Harlem's political, economic, and cultural life," transcending the limited ambit of War on Poverty programs like the HARYOU-ACT;"[258] 2) the formation of business cooperatives controlling the "buying, distributing, and selling of all basic commodities used and consumed in Harlen, such as food, clothing, luxuries, services, etc," eliminating overlapping businesses, lower prices, and improve quality, as well as create jobs, while "allowing for the transformation of excess stores into nurseries, supplementary classrooms, medical dispensaries for drug addicts, etc.;" 4) the formation of citizens' committees to "combat crime and drug-selling"; 5) the formation of a "new, all-Negro, community-wide political party to add bargaining force for social, cultural, and economic reforms," to be funded by "extensive federal and state aid"; 6) the abolition of private landlordism, to be replaced by tenants' cooperative housing; 7) the formation of citizens' planning groups on the "reorganization of Harlem's political, economic, and cultural life to establish direct lines of communication from the community to appropriate departments and agencies of the Federal government in Washington, D.C."; 9) the formation of citizens' planning groups to "devise a new school of economics based on class and community organization, predicated

[258] See Ansley T. Erickson, "HARYOU: An Apprenticeship for Young Leaders," Chapter Seven in *Educating Harlem: A Century of Schooling and Resistance in a Black Community* (New York: Columbia University Press, 2019).

on the principle of cooperative economic ownership and technical administration," which "would be more responsible to the community in social, political, and cultural affairs than middle classes based on free enterprise and laissez-faire economics," also to be federally financed; and the formation of citizens' planning groups to petition the Federal Communications Commission on the "social need to allocate television and radio facilities to community group corporations rather than only to private interests."[259]

The extraordinarily wide range of solutions contemplated by Cruse points to the temporary widening of the aperture of political possibility during the early Black Power/Black Arts Movement years. In this interval, government support for African American cultural workers could be figured as a form of social provisioning, as encouragement to maximum feasible participation by aggrieved communities in the war on poverty, as reparations, and as a sensible Keynesian response to disinvestment in inner cities and deindustrialization.

[259] Cruse, *Crisis*, 88-90.

Chapter One

"All labor is mental": Postbellum Intellectuals and the Idea of Cultural Work

In this chapter, we examine the writing of four elite thinkers who rose to positions of prominence and authority in the decades after the Civil War: the lawyer and journalist Eaton S. Drone (born 1848), the publisher and political broker George Haven Putnam (born 1844), the economist John Bates Clark, (born 1847), and the jurist Oliver Wendell Holmes, Jr. (born 1841). Great quantities of money, prestige, and social authority were often at stake in late-Victorian intellectual property battles. In many cases, the difference between a victory and a defeat could be traced to the strength and effectiveness of one side's ideological preparation. Coming to maturity within the rapidly professionalizing—and hence increasingly intellectually competitive—fields of law and science, these intellectuals were uniquely motivated to resolve the contradiction between the ideology of "autonomous" art and the apparently antithetical spirit of capitalist commerce.[1] This was the background against which they attempted to chart a new course in the conceptualization of "mental labor." They advocated in new ways for the assimilation of a wide variety of creative activities into the order of productive labor. While not in agreement on every issue, these economic and legal

[1] On professionalization and the legal profession, see Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); G. Edward White, *Tort Law in America An Intellectual History* (Oxford: Oxford University Press, 2003); Daniel R. Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995). On professionalization in the social sciences, see Mary O. Furner, *Advocacy & Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905* (Lexington: Published for the Organization of American Historians [by] The University Press of Kentucky, 1975); and Craig J. Calhoun, *Sociology in America A History* (Chicago: University of Chicago Press, 2007).

theorists shared the tendency to justify creative expression as capitalist work by arguing for the cultural worker's economic productivity. According to them, artists and intellectuals shared with other workers the fundamental propensity to create new objects imbued with monetary value and intended for sale on the market.

Foregrounding this particular economic reading of aesthetic production, they pioneered a materialist approach to cultural analysis, though none of them consciously set out to do so. They mapped out a preliminary labor theory of culture: one that stipulates that the creation, circulation, and vending of cultural commodities rely upon inputs of vast quantities of human work, at both the planning and execution stages.[2] All argued that the performer of creative labor in capitalist society ought to be reclassified as some sort of "cultural worker." A friendly critic would not be wrong to point out that the terms "cultural work" and "cultural worker" do not appear in the titles of the texts written by these five authors that we consider here, although we do see plenty of references to "literary labor" in Drone's writings and "literary producers" and to "literary laborers" in Putnam's.[3] Nonetheless, they devoted hundreds of pages to the topic of cultural work and cultural workers. This was a relatively novel rhetorical move. To compare acts of literary composition or painting on canvas to the muscular exertions of the farmer or mason constituted, in a real sense, a challenge to the valorization of toil—the possessive individualism and self-fashioning via labor—that had

[2] Denning, *Culture In The Age of Three Worlds*, 94.
[3] George Haven Putnam, *The Question of Copyright* (New York: G.P. Putnam's Sons, 1904 [1891]). *The Question of Copyright.* The full title of text is *The Question of Copyright: A Summary Of The Copyright Laws At Present In Force In The Chief Countries of The World Together With A Report Of The Legislation Now Pending In Great Britain, A Sketch Of The Contest In The United States, 1837-1891, In Behalf Of International Copyright, And Certain Papers On The Development Of The Conception of Literary Property, And On The Probably Effects Of The New American Law, Compiled By* George Haven Putnam*, Secretary Of The American Publishers' Copyright League.*

served as a cornerstone of American ideology since well before the Revolution.[4] At the same time, such comparisons proposed a new source of legitimacy for artistic and intellectual endeavors, and augured the possibility of new alliances between "workers by hand" and "workers by brain."[5]

Eaton S. Drone and the Gilded Age Revolution in Intellectual Property Law

We begin with the most obscure of the four figures discussed in this chapter: the lawyer and editor Eaton S. Drone, author of the 1879 text *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States*.[6] Drone was born in Zanesville, Ohio, in 1848, and graduating from Harvard Law School in 1866. He matriculated with an M.A. in 1869.[7] Settling in New York, Drone soon gained a reputation as an expert on the history of copyright law. This reputation was confirmed with the publication of his 1879 intellectual property law treatise. During this period, Drone became friendly with George Ticknor Curtis, the country's leading authority on constitutional law and copyright.[8]

[4] See C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962); and Gregory S. Alexander, *Commodity & Propriety Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago, Ill: University of Chicago Press, 1999).
[5] The reference here is to the famous Clause IV of the UK Labour Party's Constitution, drafted by Sidney Webb in 1917, and adopted in 1918: "To secure for the workers by hand or by brain the full fruits of their industry and the most equitable distribution thereof that may be possible upon the basis of the common ownership of the means of production, distribution and exchange, and the best obtainable system of popular administration and control of each industry or service." See Ross McKibbin, *Parties and People: England 1914-1951* (Oxford: Oxford University Press, 2010), 72; and Ian Britain, *Fabianism and Culture: A study in British socialism and the arts, 1884-1918*, (Cambridge: Cambridge University Press, 1982), 106.
[6] Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States Embracing Copyright in Works of Literature and Art, and Playwright in Dramatic and Musical Compositions* (Boston: Little, Brown, 1879).
[7] "Eaton S. Drone Dead; He Was Editor of the *New York Herald* for 24 Years—Dies at 75." New York *Times*, Feb 3, 1917, p. 13.
[8] Curtis's family connection to the leading Boston publishing firm of Ticknor & Fields no doubt was the chief source of his interest in copyright law; Drone likely absorbed much of his mentor's business-side perspective.

In the 1880s, Drone began to contribute legal articles to the New York *Herald*, and became an editor at the *Herald* in 1893. Somewhat mysteriously, Drone fell out of the public eye after the turn of the century. He was rumored to have suffered a nervous breakdown, and to have devoted himself to his consuming obsession with the collection of waltz music on phonograph records, amassing over 5,000 sides before his death in 1917.

Drone's most substantial work is the 1879 *Treatise*. It is within the pages of the *Treatise* that Drone articulated his influential early version of the labor theory of culture. A rambling legal survey, distinguished by occasional flashes of wit and frequent editorial asides, Drone's *Treatise* takes as its mission the provision of a brief for maximal intellectual property protections for "legitimate" authors and playwrights. Drone begins by acknowledging some problems connected to the "somewhat peculiar" nature of literary property. Many of his readers could have been expected to harbor a deeply ingrained skepticism in regard to the propertizability of artistic expressions, comprehending without special effort the eighteenth-century English lawyer Sir John Dalrymple's public laughter at the very idea of "Literary Property."[9] These readers might also have been expected to look quizzically at the claim that cultural work was indeed a form of productive labor.

Drone was forced to battle against such prejudices while navigating a muddled and internally contradictory legal field. Inconsistent or illogical precedents, penned by (in Drone's view) "incompetent persons," had begun to pile up. Opinions "wrong in principle" and "without binding force as authorities" had been "blindly followed as supposed precedents." In the face of these "doubt, difficulties, and confusion," Drone framed his

[9] Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: University of Chicago Press, 2002).

mission as the setting forth of "the true principles which govern the law," in addition to the clarification of the proper meaning of the statutes.[10]

The "true meaning" of intellectual property law was to be found in its function as a medium in which creative production might be transformed into capitalist commodity. "The declared object of the copyright laws," Drone emphasizes, "is to encourage learning, and to secure authors in the enjoyment of the fruits of their labors." Again and again, Drone returns to the same theme: the law should serve to stimulate intellectual production and protect "the fruit of the author's genius or mental labor." In classically liberal terms, mental labor creates property, and it is this property to which the law guarantees protection. Within a rapidly changing mnemotechnical landscape, copyright was meant to concern itself with "how far a person may lawfully go in appropriating the results of another's labor."[11] New derivative uses of texts by piratical capitalist concerns proved perplexing. Drone warns lawyers that they would have to begin to view "literary property" as not limited to the "precise forms of words" and "identical language," but rather as a name for a more abstract "intellectual creation" of which language is "but a means of expression and communication." The example of translation of a literary work into different languages served as the governing metaphor: "The same production may be expressed and communicated in many languages, without affecting its identity." The means of communication might change, but "the thing communicated remains the same," preserving the "substantial identity of the composition."[12] "Property," Drone avers, "cannot exist in simple ideas and thoughts; but only in their arrangement and combination." The labor that created literary property was not simply the

[10] Drone, *Treatise*, vii.
[11] Drone, *Treatise*, 383.
[12] Drone, *Treatise*, 98-99.

author's passive reception of inspiration: it was the detail work of arrangement and combination.[13]

In order to make this case for literary labor giving birth to literary property, Drone must address the origins of property in general. Here, Drone confronts an analytical dilemma. The legal authorities upon whom Drone relies tended to agree amongst themselves that property began not with labor, but with home-ownership, and more particularly with the fantasy of some pioneering human's desire for a means by which to exclude others from his home.[14] "All the great writers on natural law," Drone emphasizes, agreed in "placing the origin of property in preoccupancy."[15] Preoccupancy, however, is not labor, exactly, and thus the *desideratum* of labor theorists of value was therefore missing from property's primal scene. In order to get around this problem, Locke and Blackstone had selectively reshaped the story of property's origins, proposing an original "state of nature" in which all land was held in common, and emergent forms of property that resulted from "each person becoming entitled to hold to his own exclusive use that which he first occupied."[16]

Implicit in this narrative shift was the rise to prominence—indeed, the rise to a position of absolute centrality—of a vision of labor as a series of discrete actions.[17] If property rights

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[13] Drone, *Treatise*, 98.
[14] See Eduardo Moisés Peñalver, "Property as Entrance." 91 *Virginia Law Review*, 2005.
[15] Drone, *Treatise*, 2.
[16] See Locke's "turfs" passage: "The grass my horse has bit, the turfs my servant has cut, and the ore I have digged, in any place where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labor that was mine removing them out of that common state they were in hath fixed my property in them has thereby removed her from the state of nature wherein she was common, and hath begun a property." John Locke, Ian Shapiro, and John Locke. *Two Treatises of Government And a Letter Concerning Toleration* (New Haven, Conn: Yale University Press, 2003). .
[17] It was exactly this deconstruction of labor into component acts that stood at the heart of Frederick Winslow Taylor's new system of scientific management, and in the historic shift from "batch" to "flow" production methods). Frederick Winslow Taylor, *The Principles of Scientific Management* (New York: Norton, 1967 [1911]). See also Michael Nuwer, "From Batch to Flow: Production Technology and Work-Force Skills in the Steel Industry, 1880-1920," *Technology and Culture,* Vol. 29, No. 4, Special Issue: Labor History and the History of Technology (Oct., 1988), pp. 808-838; S. Giedion, *Mechanization Takes Command, a Contribution*

derived not from the relatively passive state of "occupation" but rather from the willful and transformative act of "possession," then creativity might be seen as propertizing activity within a natural rights philosophy of property. For writers like Drone, the labor theory of value had so obviously proven itself as the foundation of human existence that earlier theories of property-by-occupation cried out for retroactive revision. Even the most primitive forms of occupancy, Drone supposes, must have always implied the expenditure of labor: "for to take and hold possession of a part of the unoccupied land were impossible without bodily exertion." Over the course of millennia of historical development, Drone hypothesizes, the labor requirements needed to maintain possession had multiplied many times over: "Still more was physical effort required in later times, when occupancy represented distance overcome, toils endured, and dangers passed."[18]

Having set the stage in this manner, Drone builds an argument for a labor theory of culture. "The creator," Drone writes, "is the first possessor of that which he creates."[19] In "labor," Drone continues, "is found the origin of the right to property." Labor, it turns out, had constituted the "fundamental principle" throughout the entire history of property. "The most natural claim to a thing," Drone writes, citing the eighteenth-century English legal authority Thomas Rutherforth, "seems to arise from our having made it; for no one appears to have so peculiar a right in it as he who has been the immediate *cause* of its existence." [20]

Drone is here arguing two things. On the one hand, Drone suggests that a proper

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to Anonymous History (New York: Oxford Univ. Press, 1948); Richard Gillespie*, Manufacturing Knowledge: A History of the Hawthorne Experiments* (Cambridge [England]: Cambridge University Press, 1991); Howell John Harris, *Bloodless Victories: The Rise and Fall of the Open Shop in the Philadelphia Metal Trades, 1890-1940* (Cambridge [UK]: Cambridge University Press, 2000).

[18] Drone, *Treatise,* 4-8.

[19] See Stefan Nowotny, "Immanent Effects: Notes on Cre-activity," in Gerald Raunig, Gene Ray, and Ulf Wuggenig. *Critique of Creativity: Precarity, Subjectivity and Resistance in the 'Creative Industries'* (London: MayFlyBooks, 2011).

[20] Locke, *Two Treatises of Government;* Drone, *Treatise*, 4, emphasis added.

definition of labor and property must also encompass cultural work and intellectual property. On the other hand—and far more controversially—Drone posits that intellectual property is in fact the *highest* form of property. Correlatively, cultural work would register as the most honorable species of labor. Introducing the first premise, Drone writes: "It matters not whether the labor be of the body or of the mind." Ownership is created by production. If this principle is just, "it ought to apply generally," and cover "the whole field of labor." The "fundamental principle of property" recognizes "no distinction between the poet and the peasant in the ownership of their productions." Drone experiments with different angles. He argues from the negative: no "theory, explanation, or consideration" has been advanced by any of the great writers on property to "account for the inviolability of property in the produce of bodily labor" that would not also "apply with equal force and directness to property in the fruits of intellectual industry." He appeals to authority: the careful reader of Samuel von Pufendorf, for example, must recognize that all the "attributes and conditions" of property demanded by the German jurist may be found in "intellectual productions."[21]

Drone does acknowledge that intellectual property *is* different, in a number of obvious ways, from landed real estate or moveable objects. "That there is an important dividing-line," Drone writes, "between property in the results of manual and in those of intellectual labor is clear." Real property is "corporeal." Intellectual property lacks "material substance." Here, it is not merely a question of recognizing that sitting at a desk and writing is "work." Rather, it is the much more complicated project of describing a species of labor that results in an "intellectual creation" but is "composed of ideas, conceptions, sentiments, thoughts." Drone therefore wrestles with the theme of the relation between "immaterial labor" and "immaterial

[21] Drone, *Treatise*, 5-6. See Knud Haakonssen and Ian Hunter, *The Cambridge Companion to Pufendorf* (Cambridge United Kingdom: Cambridge University Press, 2023).

property," and finds himself entangled in multiple levels of abstraction. The legal mandate underlying copyright could not be construed as licensing only the protection of "the words of the manuscript or the printed page," nor the defense of "the paper or parchment."[22] What concerns Drone is the "invisible, intangible creation of the mind" that is fixed in form and communicated by means of language: the artwork is "incorporeal itself" but often "attached to the corporeal." What began as an apparently simple operation of applying Locke to the production of culture has resulted in a powerfully idealist theorization of phantoms and invisible forms.[23]

Making a case for the viewpoint that intellectual property is in fact the *highest* form of property, and that thus cultural work is the most dignified and intensively value-generating form of labor, Drone discovers an unexpected ally in the person of Benjamin Disraeli. The British statesman had recognized that cultural commodities were artifacts "requiring great learning, great industry, great labor, and great capital, in their preparation." Disraeli went so far as to suggest that cultural work generated a *superior* form of property, distinguished by the special ingredient of "originality." In Disraeli's writings, Drone locates the needed ammunition against a naïve Lockean view of labor and property, the basis upon which to consider quizzically the idea that, for example, the act of finding fruit on the ground and claiming it as one's own property—the paradigmatic form of property-creating labor—must not be obviously inferior to the creation *ex nihilo* of a genuinely new creative work of art.[24]

"There is no property more peculiarly a man's own than that which is produced by the labor of his mind": Drone's Survey of American IP History

[22] Drone, *Treatise*, 7-8.
[23] Drone, *Treatise*, 6.
[24] Benjamin Disraeli, quoted in Drone, *Treatise*, 82.

With Disraeli's argument in hand, Drone assembles for his readers a history of copyright legislation in the United States. Narrating this history, Drone is careful to foreground every official utterance that might lend credence to this labor theory of culture. Thus, Drone highlights the language of labor in Connecticut's 1783 "Law for the encouragement of literature and genius": "it is perfectly agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works." Similarly, Drone applauds post-Revolutionary Massachusetts for acknowledging in its Copyright Act the labors of "learned and ingenious persons in the various arts and sciences" and for affirming that "there is no property more peculiarly a man's own than that which is produced by the labor of his mind."[25]

Drone points out the labor justifications at the heart of the first federal Copyright Act, passed May 31, 1790, and every subsequent expansion and revision of the Act. American law, Drone asserts, sees the author as a producer who "labors as assiduously as does the mechanic or husbandman." In the abstract, the author ought to have "exclusive and perpetual rights" to the "fruits of his labor." The nature of literary property might be "peculiar," Drone acknowledges, but it is "not the less real and valuable."[26] The inadequacy of American protections of cultural work was nowhere more evident than in the failure of the United States to protect international copyright. Drone cites approvingly an 1837 report protesting that all "authors and inventors," no matter their country of citizenship, possessed a "property in the respective productions of their genius." Drone discovers further ammunition for his labor theory of culture in this report, with its insistence that authors were "often dependent

[25] Drone, *Treatise*, 87.
[26] Drone cites *Reports of Committees*, 21st Congress 2d Sess. (1830-31).

exclusively upon their own mental labors for means of subsistence." A British merchant sending a bale of merchandise to the United States expected his property to be duly protected by American authorities, the report writer reflected; a British author, in contrast, was vulnerable to the predations of any American pirate who wished to republish foreign works "without any compensation whatever being made to the author."[27]

Contemplating these continuing violations of the property rights of foreign authors, Drone foregrounds the claim that authorial common-law rights protect the "acknowledged mental labor" of the cultural worker. Drone considers also the question of whether a given cultural production is sufficiently meritorious to warrant legal protection—if all cultural labor creates property rights in a text automatically, it would be difficult to justify the establishment of any quality threshold over and above evidence of worked-up labor. At the same time, intellectual property law had clearly long been premised upon distinctions between "art" and "craft," the licit and the obscene, the elevating and the meretricious. The legal scholar could draw upon an abundance of precedents pointing in either direction.

Bringing his historical presentation up to recent events, Drone recalls that in 1870, Congress passed a major revision of copyright law, extending protection to dramatic compositions and photographs, and including to the list of things protected by statute paintings, drawings, litho-chromographs, statues, statuary, and "models or designs intended to be perfected as works of the fine arts." The law's solicitude for new technologies had created difficulties. So many of the new objects either seemed to lack the material evidence of handiwork (as in the case of the photograph, lacking the painting's brushstrokes) or seemed much more like mass-produced commercial articles than like art works. For the most

[27] Drone, *Treatise*, 93.

part, Drone dances around the questions of quality and artistic merit. "In the case of statutory copyright," he writes, "the theory of the law is that a work, to be entitled to protection, must be *original*, and *innocent*, and have some *literary, art, or other value*, which will contribute to the information, instruction, or enjoyment of others than the owner."[28]

In its actual operation, the law was "by no means exacting." In fact, the threshold of merit over which a text must pass in order to receive protection was "little more than nothing." Beyond a general sense that copyright law "was not intended to protect a thing utterly destitute of any value as a literary or art production," lawyers and judges had few guidelines with which to go about assessing whether a given set of aesthetic gestures that had culminated in a given text aesthetic object constituted authentic cultural work, deserving of property protections. Drone struggles to generate these guidelines. Part of the problem resided in the semiotic qualities that differentiated one art form from another. Music, for example, could be written and communicated via "signs and marks." So could algebra, mathematics, arithmetic, and hieroglyphics, all signs "conveyed by signs and figures."[29] Thus, Drone maintain that any quantitative threshold (or test of "voluminous extent of a production") for protection would necessarily and unjustly exclude "many productions of the greatest genius." Contemplating this question, Drone arrives at an important insight regarding cultural work. "Every man knows," he recalls, "that the mathematical and astronomical calculations which will enclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines." Since the "security and happiness of the species in every part of the globe" depends upon the exertions of cultural workers engaged in

[28] Drone, *Treatise*, 110, emphasis added.
[29] Drone, *Treatise,* 141, citing Lord Mansfield, *Bach v. Longman* (1777). See: http://copy.law.cam.ac.uk/cam/tools/request/showRecord.php?id=record_uk_1777

"this profundity of mental abstraction," the law was surely required to offer protections against piracy, even to the most concise publications. Quantity, in other words, could not be said to correlate directly to quality. Here, Drone reflects upon the importance of protecting the "entire field of honest literary labor." Drone seemingly feels the need to qualify "literary labor" with the adjective "honest" in order to advocate for the protection of small units of intellectual production. The law should protect not only "the profoundest work on the universe," but also "the simplest rhyme for the nursery," "driest catalogue of names" alongside "the most fascinating production of the imagination."[30]

Even simplest annotation required "an exercise of intellect and an application of learning." This would place the annotator in the "position and character of author," because of the evident "skill and labor" on display in works of annotation, and also because professional annotators were often well compensated. Writing of the 1869 case of *Laurence v. Dana*, Drone calls attention to the ruling's labor-inflected language: the Court in that case found that an edited volume—the products of the "labors of the editor"—created for that editor a copyright claim as tangible as that of the author.[31] Drone draws parallels to a related British case, regarding a skillfully edited compilation of Sir Walter Scott's ballads: "the court placed a high value on the work of the editor, who with great literary research and judgment had made apt selections, and skillfully applied them to illustrate Scott's ballads."[32]

By emphasizing the generativity of labor up and down the ladder of literary production, Drone edges toward a theory of copyright as always involving the "arrangement and combination of materials." This preliminary theorization of cultural work would gain steam

[30]Drone, *Treatise,* 144.
[31] *Laurence v. Dana,* 15 F. Cas. 26, 1869. See http://fairuse.stanford.edu/case/laurence-v-dana/
[32] See discussion in Drone, *Treatise*, 149-55.

over the subsequent decades, eventually displacing (but never completely eliminating) the notion that copyright applied primarily to the *ex nihilo* creations of literary geniuses. There are echoes here of the Pragmatism then being developed by William James and Charles Peirce, an attack on a bureaucratic scholasticism that would narrowly interpret the remit of IP law in favor of a vision of copyright that covered all "acts of authorship."[33] Drone extracts a general governing principle: applicable to most of the species of "derivative use" common in the late nineteenth century, and also flexible enough to accommodate whatever new practices might become popular with the advent of new technologies. The protections of copyright ought to apply so long as "choice and arrangement" of "selections" produced "material value."

Once such an expansion of copyright coverage has been authorized, however, an obvious conceptual difficulty presented itself: many cultural products involved multiple cultural workers inputting a variety of different kinds of authorial and editorial labor. Some scheme for grading cultural labor was apparently necessary. Attempting to solve this problem, Drone taxonomizes cultural work on the basis of several overlapping criteria: 1) originality ("If a person claims to be the owner of an intellectual production, on the ground that it is the creation of his own mind, it is obvious that his title will fail when there is an entire absence of originality, when the production is a mere copy of something else"); 2) literary merit as opposed to pure exchange-value ("The sound doctrine would seem to be that of value, at least market or commercial value, is not an essential attribute of this kind of

[33] Rethinking the definition of the volitional "act" constitutes the main work of George Herbert Mead *Philosophy of the Act*, Oliver Wendell Holmes, Jr.'s *The Common Law*, John Dewey's *Psychology*, and William James's *Principles of Psychology*. See George Herbert Mead, *The Philosophy of the Act* (Chicago, Ill: The University of Chicago Press, 1938); Oliver Wendell Holmes, Jr. *The Common Law* Cambridge, Mass: Belknap Press of Harvard University Press, 2009); John Dewey, *Psychology* (New York: American Book Company, 1891); William James, *The Principles of Psychology* (New York: Dover Publications, 1950).

property"); and 3) usefulness to the public ("The publication of an immoral, seditious, blasphemous, or libelous work, is looked upon as unlawful; and for that reason it has been held that such a work cannot be the subject of statutory copyright").[34]

Drone's concern with sedition, blasphemy, and libel speaks to the power of a growing will-to-censor at work in Gilded Age political culture. Comstockism and anti-vice crusades began to drive reform politics, rendering urgent the re-definition of "obscenity." In turn, lawyers like Drone struggled to clearly demarcate the difference between the unpublished and the published text. While in regard to the latter the state might legitimately exercise the police power of censorship, the unpublished manuscript remained off limits. "Publication," Drone insisted, "constituted the essence of the wrong."[35] More was at stake in the pre- vs. post-publication distinction, however, than the question of censorship. Drone notes that a copyright law rooted in the metaphysics of publication must elaborate some theory of the relation between cultural labor and market value. The meaning of publication had changed: no longer denoting a simple "dedication to the public," publication was increasingly figured as a market event, oriented towards the accumulation of profits. [36] If the event of publication

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[34] Drone*, Treatise*, 182.

[35] See Paul S. Boyer, *Purity in Print: The Vice-Society Movement and Book Censorship in America* (New York: Scribner, 1968).

[36] Drone writes in the section "Statutory Copyright begins with Publication; does not exist in Unpublished Works": "The chief object of the legislation for the advancement of learning is to secure the publication of literary works for the benefit of the public, and this consideration is a conniption on which protection is extended to authors. Publication is the beginning of statutory copyright, and a condition precedent to its existence. Attempting to define "publication," Drone writes: "In one sense, a work of literature or art is published when it is communicated to the public, in whatever manner this may be done; whether by the circulation of copies, oral delivery, representation, or exhibition. At common law, the word publication may have this comprehensive signification. But, to determine its meaning under the statute, it is necessary to ascertain in what sense the legislature used the word. In the case of books, maps, charts, drawings, engravings, photographs, lithographs, and chromos, the only kind of publication recognized by the statute is the circulation of copies. Hence, a literary composition is not published, within the meaning of the statute, when it is orally communicated to the public; nor a pictorial production, exception perhaps a painting, when it is publicly exhibited." Drone, *Treatise*, 283-85. For detailed analysis of the holes in Drone's legal logic, see Oren Bracha, "The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright." 118 Yale L.J. 186 (2008). On the Statute of Anne and foundational copyright cases, see Rose*, Authors and Owners*.

triggered statutory protections meant to remunerate the published text's direct producer, a labor theory of culture could hardly ignore the fact that some cultural commodities generated extraordinary revenues, while others lost money, for reasons that could never be precisely determined. Nor could a labor theory of culture disregard the fact that the direct producers of these cultural commodities often went uncompensated, whether because they were workers hired by the owners of the reproductive apparatus, or because they were foreign-born and hence barred from statutory protection. A legal order founded on the principle of equity could not regard such situations as just.

Drone proposes two tests that might be used to determine whether the forfeiture of an author's rights in a given literary work is just. First, the Court must determine whether the particular form of aesthetic labor, its "species of production," is covered by copyright statute. Second, the Court must determine whether, according to the language of the law, the event of "publication" can be said to have occurred. The careful reader will immediately notice that these tests are tautological in character. In fact, no sooner has Drone announced their arrival does he appear to recognize this problem: "Whether the common-law property in such works is lost by the public exhibition of the original, or by the circulation of engravings, photographs, or other copies, will depend on what is a publication of the work within the meaning of the statute. This is a difficult question…"[37]

Drone's hedging nevertheless illustrates an important formal point. Tautology need not necessarily detract from the pragmatist functionality of a given solution *vis-à-vis* a given legal problem. The legal pragmatist searches for a tool (however flawed, as all tools must be) to rescue the project of refining policy from the iron grip of *stare decisis* and past

[37] Drone, *Treatise*, 120.

precedent.[38]At the same time, Drone's arguments need to be contextualized within the rapidly developing growth of mass entertainment in the postbellum moment. Theatrical syndicates bloomed, in both "legitimate" and burlesque strata, and live entertainment had become a big business. Thus, the cultural workers to whose defense Drone rose were as likely to be managers as actors. Increasingly, the texts that were to be defended against piracy were "works made for hire." Increasingly, the creative labor of workers was seen by courts as having been hired precisely to generate "content" for their employers.[39]

Concerns regarding the incipient "work-for-hire" regime dominate a section of Drone's *Treatise* entitled "Rights of Employer and Author Employed." Here, Drone pivots from his concern with the rights of authors to a series of arguments for the rights of publishers. The capitalist who hires a cultural worker as an employee also purchases intellectual property rights in the fruits of that worker's labor: "any person may secure statutory copyright for a work which he has employed another to write." Drone concedes that a case could arise "wherein a writer follows so closely the directions given by his employer that the creation of the work may be due to the mind of the latter, and he may properly be regarded as the author." But this special circumstance could not be generalized to cases when the employer "merely suggests the subject" and "has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed."[40]

Drone underlines the point. "The produce of labor," he avers, "may become the

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[38] It was in this pragmatist spirit that Oliver Wendell Holmes, Jr. sought to reframe legal history in his epochal text *The Common Law*.
[39] Catherine Fisk, "Authors at Work: The Origins of Work-For-Hire Doctrine*," Yale Journal of Law and the Humanities*, Volume 15:1, 2003. See also Jean-Christian Vinel, *The Employee: A Political History* (Philadelphia: University of Pennsylvania Press, 2013).
[40] Drone, *Treatise*, 259.

property of him who has employed and paid the laborer." The reasoning is Lockean (after all, the farmer, not the horse, is entitled to the "turfs" cut by the latter). "Literary labor," Drone writes," is no exception to this universal rule."[41] While the "mere fact of employment" was not enough to render the employer "the absolute owner of the literary property created by the person employed," assignment or transfer of these rights could be arranged by contractual agreements or implied understandings between boss and worker.[42] In these preliminary adumbrations of "work-for-hire," Drone presents a more complicated portrait of corporate cultural work, in which the transfer from employee to employer of rights to intellectual property, bargained for and concretized in the employment contract, might become the basis of a new political economy of mass media: "Almost every product of independent literary labor is a proper subject of copyright; and, to be entitled to protection, the author has simply to show something material and valuable produced by himself, and not copied from the protected matter of another").[43]

George Haven Putnam, International Copyright, and Cultural Work

One particularly diligent reader of Eaton Drone's *Treatise* was the publisher George

[41] Drone, *Treatise*, 243. "When an author is employed on condition that what he produces shall belong to the employer, the absolute property in such production vest in the employer by virtue of such employment and by operation of law. This mode of acquiring property in an unpublished work is as lawful as any other, and such owner is as clearly entitled as any other owner of an unpublished work to secure the privileges granted by the statute… (works are) in many instances produced by persons employed on the condition that the results of their labor shall belong to their employers; and they are copyrighted and published as the property of such employers."

[42] In 1909 Copyright Act, the doctrine of "work-for-hire" was signed into law, which normalized the notion that the employment relation automatically vests IP rights in the employer.

[43] Drone*, Treatise*, 199.

Haven Putnam, (1844-1930). [44] Putnam begins *The Question of Copyright* (1891) with an argument for the rights of cultural workers inspired by the *Treatise*. "Americans also are beginning to appreciate how largely the intellectual development of their nation must be affected by all that influences the development of the national literature," Putnam asserts, stressing the extent to which such development depended upon "inducements extended to literary producers." Borrowing some language from Drone's *Treatise*, Putnam pushes for the defense of literary property, via robust copyright protections, as the most important of such inducements.

Putnam came by these commitments honestly. When his father George Palmer Putnam (1814-1872) passed away unexpectedly, George Haven inherited a family business—the publishing firm of Wiley-Putnam, later renamed G.P. Putnam's & Sons—and a political obsession: the pursuit of a rationalized international intellectual property regime. "It was an old idea of my father's," the younger Putnam later wrote, "that it ought to be possible to secure a world-wide development for the protection and the distribution of books, irrespective of national boundaries." George Palmer Putnam had worked aggressively for copyright reform in the antebellum years, forming an *ad hoc* coalition that included Noah Webster, Francis Lieber, and Henry Clay. The younger Putnam's keen desire to properly maintain his father's commitments to copyright reform and the moral battle against "pirates"

[44] As he became a key figure in the "book trust," Charles Zarobila writes, "Putnam took up his father's fight to establish an international copyright law that would protect literary property." Putnam worked to reorganize the American Publishers' Copyright League in 1886, and served as its secretary until 1889. Putnam was also active in the American Free Trade League (beginning in 1874, president of the League from 1916-1930). In 1879 he joined the National Civil Service Reform Association. In 1912 Putnam worked for the U.S. presidential nomination of Woodrow Wilson, and cofounded the National Security League in 1914 to agitate for America's entry into the First World War. See Charles Zarobila, "George Haven Putnam," in Allen Johnson, *Dictionary of American Biography*. <http://catalog.hathitrust.org/api/volumes/oclc/33403345.html>. See also Putnam's obituary, "George Haven Putnam," New York *Times*, Feb 28, 1930, p. 22.

into the 1880s and 1890s led him to Drone's *Treatise*. In the *Treatise*, Putnam discovered the ideological ammunition he felt necessary to guide his family's firm to security and prosperity. He found also the intellectual materials necessary for the related tasks of rationalizing American copyright law and working to secure a binding international treaty on intellectual property.

As early as the 1830s, George Palmer and his friends began to experiment with a synthesis of the language of Jeffersonian producerism and literary theory. The elder Putnam's associate Francis Lieber provided the most memorable distillation of this argument. "The whole right of property," Lieber avers, "rests on appropriation and production." Lieber compares famous literary works, such as Goethe's *Faust* to a barrel of herring caught in the North Sea and challenges the reader to find *Faust* a production less worthy of protection than the barrel of fish. "I appeal to the intuitive conviction of every thinking man to say whether a literary work," Lieber writes, "is not a production in the fullest sense of the word," and suggests that none would deny that the author has the right to prevent meddling with their literary property. [45] There is a good deal of rhetorical extravagance here. Prior to the Civil War, Lieber's proposal that a purloined barrel of fish could be straightforwardly compared to a pirated edition of *Faust* amounted to a deliberate provocation. In the postbellum era, such rhetorical moves entered into mainstream discourse.

For the Putnams, the project of copyright reform was deeply connected with the formulation of a competitive business strategy within a crowded market. George Haven

[45] Francis Lieber (March 18, 1798[1] or 1800 – October 2, 1872), known as Franz Lieber in Germany, was a German-American jurist, gymnast, political philosopher, and editor of *Encyclopaedia Americana*. In 1840, Lieber published a volume on copyright: *On International Copyright, in a Letter to the Hon. William C. Preston, Senator of the United States* (New York: Wiley and Putnam, 1840). See Frank Freidel, *Francis Lieber: Nineteenth-Century Liberal* (Baton Rouge: Louisiana State Univ. Press, 1948).

wrote that his father "believed also that the publishers who, like himself, had always refused to issue American editions excepting under arrangements with the transatlantic authors, ought, when international copyright should be established, to be in a position to secure a decided business advantage over their less conscientious competitors."[46] Wiley-Putnam sought to distinguish its firm by building a reputation as unusually author-friendly. It advertised this solicitude for authors' concerns by campaigning vigorously for international copyright reform. Putnam recalled that his father had been a man of hopeful disposition, and "to the day of his death, he was always believing that 'next year' it ought to prove practicable to secure favorable action from Congress."[47] In concert with a rationalized domestic and international copyright structure, the elder Putnam envisioned (in his son's telling): "a world's market by means of which the author, securing some return from each reader who had been benefited by the author's work, should be able to make the charge for each reader comparatively moderate." Recognizing as disastrous the fact that authorized editions of English books were speedily followed by cheap unauthorized reprints, the elder Putnam argued that only comprehensive legal reform could forestall the literary pirate's manipulation of what economists today call the "free rider" problem: the bringing into market of a "competing issue" that could be sold more cheaply.[48]

At the same time, the Putnams sought to mitigate the power of the typographical unions. After an 1886 push by Putnam and his allies for international copyright reciprocity foundered as a result of organized protests by the typographical unions, Putnam coordinated his efforts with the International Typographical Union (ITU), agreeing to include domestic

[46] George Haven Putnam, *George Palmer Putnam: A Memoir* (New York: G.P. Putnam's Sons, 1912), 47.
[47] Putnam, *George Palmer Putnam*, 45-46.
[48] Putnam, *George Palmer Putnam*, 45-46.

printing requirements in any extension of US copyright to foreign authors.[49] Likely, Putnam regarded partnership with the printers and typesetters as a temporary and pragmatic accommodation. In the increasingly anti-union atmosphere of the late Gilded Age, publishers anticipated the attenuation of labor radicalism, the suppression of strikes by means of injunction, and the triumph of the open shop. Once the groundwork for international copyright was laid, Putnam probably foresaw an opening for striking from IP legislation the domestic printing clauses.

We are less concerned, here, with the fate of the liberal copyright reform coalition in terms of policy or legislative history, but rather with the discursive impact of the new theorization of the "literary worker" set in motion during these reform campaigns. Putnam and his colleagues in liberal copyright reform politics approached the problem of the "literary worker" from two contradictory angles. On the one hand, they sought to demonstrate that writing and other forms of creative activity did, indeed, constitute "labor" in the republican sense of property-creating effort. On the other hand, they skillfully invoked the new corporate-capitalist coloration of the publishing industry to strengthen the case that literary workers were white-collar employees, and that the publishing industry was therefore deserving of property state protection from counterfeiters and pirates.[50]

Battling against centuries of dogma that situated the arts outside of the economy, Putnam and his collaborators attempted to contextualize "literary work" within the intellectual matrix of liberal political economy and the labor theory of value. This was no easy task. Contradictions and roadblocks abounded. To a considerable degree, however,

[49] Thorvald Solberg, "Copyright Law Reform" *The Yale Law Journal*, Vol. 35, No. 1 (Nov., 1925), 55.
[50] See David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862-1872* (New York: Knopf, 1967).

Putnam and his allies found ways to paper over these difficulties. Drone's *Treatise* provided the key ballast for Putnam's arguments, grounding both a natural law justification for literary property and the rhetorical connection of protest against the inadequacy of intellectual property protections to concerns about the vulnerability of the American status within the international order. Drawing upon the *Treatise*, Putnam consistently argued that the state's failure to protect authors and their heirs constituted a national embarrassment. Much of this was flummery. There was, however, a kernel of genuine concern animating Putnam's anxious pleas for greater protections of authors, and this led Putnam to expend considerable energies on the task of justifying and legitimating the cultural worker.

In 1866, at age 22, Putnam was appointed junior partner of G.P. Putnam's & Son.[51] Like his father (a self-taught aesthete who had authored a number of popular works of amateur historiography), Putnam harbored literary and scholarly aspirations, hoping originally to travel to Göttingen for further study before he was drafted to join the family firm. However, the condition of the publishing industry in the immediate postbellum years was chaotic, and Putnam was called to help steer the family business through the anxious decades of the1860s and 1870s.[52] As he assumed a central role in the management of the Putnam firm, George Haven also worked within the political coalition nicknamed the "Young Scratchers," campaigning for civil service reform and laissez-faire in the matter of currency, trade, and tariffs.[53]

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[51] "My relations with him during these years of our business association were very close. I had myself no business experience…" Putnam, *Memories of a Publisher,* 7.
[52] Putnam, *Memories of a Publisher*, 7.
[53] See E. McClung Fleming, "The Young Scratcher Campaign of 1879: The Birth of the Mugwumps," *New York History*, Vol. 23, No. 3 (July 1942), pp. 315-327; H. Eliot Kaplan, "Accomplishments of the Civil Service Reform Movement," *Annals of the American Academy of Political and Social Science,* Vol. 189, Improved Personnel in Government Service (Jan., 1937), pp. 142-147. See also "George Haven Putnam" (obituary), New York *Times*, Feb 28, 1930, 22; George Haven Putnam, "Pleas For Copyright" in *The North American Review*,

The Putnam family circle included Carl Schurz, Dorman B. Eaton, Daniel Coit Gilman, E.L. Godkin, Charles Collins, Everett P. Wheeler, and Edward Cary. The Putnams were also related by marriage to the famous Peabody Sisters: Elizabeth (abolitionist and feminist activist and writer), Mary (the wife of education reformer Horace Mann), and Sophia (for a time married to Nathaniel Hawthorne). Putnam often visited the Cambridge cottage of the Peabody sisters, the back garden of which had been transformed into housing for successive groups of refugees (including, in the 1840s, African Americans navigators of the "underground railroad").[54]

Before the Civil War, at his father's urging, Putnam had apprenticed with the liberal economist David Atkins Wells. In 1854, Wells sought to befriend Putnam Sr. with the hope of obtaining employment in the book trade.[55] Putnam's father decided against hiring Wells, but the two men stayed in touch. It was during this period that Wells revised his understanding of political economy, scrapping early commitments to protectionism and embracing, in Putnam's words, "the wisdom and advantage from every point of view, of the freest possible system of commercial exchanges."[56] As Wells systematized his liberal conception of political economy, Putnam commenced an informal intellectual apprenticeship.[57] Putnam received at the feet of Wells an education in a pure strain of liberal

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Vol. CXLVIII, 1889; Thorvald Solberg, "Copyright Law Reform" *The Yale Law Journal,* Vol. 35, No. 1 (Nov., 1925); "The International Copyright Union" *The Yale Law Journal*, Vol. 36, No. 1 (Nov., 1926); "The Present Copyright Situation" *The Yale Law Journal*, Vol. 40, No. 2 (Dec., 1930).

[54] Josephine E. Roberts, "Horace Mann and the Peabody Sisters." *The New England Quarterly*, vol. 18, no. 2, 1945, pp. 164–80; Megan Marshall, *The Peabody Sisters: Three Women Who Ignited American Romanticism* (Boston: Houghton Mifflin, 2005).

[55] Putnam, *Memories of a Publisher*, 34-35.

[56] Putnam, *Memories of a Publisher*, 35-36.

[57] Writing in 1912, Putnam recalled this apprenticeship and indicates that Wells's lessons had stayed with him: "I had the privilege as a youngster of making my first economic studies under the direction of Wells, and I believe now, as he had taught me to believe fifty-five years ago, that the principles and convictions then impressed upon me are those which must in the future come to be accepted as the foundations of a wise and equitable industrial system for the United States and for the civilized world. It is in fact clearer today than it was

political economy. Mary Furner reminds us that the postbellum economic profession found itself after the Civil War a rickety coalition of amateur social scientists and college teachers who regarded political economy as a subtopic in moral philosophy and theology.[58] Jean-Baptiste Say and Frédéric Bastiat—firm believers in the natural harmony of supply and demand, the unnatural character of class antagonism, the universal tendency towards equilibrium, and the existence of laws of economy as ironclad as those described by Newton vis-à-vis the natural universe—remained guiding lights of American economic thought.[59]

It was in opposition to the harmonist arithmetic of Say and Bastiat that the liberalism of Wells, Godkin, and Sumner seemed, for a moment, progressive and even (potentially) radical. Economic liberalism challenged the placidity of Say's Law and Bastiatian harmony by recognizing the material roots of class antagonism and the ways in which new credit instruments and financial structures were reshaping capitalism. Within the new conceptual universe of postbellum liberalism, ideological differences invariably boiled down to disagreement about the proper role of the state. A liberal, in this context, was someone who reflexively rejected almost every conceivable form of state intervention in the economy as illegitimate.[60]

Putnam came to maturity within this orbit of these paradoxical influences, and amid the competing values of humanitarian radicalism and orthodox liberalism, aesthetic curiosity and grumbling impatience for the "return of free trade." As the 1860s gave way to the 1870s,

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in 1856 that the breaking down of tariff barriers between nations and the throwing open of the markets of the world to the producers who through natural advantages developed by individual skill are the best fitted to supply those markets, will remove the most serious causes of friction, irritation, and antagonism between nations, and would enormously decrease the possibility of war." Putnam, *Memories of a Publisher*, 37.

[58] Mary O. Furner, *Advocacy & Objectivity*: *A Crisis in the Professionalization of American Social Science, 1865-1905* (London: Routledge, 2017).

[59] Sklansky*, The Soul's Economy*, 79.

[60] Joel F. Yoder, "Herbert Spencer and His American Audience" (2015). Dissertations. Paper 1660. http://ecommons.luc.edu/luc_diss/1660

Putnam and his associates began to feel increasingly alienated and isolated, sensitive to the growing division between the old-line New York bourgeoisie and the *nouveaux riches* of the Gilded Age. These latter, "who had made money out of shady contracts or through speculations in pork,' could not be won over to *laissez-faire* orthodoxy, and, furthermore, "could not easily be reached by the publishers of standard literature."[61] Slowly, however, the impact of speculator parvenus was mitigated by the arrival in New York of teams of young men "hoping to make a place for themselves with the magazines or in the publishing offices." Post-Civil War New York established itself as the center of American publishing, displacing Boston and Philadelphia. From the beginning of his career in publishing, Putnam understood that the literary world was gradually mutating into one in which cultural workers provided increasing quantities of the material that filled up books and magazines.[62]

Prior to his marriage in 1869, Putnam lived in a boarding house run by Ann Swift at the corner of Tenth Street and Fourth Avenue. The Swift boarding house served as a sort of running informal literary salon. "Miss Swift," Putnam wrote, "was a woman of education and intellectual interests, and she succeeded during the years of her work as boarding-house manager in attracting to her circle of clients a number of noteworthy people most of whom became her personal friends."[63] Horace Greeley was a frequent visitor at the house. Fellow boarders included Bayard Taylor (at the time, the literary editor of the *Tribune*); journalist Richard Henry Stoddard and his wife, the novelist Elizabeth Drew Stoddard; the poet, novelist, and travel writer, T.B. Aldrich (described by Putnam as just then "beginning his career as a literary worker with rather precarious newspaper connections"); Oliver Johnson,

[61] Putnam, *Memories of a Publisher*, 6-7.
[62] Putnam, *Memories of a Publisher*, 22.
[63] Putnam, *Memories of a Publisher*, 23-24.

writer at *The Independent*; and James Morgan Hart, literature scholar and later Professor at Cornell.[64]

After his father's death in 1871, Putnam followed in his footsteps: working for the American Free Trade League, leading various anti-machine efforts, and spearheading the quest for revised American copyright laws (with the particular aim of establishing intellectual property reciprocity between the United States and England). With Wells's liberalism as his compass and Drone's legal and philosophical arguments as his map, Putnam worked to fulfill his father's copyright reform vision: seeking securing "justice for the producer" while simultaneously "furthering the business interest of the consumer."[65]

Reading *The Question of Copyright*

Sensing a political opening in the Berne Convention of 1887 and its establishment of an International Copyright Union, Putnam and the American liberal copyright reform coalition sought to cultivate public sympathy for the plight of exploited "literary workers" in order to achieve a strategic series of legislative gains.[66] Congress had just passed the Platt-Simonds copyright bill (a bill for which Putnam and his colleagues had been lobbying for

[64] See John R. Commons, "Horace Greeley and the Working Class Origins of the Republican Party*." Political Science Quarterly*, vol. 24, no. 3, 1909, pp. 468–88; Laura Stedman, "Bayard Taylor." *The North American Review*, vol. 201, no. 715, 1915, pp. 904–07; Jessica R. Feldman. "'A Talent for the Disagreeable': Elizabeth Stoddard Writes The Morgesons." *Nineteenth-Century Literature*, vol. 58, no. 2, 2003, pp. 202–29; Charles E. Samuels, *Thomas Bailey Aldrich* (New York: Twayne Publishers, 1966).
[65] Putnam, *Memories of a Publisher*, 45.
[66]The list included: (1) President Harrison; (2) Ex-President Cleveland; (3) 144 leading American authors; (4) Western authors; (5) Southern authors; (6) American musical composers; (7) 60 colleges; (8) Leading educators; (9). 200 leading librarians; (10) The American Publishers' Copyright League; (11) The American newspaper publishers; (12) The International Typographical Union; (13) American employing printers, and many others. See Richard Rogers Bowker, *Copyright: Its History And Its Law* (Boston and New York: Houghton Mifflin, 1912).

decades), which secured certain limited intellectual property rights for foreign authors. In 1891 Putnam published *The Question of Copyright,* an edited volume that combines Putnam's own writings with a variety of materials from other active supporters of copyright reform, including fellow "Young Scratcher" and long-time copyright reform advocate Richard R. Bowker, Columbia literature professor Brander Matthews, and Thorvald Solberg, soon to be appointed Commissioner of the US Copyright Office.[67] "In connection with the recent enactment by Congress of a Copyright Law securing American copyright for aliens," Putnam writes, "the subject of literary property, and of the rights of the producers of literature in the United States and throughout the world is attracting special attention."[68]

Putnam emphasizes the "steady progress of the idea that the *literary laborer* is worthy of his hire."[69] Legal clarification was required, however, in order to secure "consistent, enduring, and satisfactory legislation," and to forestall "needless business perplexities necessitating for their solution frequent appeals to the courts."[70] Putnam secured from an impressive swath of American authors a petition for international copyright. The language of this petition leans heavily on the trope of the cultural worker. The authors self-identify as

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[67] E. McClung Fleming, "The Young Scratcher Campaign of 1870."

[68] George Haven Putnam, *The Question of Copyright* (New York: G.P. Putnam's Sons, 1904 [1891]), iii. The full title of text is *The Question of Copyright: A Summary Of The Copyright Laws At Present In Force In The Chief Countries of The World Together With A Report Of The Legislation Now Pending In Great Britain, A Sketch Of The Contest In The United States, 1837-1891, In Behalf Of International Copyright, And Certain Papers On The Development Of The Conception of Literary Property, And On The Probably Effects Of The New American Law, Compiled By* George Haven Putnam*, Secretary Of The American Publishers' Copyright League.*

[69] Putnam, *The Question of Copyright,* 26.

[70] This theme would grow increasingly prominent in Putnam's agitation for copyright reform: as in the statement of one participant in the 1906 Copyright Act revision hearings: "The greater part of the effort of the authors of this bill has been to provide in that field of copyright which Congress has already bounded and established, and which the existing law creates, a reasonable and orderly regulation; to provide against these conflicts and uncertainties and difficulties which the repeated amendment of the law has brought about." See *Arguments Before the Committee on Patents of the House of Representatives, Conjointly with the Senate Committee on Patents, on H.R. 19853, to Amend and Consolidate the Acts Respecting Copyright: June 6, 7, 8, and 9,* 1906 (Washington: G.P.O, 1906), 34.

"American citizens, who earn their living in whole or in part by their pen" who had been "put at disadvantage in their own country by the publication of foreign books without payment to the author."[71]

Richard Rogers Bowker was a particularly important intellectual ally of Putnam's.[72] Bowker's contribution to *The Question of Copyright*, "The Nature and Origin of Copyright," provides a natural law grounding of literary labor. "There is nothing which may more properly be called property," Bowker writes, harkening back to Defoe's polemics on behalf of authors, "than the creation of the individual brain." Property denotes that which is "man's very own." Nothing qualifies as a personal possession more consummately than the creative thought, "made out of no material thing." Furthermore, literary property was uniquely meritorious because of its relationship with human individuality. Thus, Bowker continues, the best proof that literary property was, indeed, *property*, could be arrived at by conducting a thought experiment: "if this individual man or woman had not thought this individual

[71] Among the signers of this petition were: Henry C. Adams, Frances Hodgson Burnett, Louisa May Alcott, George Washington Cable, Mark Twain, Henry Ward Beecher, Richard T. Ely, Washington Gladden, Joel Chandler Harris, Bret Harte, Thomas Wentworth Higginson, Oliver Wendell Holmes, William Dean Howells, Helen Jackson, Sara Orne Jewett, Henry Cabot Lodge, Francis Parkman, David A. Wells, Henry George, Walt Whitman, and George Bancroft.

[72] Richard Rogers Bowker (4 Sept. 1848-12 Nov. 1933), editor, publisher, and reformer, was born in Salem, Massachusetts, the son of Daniel Rogers Bowker, a manufacturer of barrel machinery. His family moved to New York City in 1857. Bowker attended the College of the City of New York, graduating with a B.A. in 1868, and became the city editor and later the literary editor of the newly created *New York Evening Mail*. He remained with that newspaper until 1875, at which time he moved on to the literary department of the *New York Tribune*. During this period Bowker also wrote for the book trade publications of Frederick Leypoldt. He became involved with efforts to organize the book trade and build public reading libraries. In September 1876 Bowker co-founded the *Library Journal* and helped to found the American Library Association. In 1879, Bowker purchased *Publishers' Weekly*, in the meantime working for several years on the British edition of *Harper's Magazine*. He participated in a variety of "good government" campaigns. Copyright reform work was a natural complement to these political efforts. He was an early member of the American Copyright League. In 1886 Bowker wrote *Copyright: Its Law and Its Literature*, followed by *Copyright: Its History and Its Law* in 1912. See Francesco L. Nepa, "Bowker, R.R" in *American National Biography Online* Feb. 2000. http://www.anb.org.proxy.library.ucsb.edu:2048/articles/16/16-02548.html. Bowker was probably most famous, during his lifetime, as the patriarch of the independent Republican tendency known as "Mugwump-ism." See E. McClung Fleming, *R. R. Bowker: Militant Liberal* (Norman: University of Oklahoma Press, 1952), and Fleming, "The Young Scratcher Campaign of 1879," 316.

thought, realized in writing or in music or in marble, it would not exist." If the thinking individual had not created a record of the act of cogitation, the item of literary property "would not, in any practical sense, exist."[73]

In addition to Bowker's essay, *The Question of Copyright* excerpts in full Brander Matthews "The Evolution of Copyright," originally printed in 1890 in the *Political Science Quarterly*.[74] Matthews traces a line from the earliest tools up the ladder of abstraction to ideas themselves. In the beginning, property "attached only to tangible things—to actual physical possession—to that which a man might pass from hand to hand." At the dawn of history, "nothing was less a physical possession than literature." Narrative art preceded the invention of writing, but the "spoken poem flew away with the voice of the speaker and lingered only in memory." Even after the invention of writing, however, and after "parchment and papyrus made it possible to preserve the labors of the poet and the historian, these authors had not, for many a century yet, any thought of making money by multiplying copies of their works." Greek dramatists, Matthews observes, "relied for their pecuniary reward on the public performance of their plays." There seems to be no evidence of Roman copyright, despite a flourishing book trade. Classical writers complain of the "blunder of copyists," but did not complain about the infringement of authorial rights. This, Matthews suggests, was because "the author did not yet know that he had any wrongs."

Thus, it was "only after the invention of printing that an author had an awakened sense of the injury done him in depriving him of the profit of vending his own writings."

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[73] Bowker in Putnam, *The Question of Copyright*. See also R. R. Bowker, *Copyright Its Law and Its Literature Being a Summary of the Principles and Law of Copyright with Especial Reference to Books. with a Bibliography of Literary Property* (New York: Publishers' Weekly, 1886).
[74] Brander Matthews, "The Evolution of Copyright." *Political Science Quarterly,* Vol. 5, No. 4 (Dec., 1890), pp. 583-602

Gutenberg's invention rendered visible to the author "the possibility of definite profit from the sale of his works." With the invention of printing came new opportunities for economic profit, and "as soon as the author saw this profit diminished by an unauthorized reprint, he was conscious of injury, and he protested with all the strength that in him lay." In this way, a centuries-long process was initiated through which, by "slow steps," the author was gaining protection.[75] As Matthews narrates these historical developments, he processes delicately the elisions between copyright as a reward or incentive for creative labor and copyright as a corporate privilege meant to offset large capital investments. "In the beginning," Matthews reminds his readers, "printers were publishers also." The work of the printer/publisher was labor-intensive: editing, comparison of manuscripts, revisions, the solicitation of scholarly emendations from trained intellectuals. The first edition was a "true pioneer's task"—a "blazing of the path" and "clearing of the field." The economic problem of the free rider quickly appeared on the scene. It was relatively easy for any subsequent entrant into the book trade to simply copy the finished manuscript, having skirted the costs associated with bringing it to market. "Therefore," Matthews laments, the printer-publisher who had given time and money and hard work was outraged when a rival press sent forth a copy of his edition, and sold the volume at a lower price, possibly, because there had been no need to pay for the scholarship which the first edition had demanded." The rapid growth of copyright, Matthews proposes, was "due to the loud protests of authors deprived of the results of their labors, and therefore smarting as acutely as under a personal insult." Beginning in Elizabethan England, authors sought and received seven-year publishing privileges, "in the consideration of the value of… work and the time spent on (the manuscript)." This was "the

[75] Matthews, "The Evolution of Copyright," in Putnam, *The Question of Copyright*, 329.

first recognition of the nature of copyright as furnishing a reward to the author for his *labor*."[76]

Building upon these historical arguments, in his own sections of *The Question of Copyright*, Putnam asserts that "intelligent voices" across the county were clamoring for copyright reform on a labor-deserts basis. Putnam appeals to patriotic vanity and imperialist anxieties: "Our term of copyright is shorter than that sanctioned by the verdict of the civilized world." Putnam cites the composers Theodore Thomas ("The present state of the law is an inducement to swindling, and is degrading to us as a nation") and Eugene Thayer ("There must be an international copyright, and that without delay, or American music will sink into oblivion"), and worries for the future: "our present procedure vitiates the education and tastes of American youth." Putnam's strongest argument, however, is borrowed from Drone: that "an author has a natural exclusive right to his intellectual productions," which suffices to guarantee strong IP protections even in the absence of any other justification.[77]

"The Literary Ishmael of the Civilized World"

In *The Question of Copyright*, Putnam emphasizes the international reputational dimension of the problem of literary work. "An examination of the copyright legislation of Europe makes clear that the United States, notwithstanding the important step in advance it has, after such long delays, just taken, is, still, in its recognition of the claims of literary workers, very much behind the other nations of the civilized world." Putnam worries that unless the US adhered to international copyright it would stand as the "literary Ishmael of the

[76] Matthews, "The Evolution of Copyright," in Putnam, *The Question of Copyright*, 330.
[77] Putnam, *The Question of Copyright*, 130.

civilized world." Pushing the point, Putnam suggests that Americans were "beginning to appreciate how largely the intellectual development of their nation must be affected by all that influences the development of the national literature, and to recognize the extent to which such development must depend upon the inducements extended to literary producers, as well as upon the character of the competition with which these producers have to contend."[78]

Drawing upon Drone's definitions of literary property ("the exclusive right of the owner to possess, use, and dispose of intellectual productions") and copyright ("the exclusive right of the owner to multiply and to dispose of copies of an intellectual production"), Putnam announces that protectionist political currents had created a "mortifying" situation for Americans "possessed of any sensitiveness, not only for their national honor, but for their national reputation for common sense." The arguments that animate *The Question of Copyright* derive, in large part, from anxieties attending the reversal of the relationship between England the United States. The latter was moving steadily from net importer (with "importation" often meaning unauthorized reprinting of English texts) to net exporter. "During the past few years American writers have been securing growing circles of readers in England and on the Continent," Putnam writes, "and a material increase can now be looked for in the European demand for American books." Failure to secure international copyright accords would lead inexorably to the pirating of popular American novels across the Atlantic. Nothing was more urgent, then, than securing American entry into the International Copyright Union (established by the Berne Convention) and working thereby towards the "abolition of political boundaries for literary property."[79]

[78] Putnam, *The Question of Copyright*, vii.
[79] Putnam, *The Question of Copyright*, xviii.

In the main, Putnam emphasizes the more abstract dimensions of natural law, the rights generated by the act of authorship, and the state's obligation to protect those rights. Drawing upon Drone, in a section entitled "The Author's Natural Right," Putnam writes that IP protections needed no more legitimation than the fact that "an author has a natural exclusive right to the thing having a value in exchange which he produces by the labor of his brain and hand."[80] Notable in this passage is the language of "labor of brain and hand," which finds Putnam sounding very much like a Fabian socialist. Creativity creates "the strongest possible title" and the author possesses his literary property "by this first, best, and highest of all titles."[81] Put another way:

> The monopoly of authors and inventors rests on the general sentiment underlying all civilized law, that a man should be protected in the enjoyment of the fruits of his own labor… The author cannot enjoy the value in exchange of his property if others reproduce the visible expression of his mental conception without his permission. To do so is to appropriate his valuable thing without giving value in exchange.[82]

From these strong arguments for authorial sovereignty over literary property, Putnam takes up the question of intellectual property's immaterial character: "The author's right is incorporeal, but it is not a small thing because incorporeal." Putnam stresses that the incorporeality of intellectual property is not altogether unique. "The major part of the wealth of the world is incorporeal," Putnam observes, In fact, "nineteen-twentieths" of the existing wealth on the planet was in fact similarly incorporeal, such as "the franchises of ferries, railways, telegraph and telephone companies, patents, trade-marks, good-will, shares in

[80] Putnam, *The Question of Copyright, vii.*
[81] Putnam cites Drone throughout this section: e.g., "The principle is as old as the property itself, that what a man creates by his own labor, out of his own "materials, is his own to enjoy to the exclusion of all others (*Drone on Copyright*, p. 4)." Putnam, *The Question of Copyright*, 84.
[82] Putnam, *The Question of Copyright,* vii.

incorporated companies, and annuities."[83]

American entry into the International Copyright Union constituted, for Putnam, a key step on the path to rectifying a broken system. But it would likely not suffice. If Congress sought to properly rationalize copyright law, it would need to pass "consistent, enduring, and satisfactory legislation" that would "fairly meet all the requirements and will not bring about needless business perplexities necessitating for their solution frequent appeals to the courts."[84] Because of the complexities of copyright law, revision could not be "safely be entrusted to the average congressional committees, especially if the bills framed in such committees are to have injected into them afterwards the 'amendments' of eleventh-hour experts of the Senate or the House, men who, having looked into the matter over night, feel assured that they know all about it." To ensure the adequacy of this legislation would require the "appointment of a commission of experts to make a thorough investigation of the whole subject of copyright, literary, musical, and artistic, domestic and international."[85] Congress would soon take Putnam's advice, convening a series of hearings on copyright reform over the course of the first decade of the twentieth century, culminating in the passage of the Copyright Act of 1909.[86] During this protracted process, Putnam and his collaborators on *The Question of Copyright* would hover as constant intellectual presences. The results were

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[83] Putnam, *The Question of Copyright,* vii. The contemporary reader cannot help but be reminded here of the arguments of Morton Horwitz, Martin Sklar, Alan Trachtenberg, and James Livingston on the increasing salience of immaterial property to the corporate capitalist order that took off after the Supreme Court issued its decision in the *Santa Clara* case. Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992); Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge [Cambridgeshire]: Cambridge University Press, 1988); Alan Trachtenberg and Eric Foner, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982); James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850-1940* (Chapel Hill, N.C.: University of North Carolina Press, 1994).

[84] Putnam, *The Question of Copyright,* xix.

[85] Putnam, *The Question of Copyright,* xxi.

[86] Lisa Gitelman "Reading Music, Reading Records, Reading Race: Musical Copyright and the U. S. Copyright Act of 1909." *The Musical Quarterly,* Vol. 81, No. 2 (Summer, 1997), pp. 265-290.

mixed. But without question, Putnam and his copyright reform colleagues contributed non-trivial innovations to the project of legitimizing cultural work.

John Bates Clark: "All Labor Is Mental"

From Drone and Putnam, we turn to the early career of the political economist John Bates Clark. This shift of focus entails a departure from the wilds of IP law. While we are temporarily taking leave of copyright matters, I think that the continuities linking Drone and Putnam to Clark as labor theorists of culture and enthusiasts for the idea of cultural work justify the diversion. For it is in the writing of Clark that we find the first serious articulation by an American economist of a labor theory of culture, a call to include within the ranks of "productive labor" workers such as "the actor, the musical performer, the public declaimer or reciter, and the showman."[87]

Unlike the vast majority of his contemporaries, Clark approaches cultural work as productive in its own right, and not a wasteful diversion from the farming and manufacturing at the heart of the "real economy." Instead, Clark describes cultural work as fully capable of generating value. All that is required to create new wealth, Clark argues, is the application of human effort to some part of nature in order to satisfy a desire, provided that this act of improvement endows the new object with the essential attribute of "appropriability." Clark calls for the abandonment of any fixed measure of usefulness or ("absolute value") and advocates instead for a dynamic understanding of utility (oriented around the notion of

[87] John Bates Clark, *The Philosophy of Wealth; Economic Principles Newly Formulated* (Boston: Ginn & Company, 1903 [1887]), 2.

"relative value").[88]

These bold experiments found their initial and most forceful articulation in *The Philosophy of Wealth* (1887), perhaps the most original volume of political economy published in the United States in the late nineteenth century. Although *The Philosophy of Wealth* is not widely read today, it was something of a sensation in its time, garnering a featured review from Henry C. Adams, who celebrated the text as presenting "the rare excellence of fully recognizing the influence of moral forces in economic actions while at the same time maintaining the scientific spirit in the analysis of industrial processes."[89] Clark's colleague Jacob H. Hollander highlighted Clark's originality in a 1927 tribute essay. In 1876, the United States had yet to produce any original contributions to the theory of political economy. "But the extraordinary changes in American economic organization," Hollander writes, "were already beginning to exert influence." American economists had begun to embrace "realistic study" of economic phenomena and eschewing the "doctrinal controversies" that divided English economists." Clark's *The Philosophy of Wealth* and *The Distribution of Wealth* led the way in this move away from Victorian moral philosophy thinly veiled as economic reasoning.[90]

The influence of *The Philosophy of Wealth* can be seen throughout the early twentieth century. Thorstein Veblen, Clark's one-time student, borrows heavily from his former teacher in his classic text *Theory of the Leisure Class*. Joseph Schumpeter consistently acknowledged intellectual debts to Clark. As late as the 1930s, Clark's early work attracted

[88] Clark, *The Philosophy of Wealth*.
[89] Henry C. Adams, Review of *The Philosophy of Wealth*, in *Political Science Quarterly*, Volume One, Number Four (Boston: Ginn & Company, 1886), 687.
[90] Jacob H. Hollander, "John Bates Clark As An Economist," in *Economic Essays Contributed in Honor of John Bates Clark* (New York: Macmillan, 1927), 2.

extensive attention from popular writers on economics. Most famously, Wesley C. Mitchell (father of American institutional economics) wrote often about Clark, devoting pages to him in *The Backward Art of Spending Money* (1937).[91] Given this wide audience of influential readers, it is all the more significant that Clark devotes so much attention to the figure of the cultural worker in *The Philosophy of Wealth* and *The Distribution of Wealth.*

"What you say sounds so much like what Marx says on the same subject"

Clark, born in 1847, assumed the role of dean of the American economic profession in the last decades of the nineteenth century and the first decades of the twentieth, a position he maintained until his death in 1938.[92] Clark's colleague and friend Jacob Hollander wrote: "The real work of John B. Clark as an economist lies within the thirteen years from 1886 to 1899." In this period, during which Clark published *The Philosophy of Wealth* (the first presentation of "something approaching in systematic form Clark's basic ideas") and *The Distribution of Wealth* (which worked up this philosophy into a more or less complete system").[93]

Clark's father had worked as an official for the Corliss Engine Works in Providence, Rhode Island, before falling ill and moving the family to the Midwest. As a teen, Clark was called upon to manage family affairs as his father sought treatment for tuberculosis in Minnesota. Eventually, Clark would leave his studies at Amherst at the end of his junior year

[91] Wesley Clair Mitchell, *The Backward Art of Spending Money: And Other Essays* (New York: A.M. Kelley, 1950 [1937]), 154.rris
[92] Today, the American Economic Association awards a John Bates Clark Medal to "that American economist under the age of forty who is adjudged to have made a significant contribution to economic thought and knowledge."
[93] Jacob H. Hollander, "John Bates Clark As An Economist" in *Economic Essays Contributed in Honor of John Bates Clark* (New York: Macmillan, 1927).

to take over the family's plow business in Minneapolis. The young Clark traveled Minnesota's countryside, collecting payments from farmers and shopkeepers. Resuming his studies in 1871, Clark initially prepared for a career in the ministry, but was guided by his mentor, the Reverend Julius Seelye, to pursue a career in the burgeoning field of economics.[94]

Like many other intellectuals of his generation, Clark traveled to Europe for graduate study. Clark immersed himself in the new social science and political economy in Heidelberg and Zurich, and returned to the US in 1875, securing a lectureship at Carleton College in Northfield, Minnesota.[95] (It was at Carleton that Clark mentored the young Veblen). Clark moved on to a series of teaching jobs at Smith, Amherst, and Johns Hopkins, participating in the establishment of the American Economic Association in 1885, and settling at Columbia University in 1895. In the same period, inspired by the social and political turbulence of 1877, Clark published a series of articles that took seriously the moral critique of capitalism advanced by labor radicals. The most famous of these articles was "The Nature and Progress of True Socialism" (1879), which advocated a form of socialism that left intact a natural law defense of private property.[96] Clark affirmed the perception of many laborites and socialists that modern business retained a "remnant of natural ferocity." With the radicals and Populists, Clark criticized the punitive character of *laissez-faire*'s zero-sum game. Guided by a strong faith that the arrow of progress was pointed towards a more rational future, Clark speculated that capitalism might well transform itself into "the only socialism that can be

[94] For this biographical discussion, I draw primarily upon Chapter VIII ("John Bates Clark: The Conflict of Logic and Sentiment") of Dorfman's *Economic Mind*.
[95] Daniel T. Rodgers, *Atlantic Crossings Social Politics in a Progressive Age* (Cambridge, Mass: Belknap Press of Harvard University Press, 1998).
[96] John Bates Clark, "The Nature and Progress of True Socialism," *New Englander and Yale Review*, 38:151 (1879), pp. 565–82.

permanent or beneficial."[97]

Clark's corporatist vision may not strike us, today, as particularly exciting or radical. In its moment, however, there was something quite risky about a mainstream economist advocating a vision of a permanent solidarity of both capital and labor that would eliminate the worst pathologies of monopoly and engender maximum efficiency throughout the productive process.[98] In "The Nature and Progress of True Socialism," Clark deploys the newly mathematized techniques of economic research, popularized by William Stanley Jevons, in order to argue that a state of perfect competition could one day be achieved in which exploitation was totally eliminated, thereby registering a profound disagreement with the reigning vision of class struggle as natural, divinely ordained, or the product of the natural inferiority of the lower classes. For the Gilded Age socialist, Clark's political philosophy would no doubt have been waved away as a typical bourgeois fantasy: it offered decidedly weak tea where powerful critique and large-scale reforms were required. Clark ceded a place at the bargaining table to "rational" labor unions, but took issue with the legitimacy of the primary levers of working-class power: the closed shop, the struggle for the eight-hour day, and the right to exercise the strike power.

Whatever his own sentimental sympathies with left politics, then, Clark was always careful to affirm Mugwump *bona fides*. For the Gilded Age socialist, Clark's political philosophy would no doubt have been waved away as a typical bourgeois fantasy: it offered decidedly weak tea where powerful critique and large-scale reforms were required. Clark ceded a place at the bargaining table to "rational" labor unions, but took issue with the legitimacy of the primary levers of working-class power: the closed shop, the struggle for the

[97] Clark, "The Nature and Progress of True Socialism."
[98] Dorfman, *Economic Mind*, 193.

eight-hour day, and the right to exercise the strike power. At the same time, Clark supported Populist and progressive initiatives like the referendum and was open to the municipal-level "sewer socialist" drives to remove gas plants and other utilities from the market. Against the common "fear of bigness," hatred of monopoly in every form, and terror in the face of the growth of government, Clark thought it eminently reasonable to distinguish between the "natural enlargement of State functions," on the one hand, and the "doctrinarian policy of pushing such enlargements toward a goal," on the other. In this pragmatist accommodation, we might regard Clark as to the left of economists like Richard T. Ely—often depicted as the most radical of the postbellum economists. Ely was far more concerned with republican questions of "virtue" and "corruption" and perceived in the modern state and corporation moral dangers that seemed to Clark overdrawn.[99]

Clark's right-leaning fellow economists chafed at Clark's willingness to entertain—if mostly hypothetically—moral challenges to capitalism from below. Arthur Twining Hadley penned a critical unsigned review of *The Philosophy of Wealth* for the *Independent* magazine. Hadley, professor of political economy at Yale, author of several important works on railroads, cartelization, and regulation, and head of Connecticut's Bureau of Labor Statistics, accused Clark of falling prey to the "crudest socialistic fallacies" and warned that popular acceptance of Clark's work would lend credence to two doctrinal fallacies against which political economists waged daily battle: first, the idea that "labor creates all wealth," and second, the idea that "trade is a gain of one party at the expense of another." Letters exchanged between the two men reveals that Hadley perceived Clark's modest deviations from orthodoxy as a grave threat. "What you say sounds so much like what Marx says on the

[99] See, for example, Richard T. Ely, "Industrial Liberty." *Publications of the American Economic Association*, 3(1), 59–79, 1902; "Socialism in America." *The North American Review*, vol. 142, no. 355, 1886, pp. 519–25.

same subject," Hadley wrote Clark, "that readers will think that you object to speculation as such, and not merely to manipulation of the market."[100]

"Some one must labor, and some one's want must be satisfied"

The cultural worker makes an early appearance in *The Philosophy of Wealth.* Clark calls forth the figure of "the artisan" in order to protest against the bifurcation of labor into categories of "productive" and "unproductive." "the actor, the musical performer, the public declaimer or reciter, and the showman." Clark returns, again and again, to the keywords of "effort" and "gratification." By foregrounding these terms, Clark is able to challenge the reigning economic presuppositions of the post-Civil War moment—the labor theory of value and the utilitarian hedonic calculus.

What was needed, Clark suggests, was an altogether different posture or position in relation to Ricardian first principles—a stance open to unanticipated developmental tendencies and sensitive to the data of real life, rejecting at every turn the seduction of abstract models and fables of the origins of property and exchange.[101] To the significant extent that economic life is unthinkable without some correlation of labor and value, and unanalyzable without some correlation of consumer desires and prices, the older modes of analysis would have to be absorbed within—rather than negated by—any new synthesis. The example of the "artisan" fascinates Clark because, in so many cases, cultural work involves

[100] Hadley's review is quoted in Dorfman, *Economic Mind, Vol. III*, 195-96. On the relationship between Clark, Hadley, and Marxism, see Sklar, *The Corporate Reconstruction of American Capitalism*.
[101] See, for example, this passage: "That which was the basis of Ricardian economics is slowly passing out of existence at points where its presence is most needed, leaving society in a condition anomalous, full of peril, and demanding a prompt recourse to a new principle of adjustment in the distributing of the rewards of industry." Clark, *Philosophy*, 65.

the dramatization of the effortfulness of labor, and because cultural consumption seems so palpably guided by the desire for "gratification." To illustrate this point, Clark returns to the figure of the professional musician. Music, Clark observes, is a service that consists of both an "effort" and a "gratification." To produce this service, "some one must labor, and some one's want must be satisfied." Pure "effort," as such, gratifies no one. In and of itself, effort is "irksome to the laborer." In fact, our natural sympathies would render intolerable the witnessing of such an effort, "without outward results." Thus, the "artisan's effort" gives pleasure to the viewer or listener "only through the medium of the commodity which he produces."[102]

Clark decries the "intrinsic absurdity of calling a violin manufacturer a productive laborer," while categorizing the artist who plays the violin as an unproductive one. In such a formulation (favored by economists like John Stuart Mill), the violin would be classified as "wealth," while the music, the sole end of the violin's manufacture, was somehow to be labeled as "not wealth." For Clark, nothing could be more obvious than the commodity character of musical performance. The violinist "satisfies a direct want"—the listener's desire to hear music—while the violin itself satisfies only an indirect one. "The latter," Clark insists, "is an instrument for producing that which satisfies direct desire."[103]

In this light, differences between "mental" and "manual" labor were to be understood as relative, not absolute. "The mechanic who makes the violin imparts utility to wood," Clark observes, while "the artist who plays it imparts utility to air vibrations." Clark asks, therefore: what is the source of the ontological distinction at work here? "One product is perceived by the senses of sight and touch, the other by the sense of hearing," Clark

[102] Clark, *Philosophy*, 8.
[103] Clark, *Philosophy*, 16.

continues. “One is extremely durable, the other extremely perishable; but both alike come under our definition.” In both cases, a “natural agent has received a utility through human effort; both products are wealth, and both laborers productive.”[104] Clark seems almost convinced of this heterodox claim, although later in *The Philosophy of Wealth* he will slip back into conventional wisdom, confessing his belief that the “scientist differs in mental and physical development from the hand-worker.”[105]

Again and again, Clark returns to the case of the musician as paradigmatic cultural worker. *The Philosophy of Wealth* was written as the nineteenth century craze for virtuoso musical performance reached its crescendo. Economists had not convincingly accounted for the mysterious “X” that the musical virtuoso sold to audiences. Clark’s answer was straightforward and empiricist: what the musical virtuoso sold to the public was precisely the spectacularly dramatic display of effort applied to the interpretation of a musical text. We recall that performers on the late-nineteenth-century American circuit followed the model of Franz Liszt, who (in Charles Hallé’s telling) “created an odd appearance… this curious figure is in perpetual motion: now he stamps with his feet, now waves his arms in the air, now he does this, now that… stormy moments… followed by a soft abandonment, a melancholy full of grace and feeling, and then by magnificent audacity and noble enthusiasm … One no longer hears the piano—but storms, prayers, songs of triumph, transports of joy, heart-rending despair.”[106]

In a striking passage in *The Philosophy of Wealth*, Clark imagines a Lisztian virtuoso pounding away on a silent instrument: “Let an accomplished pianist advertise a concert on

[104] Clark, *Philosophy*, 16.
[105] Clark, *Philosophy*, 40.
[106] Charles Hallé, quoted in Stuart Isacoff, *A Natural History of the Piano: The Instrument, the Music, the Musicians—from Mozart to Modern Jazz, and Everything in Between* (New York: Alfred A. Knopf, 2011), 105.

one of Mr. Petersilea's mute piano-fortes, and promise to display a large amount of effort; how many tickets, at a dollar each, would he probably sell?"[107] Here, Clark invokes a recent technological innovation—a piano with dampened strings, which allowed music students to practice at home without disturbing the neighbors—in order to isolate that valuable "something" produced by the pianist.[108] Clark insists that the "musician's effort is displeasing in itself." In and of itself, the expenditure of effort registers as "annoyance," to both the performer and the listener. The piano player flailing away at a soundless instrument would indeed be an "unproductive laborer." But because the piano player does not play on some mute amalgam of wood and wires, but rather on a machine designed to produce pleasing tones at a powerful volume, the affective displeasure occasioned by the visual spectacle of the pianist's exertions is "counterbalanced." In fact, "a large balance of enjoyment is secured," for good measure, by the "objective effect" of the physical exercise: "musical sound."[109]

Drawing an analogy with public oratory—an important element of theatrical popular culture for much of the nineteenth century, in venues as diverse as the revival tent, the Chautauqua circuit, and the Athenaeum—Clark pushes the point: "Let a voiceless speaker attempt to entertain an audience by a similar display of effort; how long would the assembly remain together?" In both cases, "absolutely nothing would be wanting but the tenuous outward product—sound." This fleeting acoustic event, therefore, seems to play a most

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[107] Clark, *Philosophy*, 8. "Prof. Carlyle Petersilea Dead" New York *Times*, Jun 14, 1903, 8.
[108] "Mr. Petersilea is a musical author of great prominence, having published a series of technical studies which have met with highest praise from art critics everywhere. He is also the inventor and patentee of the Petersilea mute piano for thorough pianoforte practice, one hour being equal to four on the ordinary piano. The annoyance to neighbors by the use of this instrument is entirely avoided, and by its use perfect control, physically and mentally, of all the muscles of the arm, wrist, hand, and fingers is obtained." *Leading Manufacturers and Merchants of the City of Boston, And a Review of the Prominent Exchanges, Illustrated* (Boston: International Publishing Company, 1885).
[109] Clark, *Philosophy*, 8.

significant part in rendering the cultural commodity valuable. In the same way the violinist imparts utility to fiddle, Clark argues, so also the sculptor imparts utility to marble, the painter imparts utility to colors, the photographer imparts utility to chemical agencies and solar light, and the writer imparts utility to ink. "No utility of a higher order is conceivable," Clark writes, "than that which the writer imparts to ink and paper, and the speaker to vibrating air, namely, the capacity for conveying intelligence." In other words, the cultural worker imparts utility by providing aesthetic form. "All artistic productions," Clark avers, "are creations of form utility, and differ from each other only in the different agents to which this quality is imparted."[110]

At a more general level, *The Philosophy of Wealth* engages with the question of cultural work in order to contextualize the new sovereignty of consumer desire within the structure of American capitalism. For Clark, "desire" serves as the alternately beneficent and despotic authority overseeing all fields of production "into which an aesthetic element enters."[111] It was this new reality to which Clark seeks to orient himself—and this orientation is sought, throughout *The Philosophy of Wealth,* by way of a sustained consideration of the new figure of the cultural worker. Virtually every observer of late Victorian capitalism agreed that religious and traditionalist values no longer functioned to secure loyalty to the social order nor to legitimate the brutality of industrial work. At the dawn of the Progressive Era, economic life seems to derive either from the effects of aesthetic allure—the way that a beautiful object drew the eye or quickened the heartbeat, capturing the potential consumer

[110] Clark, *Philosophy*, 28.
[111] Clark, *Philosophy*, 47. On capitalism and desire, see William Leach, *Land of Desire: Merchants, Power, and the Rise of a New American Culture* (New York: Pantheon Books, 1993), and the critique of Leach in James Livingston, *Pragmatism, Feminism, and Democracy Rethinking the Politics of American History* (New York: Routledge, 2001).

and forcing him or her to spend—or the grim realities of market dependency, with the forced choice of work or starvation. These new realities pointed to a portrait a looming crisis of moral philosophy and political theology. What could possibly serve as a source of organic cohesion and social solidarity, what William James named the "moral equivalent of war," in a world organized only around a multiplicity of wants and satisfactions and absent some firmer agency of virtue and discipline?[112] What would guarantee that the new order would not descend into pure anarchy? Clark's attempts to answer these challenges by reframing desire itself, insisting that the "ideal wants" are all fundamentally "unselfish." Selfishness would always be counterbalanced by the thirst for the "true and the beautiful." Under the influence of such motives, society could "never be wholly given over to an ignoble scramble for profit."[113]

Clark experiments with a diagram of society organized solely around four protagonists: "Man, the consumer," who acquires "an infinitude of conscious needs" through social development, and "Society, the producer," diversifying its mechanisms so as to supply them all; "Society, the consumer," which develops "an infinitude of wants"; and "Man, the producer," who "specializes his industrial action so as to assist in supplying one of them." To this fourfold diagram, Clark adds a second set of distinctions, reducing all of wealth creation to four sorts of value-adding operations: "elementary utility," "form utility," "place utility," and "time utility." Cultural work provides the key examples of all but the first of these operations, which relates only to variations of the "vital forces of the soil."[114] Outside of

[112] William James, *The Moral Equivalent of War, and Other Essays; And Selections from Some Problems of Philosophy* (New York: Harper & Row, 1971). See also George Cotkin, *William James, Public Philosopher* (Baltimore: Johns Hopkins University Press, 1990).
[113] Clark, *Philosophy*, 45.
[114] Clark, *Philosophy*, 97.

agricultural work, cultural work is paradigmatic.

Thinking with the cultural worker allows Clark to correct against the partiality of a different sort of analytic gesture, exemplified by John Stuart Mill and late-nineteenth-century liberals. This was the classification of the laborer's "acquired skill" and "technical knowledge" as wealth. Implicitly, Clark is here attacking notions that, in more recent years, have become popular under the banners of "human capital" and "cultural capital."[115] Against such tendencies, Clark argues that cognitive ability is not a "possession." The brain is not equivalent to the industrial capacity of a firm's physical plant because abilities constitute a potential fortune rather than an actual one.[116] Skill only becomes an asset, for Clark, when mixed with labor. Clark here constructs the scaffolding upon which he will situate his argument that the products produced by cultural workers may be properly classified as "commodities. This argument will, in turn, serve as the basis for a reformulation of the very idea of the commodity, one that insists that, regardless of conventional distinctions between mental and manual labor, and corporeal and incorporeal goods, "the human effort which creates a product, calls into exercise activities physical, mental and moral."[117]

The "Mind-Bridge" and the "Mind-Ferry"

In the manner typical of social science of the 1870s and 1880s—and now familiar to us via the cases of Drone and Putnam—Clark outlines an evolutionary historical narrative to

[115] See Luca Flabbi, Roberta Gatti, *A Primer on Human Capital* (Washington. D.C.: The World Bank, 2018); Malcolm Harris, *Kids These Days: Human Capital and the Making of Millennials* (New York: Back Bay Books, 2018).
[116] Clark, *Philosophy*, 6.
[117] Clark, *Philosophy*, 7.

explain the emergence of modern economic institutions.[118] Like Drone and Putnam, Clark narrates a progression from occupancy or tenancy to possession. Hunting and gathering corresponds with only the most rudimentary forms of property: "the mere appropriation of the spontaneous products of tropical nature." In the absence of the state, humans spent most of their time in guarding their property. What must have transpired, then, was some revolution, in which the "capacity to be owned" in the manner of private property developed. *The Philosophy of Wealth* posits an upward movement of property-as-value-form, from primitive territory policed in the manner of an animal guarding its turf to the highest manifestations of property as intangible and invisible collocations of semiotic materials. "It is a mark of progressing civilization," Clark suggests, "when the products of labor, the objective elements in service, take as their basis the more tenuous materials given in nature." Thus, as the "thought of man impresses itself on vibrating air or makes electricity its messenger to remote regions," a certain supremacy over natural forces, the mark of intellectual sovereignty, is asserted. In a highly organized society, the "more ethereal products of human effort" come to constitute greater portions of overall wealth.[119] To achieve such "ethereal products of human effort," a parallel evolution in the legal order was required. Clark insists on the interrelation of economic form and legal institutional capacity: "The condition of appropriation is a relation between commodities, on the one hand, and persons, on the other, and implies, therefore, that both the commodity itself and the society where it exists should be such that the relation may be established."[120] In language reminiscent of William James's *Principles of Psychology*, Clark invokes the metaphor of a "mind-bridge" as

[118] Oliver Wendell Holmes, Jr,. *The Common Law* (Cambridge: Belknap Press, 2009 [1881]).
[119] Clark, *Philosophy*, 9.
[120] Clark, *Philosophy*, 11.

the vehicle of transport that mediates between the material and the purely ideational. [121] Clark offers as an example of the "mind-bridge" the phenomenon of literary publication, which renders "an interchange of mental products possible, as the bridge over the stream does of material products."

Daniel Czitrom observed in his classic study *Media and the American Mind* that the very notion of communication in the nineteenth century often overlapped with the idea of "transportation."[122] More recently, Joe Milutis has documented the many ways in which this overlap of metaphors of communication and transportation in the Victorian Era shaded over into spiritualist interest in telepathy, spirit possession, and hypnagogy.[123] *The Philosophy of Wealth* illustrates these tendencies throughout, invoking the allegorical figures of bridges, canals, streams, and ferries to concretize the evanescent labor of the artist and performer.

Clark argues that economic value may be created by means of "place utility": "A material in the requisite form may need removal to the proper place in order to enable it to satisfy wants." Transportation, Clark writes, "confers on commodities the utility of being where they are wanted." In the age of the telegraph, photography, and the incipient technologies of phonography and cinema, this transportational frame was an attractive tool for arguing that cultural work creates value. We recall, for example, the way in which Samuel B. Morse's telegraphic revolution earlier in the century was always contrasted with semaphoric systems for relaying information over long distances (for example, older arrangements of evenly spaced towers that allowed for the relaying of simple messages one

[121] William James, *The Principles of Psychology* (New York: Dover Publications, 1950 [1890]).
[122] Daniel J. Czitrom, *Media and the American Mind: From Morse to McLuhan* (Chapel Hill: University of North Carolina Press, 1982).
[123] Joe Milutis, *Ether: The Nothing That Connects Everything* (Minneapolis: University of Minnesota Press, 2006).

colored flag at a time).[124] There was something new and powerful about Morse's idea that messages could travel uninterrupted over lengths of wire, and eventually by more modern methods that required only the medium of the ether. This is the broad context we should keep in mind as we read Clark on cultural work as a sort of carrying trade.

Clark writes, for example, that human minds "are united in organic life by the one means of communication as bodily activities are by the other." An author's printed writing serves as a "mind-bridge," while an orator's speech functions as a "mind-ferry." Just as the boats of America's large river systems conveyed the farmer's produce to the grocer, "so the words of a public speaker, floating on air… convey his intellectual products to the place where they find their market."[125] As he constructs these metaphors of communication and transportation, Clark encounters a certain heuristic difficulty. Where exactly do "ideas" fit into the schema of mental labor? How do we account for the extraordinary monetary and social value attached to certain works of art and literature, which seem to exceed any rational calculus of "effort" and "gratification"? What of the tricky epistemological puzzles that plague intellectual property law vis-à-vis the relation of "originals" to "copies" and "ideas" and "expression"?[126]

"It is obvious," Clark writes, "that in literary and oratorical products, the utility imparted by the human efforts" transcends the materials upon which they work. Clark's models of "mind-bridge" and "mind-ferry" become increasingly unwieldy. We watch as they spin out of control: "The articulate sounds of the speaker are the ferry-boat; the ideas are the

[124] Kenneth Silverman*, Lightning Man: The Accursed Life of Samuel F.B. Morse* (New York: Alfred A. Knopf, 2003).
[125] Clark, *Philosophy*, 17.
[126] See Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship Appropriation and the Law* (Durham: Duke University Press, 1998). Jane Gaines, *Contested Culture: The Image the Voice and the Law* (Chapel Hill: University of North Carolina Press, 1991).

cargo, and the latter may exceed the former in value to an indefinite extent. In this case boat and cargo are a simultaneous product; the boat is fitted, in form, to every different lading, and the two, as an industrial product, are inseparable." Perhaps aware of how tortuous this train of thought had become, Clark admits: "This illustration affords the most searching test of our definition of wealth."[127]

In addition to "place utility," Clark argues that cultural work can create "form utility," by giving temporary fixation to free-floating feeling and ideas. Clark writes: "The mason imparts utility to the stone of the bridge, and the boat-builder to the wood of the boat; the writer imparts a higher utility to ink, and the speaker to sound." "All are productive laborers" and their products "fall within our definition of wealth." In fact, "the intellectual fashioners of tenuous material who are social workers par excellence, since the diffusion of thought which their products ensure gives intellectual life to the social organism."[128] The discrete thought, for Clark, is inalienable. It cannot be bought in its pure form. "It only acquires the attribute of transferability," Clark writes, when it attaches itself to the "agent" — the "vocal sound." The "apparently trifling agent" of the "vocal sound" transforms the thought from "a simple activity" into an "industrial product." Passed from hand to hand, this "industrial product" receives its price in the market, and, for the brief period of its duration, is "entitled to its place on the inventory of social wealth." Although the evanescent cultural commodity––the musical performance, the public lecture—persists, in a fashion, in the mind of consumers and audiences, it loses its transferability once it parts with its "material vehicle, the sounds that convey it." It then reverts to being a "simple activity" rather than an industrial product." The thought may once again become an "industrial product," at some point in the

[127] Clark, *Philosophy*, 17.
[128] Clark, *Philosophy*, 17.

future, but in order to be so transmuted, it "must be freighted again on vocal sounds."[129]

The "*Vis A Tergo*" and the Siren

Having worked out the "gratification" side of the argument, Clark turns again to the question of "effort." Just as the "widest range of application" is granted to the potential set of materials that can be turned into "mind-bridges" and "mind-ferries," so, Clark argues, must "an equally broad application… be given to the term labor." *The Philosophy of Wealth* argues that "human activity which produces wealth" ought to be seen as always combining "physical, mental, and moral" dimensions, and concludes that "there is no industrial product so simple and so purely material that these three elements of the human agency are not represented in it."[130] Value accrues to activities in which "the intellectual element in the labor predominates over the physical," and accumulates in even greater intensity to the degree that the moral element is visible. The further a product moves away from the merely material, the higher it rises in the "scale of respectability and of value." But Clark takes pains to emphasize the moral and intellectual effort inherent in, for example, the work of the stonemason: a line of argument that echoed similar claims articulated by John Ruskin and William Morris.[131]

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[129] Clark, *Philosophy*, 18.
[130] Clark, *Philosophy*, 19.
[131] Clark invokes Ruskin sporadically throughout the text. For example, "As Mr. Ruskin has well said, such disturbing influences are rather chemical than mechanical. 'We made learned experiments upon pure nitrogen, and have convinced ourselves that it is a very manageable gas; but behold! the thing which we have practically to deal with is its chloride, and this, the moment we touch it on our established principles, sends us with our apparatus through the ceiling.'" See Peter Anthony*, John Ruskin's Labour: A Study of Ruskin's Social Theory* (Cambridge: Cambridge University Press, 1983) and E. P. Thompson, *William Morris: Romantic to Revolutionary* (Oakland, CA: PM Press, 2011).

As with the English Romantic critique of capitalism, Clark seeks for evidence of this moral and intellectual effort in the skilled trades in the comparison of well-made objects and shoddily produced commodities. Proceeding with such an analysis, Clark highlights the proximity of manual and mental labor. Just as the results of physical effort may be seen in the "position of the materials that have been moved in the construction," those of intellectual effort may be seen in the "strong and tasteful arrangement" of materials. "In literary, professional, and educational labor," Clark observes, "the intellectual element, of course, predominates to an indefinite extent over the physical, and the moral element is greatly increased." This moral element figures in the labor of the writer as sincerity and in the labor of the lawyer and the physician as disinterestedness. What must be emphasized here is the novelty of grouping these various kinds of workers together. If, for example, "reliability" is valued by consumers in both the construction of homes and the assembly of novels, then a radical continuity of mental and manual labor might be posited without any special pleading. "In view of the constant presence of these three elements in labor, the physical, the mental, and the moral," Clark insists, "any effort, in the supposed interest of the working classes, to depreciate mental labor in comparison with physical is unintelligent."[132]

Clark distills these thoughts in a forceful phrase: "all labor is mental." This is true up and down the class ladder. Clark suggests that "the mental element is present in the simplest operations." Shoveling in the gravel pit requires the "directing and controlling influence of the mind." To the degree that the laborer is able to secure higher wages than those paid to oxen and other beasts of burden, Clark concludes, the laborer "may place the difference to the credit of intellectual labor." Clark proceeds from this human-animal comparison to a

[132] Clark, *Philosophy*, 182.

restatement of the argument he had earlier articulated in regard to musical performance as capitalist commodity. We do not pay for labor, as such, but for the pleasures of the product that would not exist save for the exertions of certain workers. "No employer takes pleasure in the sweat of his laborer's brow," Clark insists. The employer, in fact, regrets that the worker must sweat. He "would willingly pay the same compensation to the same person if that particular product could be produced, by that person only, without effort."[133]

Why is Clark so insistent upon this point? Why does his distinction between labor-power and labor (to phrase the matter in Marxist terms) seem to require this fantasized sociology of work, one that is almost comically detached from the everyday sadism of the late Victorian employer-employee relationship? Much of the answer must be sought in the texts against which Clark polemicizes. In particular, he pushes back against the conventional presentation of labor as a simple commodity that is governed by the same laws as other commodities, calling it "one of the mischievous errors that still cling to the science." Clark rebels against the commonplace notion that all wealth derives from labor.[134] **"**Labor," Clark insists, "is the *measurer*, not the originator" of the utility of products. Value cannot be traced back to actual inputs of labor injected into a commodity. Rather, it is "imagined" or "hypothetical" labor that organizes the process of valuation.[135] Clark fantasizes a million-dollar sparkling diamond as an example of the constitutive role of "hypothetical labor" in determining value. A precious stone, discovered accidentally, "does not owe its utility to any

[133] Clark, *Philosophy*, 21.
[134] "Few statements are more common in text-books of Political Economy," Clark writes, "than the assertion that nothing can constitute wealth which is not the product of labor." Clark, *Philosophy*, 21.
[135] Adam Smith was not wrong, Clark stresses, to have pushed for a new understanding of labor's productivity against the "pernicious systems" of the Mercantilists and the Physiocrats. But Smith's theory was grounded in a "grand error" and the time had "abundantly arrived for its critical examination and essential modification." Clark, *Philosophy*, 23. On these rival schools see, Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (New York: Pantheon Books, 1971), and Mary S. Morgan, *The World in the Model: How Economists Work and Think* (Cambridge: Cambridge University Press, 2012).

labor actually expended in its production." Instead, the measure of its value is arrived at by way of a "calculation in the mind of the purchaser as to how much labor would be necessary in order to obtain another like it."[136]

The labor theory of value could not explain why a medical discovery created new demands for some species of vegetation that had only moments earlier seemed "valueless." The given plant would immediately be seen as highly valuable, but this rise in value "would not be traceable to any labor expended in its production." After all, if labor really functions as "talisman" which turns everything to gold, then "the slag of a blast-furnace" should have as much value as the iron. The difference between them had to be ascribed to utility rather than origin. The possession of want-satisfying products is what the laborer seeks, and desire is the moving force in the whole process. Labor is not to be conceived of as the "*vis a tergo*" (or "force acting from behind") that pushes wealth forward.[137] Rather, wealth is to be conceived of as the "siren" that lures labor onward. The aesthetic beckons, and political economy follows. In such an order, the cultural worker has as valid a claim to residence in the house of labor as anyone else—perhaps, the most valid claim of all.

Oliver Wendell Holmes, Jr.: "The Taste of Any Public Is Not To Be Treated With Contempt"

A reader of the early chapters of the biography of Oliver Wendell Holmes, Jr. (1841-1935) would not find it at all surprising that Holmes would come to take on the task of synthesizing the various currents of thought related to the cultural worker, concretizing the cultural worker as the central character of intellectual property jurisprudence. The young

[136] Clark, *Philosophy*, 23.
[137] Clark, *Philosophy*, 25.

Holmes, eldest of three sons in a prominent Boston family, grew up in the shadow of his father, a poet and popular writer, famous for penning the "Autocrat of the Breakfast Table" stories that the *Atlantic Monthly* began publishing in 1857. As a boy, Holmes was friendly with William and Henry James, and they remained close throughout their adult lives. As a young man, Holmes cultivated aesthetic interests, devouring the writings of John Ruskin, and gaining familiarity with the classics and masterworks of European art. [138]

Holmes enrolled in Harvard in 1857. Holmes's senior year at Harvard had coincided with the outbreak of the Civil War. He left his studies to fight with the Union Army from 1861 to 1864, suffering three serious war injuries. The experience of war shook Holmes, provoking a moral and epistemological crisis; he told a correspondent that "after the Civil War, the world never seemed right again." (In later writings, he would adopt a more Romantic reverence for military service). Never particularly religious, in the aftermath of the Civil War, Holmes wrestled with the challenges of Darwinism and the new realities of corporate capitalism. With William James and Charles S. Peirce, Holmes sought to explain the flux and decenteredness of the contemporary moment by searching the history of philosophy, revising and rejecting many of its premises while building the new mode of thinking that would come to be known as American Pragmatism.[139]

At some point around 1870, Holmes began to explore a pragmatic and philosophical approach to jurisprudence, which strengthened his identity as a legal scholar and theorist of legal history. Holmes sought to organize the "ragbag of details" of the common law tradition

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[138] G. Edward White, "Introduction" in *The Common Law*. Edward G. White, *Oliver Wendell Holmes Jr*. (Oxford: Oxford University Press, 2006); Mark De Wolfe Howe, *Justice Oliver Wendell Holmes* (Cambridge Mass: Belknap Press of Harvard University Press, 1957); Frederic Rogers Kellogg, *Oliver Wendell Holmes Jr. and Legal Logic* (Chicago: University of Chicago Press, 2018).
[139] Seth Vannatta, ed., *The Pragmatism and Prejudice of Oliver Wendell Holmes Jr*. (Lanham Maryland: Lexington Books, 2019).

into a stable, scientific object that could be analyzed anew. Much of this preliminary work was sketched out in a series of articles for the *American Law Review* (where Holmes also served as an editor) in the 1870s, and in the editing of the twelfth edition of James Kent's *Commentaries on American Law*. In 1880, Holmes presented the fruits of his research on the history of common law to the public, in the form of the Lowell Institute Lectures in Boston, later to be published to great acclaim as *The Common Law*.[140]

Shortly thereafter, Holmes assumed a teaching position at Harvard Law School, but left almost immediately upon arrival, having been offered a position as Associate Justice on the Supreme Judicial Court of Massachusetts in late 1882. Holmes served as Associate Justice of the SJC until 1899, and as Chief Justice between 1899 and 1902, at which point he accepted President Theodore Roosevelt's offer of a position on the US Supreme Court. Following his confirmation by the Senate on December 4, 1902, Holmes served for thirty years. For the generation of young lawyers who would cluster around the cause of "Legal Realism," Holmes was a role model and inspiration. While never entirely comfortable with the label of "Pragmatist," Holmes demonstrated throughout his career fidelity to the experimental, process-oriented, and progressive epistemology that he and his philosopher friends had pioneered in the 1860s. Holmes's pragmatic attitude to jurisprudence on matters related to cultural work is particularly illuminating of his general style and approach.[141]

In much the same way that John Bates Clark saw cultural work as a problem for traditional conceptions of the economy, Oliver Wendell Holmes, Jr. saw cultural work as a problem for traditional conceptions of the law of property. Whereas Clark was attracted to

[140] Oliver Wendell Holmes, Jr,. *The Common Law* (Cambridge: Belknap Press, 2009 [1881]).
[141] Thomas C. Grey, "Holmes and Legal Pragmatism" *Stanford Law Review*, Vol. 41, No. 4 (Apr., 1989), pp. 787-870.

the problem of the cultural worker because of its salience to long-running debates about "productive" and "unproductive" labor, Holmes's connection to the problem of the cultural worker was largely shaped by the multiple crises set in motion by the mnemotechnological revolution of the late nineteenth century. We recall Putnam's insistence upon the "steady progress of the idea that the *literary laborer* is worthy of his hire," and his anxiety that tensions between the rising legitimacy of the "literary laborer" and "new processes of reproduction of works of art, etc.," were not adequately provided for in existing legislation.[142] Legal clarification was required in order to secure "consistent, enduring, and satisfactory legislation," and to forestall "needless business perplexities necessitating for their solution frequent appeals to the courts." It was precisely this call for the refinement of intellectual property law, and alignment with the desire to reduce "needless business perplexities," that motivated Holmes to challenge conventional wisdom in a series of precedent-setting rulings. Holmes's contributions to the theorization of the problem of the cultural worker may be found in three major copyright-related Supreme Court decisions: *Bleistein v. Donaldson* (1903), *White-Smith v. Apollo*, and *Herbert v. Shanley* (1917).[143]

Bleistein v. Donaldson

In his comprehensive survey of the history of copyright law in the US, legal scholar William Fisher identifies *Bleistein v. Donaldson* as an inaugural event.[144] With *Bleistein*, Holmes initiated a dramatic reshaping of intellectual property doctrine into an expansive

[142] Putnam, *The Question of Copyright.*
[143] *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903); *White-Smith Music Publishing Company v. Apollo Company*, 209 U.S. 1 (1908), *Herbert v. Shanley Co*., 242 U.S. 591 (1917).
[144] See William W. Fisher III, "The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States." http://cyber.law.harvard.edu/people/tfisher/iphistory.pdf

doctrine accommodative of popular culture's unwieldy propensity to continually produce new varieties of texts and commodities. For all of its historical importance, however, *Bleistein* strikes the reader today (in legal scholar Diane Leenheer Zimmerman's words) as "an unprepossessing case, involving a garden-variety claim of copyright infringement."[145] We need to dig deeper to appreciate how such a run-of-the-mill legal fight could have resulted in so philosophically rich and materially transformative a judicial ruling. The case involved a conflict between two lithography companies: George Bleistein's firm (the Courier Lithographing Company) and its competitor, the Donaldson Lithographing Company. Courier had designed and printed advertising posters for the Great Wallace Shows, a traveling circus based in Indiana. When the circus ran out of posters, it bypassed Courier, and instead asked Donaldson to print additional copies (using Courier's designs as models for the new posters). These were the acts of ostensibly illegitimate copying for which Bleistein sought damages, in the amount of one dollar per sheet.

As the litigation moved its way up from district to Supreme Court, debates over the niceties of the distinction between "originals" and "copies" were superseded by a larger debate regarding the suitability of mass-reproduced circus posters as proper objects of copyright protection. This debate resonated with a range of turn-of-the-century sources of anxiety: about the fate of art in the age of advertising, about Victorian propriety in the age of vaudeville, about the ever-shifting character of taste hierarchies, class antagonisms, radical identity, and gendered ways of looking and knowing. Traditional legal thinkers had long wished to refine copyright as a unique privilege of elites, available only to those capable (in

[145] Diane Leenheer Zimmerman, "The Story *of Bleistein v. Donaldson Lithographing Company*," in Jane C. Ginsburg and Rochelle Cooper Dreyfuss, *Intellectual Property Stories* (Thomson West Law: Kindle Edition, 2010), 77.

the language of Victorian legal discourse) of "an original mental conception." Against such elitist visions, Holmes insists in *Bleistein* that every "personality" has in it "something irreducible, which is one man's alone." This minimal level of personal uniqueness might be expressed in an expression as humble and quotidian as a distinctive style of handwriting:

> The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[146]

Copyright law, if was is to serve its purpose in an increasingly democratic and technologically mediated mass society, was required to take as its measure this trace evidence of individuality (we might say, in the more formal philosophical terms favored by some of Holmes's pragmatist peers, that the maturation of capitalism demanded of the law a recognition of the *haecceity*—the special "this-ness"—denoted by each subject's proper name).[147]

"I fired off a decision upholding the cause of law and art," Holmes wrote to a friend after he was done with the *Bleistein* case, "deciding that a poster for a circus representing décolletés and fat legged ballet girls could be copyrighted."[148] Holmes here rejects class-bound taste hierarchies. The novelty of the *Bleistein* ruling rested in Holmes's skepticism about the ability of judges to properly evaluate aesthetic merit: the daring suggestion that "the taste of any public is not to be treated with contempt." This was to serve as the most lasting influence of *Bleistein*, and to shape, in turn, the subsequent development of the legal

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[146] *Bleistein* v. *Donaldson Lithographing Co.*
[147] On pragmatism and "haecceity," see T. L. Short, *Peirce's Theory of Signs* (Cambridge: Cambridge University Press, 2007).
[148] Quoted in Barton Beebe, "Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law," *Columbia Law Review*, Vol. 117, No. 2, 2017.

conception of the cultural worker. In 1903, in most corners of the US, the line separating "art" from "not-art" was still quite rigid. Conventional wisdom increasingly held that all but the finest art might be poisonous to public morality.[149] At the same time, the new demotic arts continued to grow in economic power and ideological influence. In *Bleistein*, Holmes does more than simply declare that circus posters might be art: he also suggests that the person who produces the circus poster might be an artist or author.

As Holmes worked out his argument for the unproblematic inclusion of circus posters within the ambit of copyright law, the class antagonisms at the heart of copyright doctrine became increasingly obvious. Holmes takes pains to point out that the "illustrations or works connected with the fine arts" covered by copyright law were not to be contrasted with "works of little merit or humble degree, or illustrations addressed to the less educated classes." What lay beyond the penumbra of copyright coverage was purely commercial speech and expression: only "prints or labels designed to be used for any other articles of manufacture" were categorically excluded.

The circus posters at the center of *Bleistein* were, undeniably, commercial advertisements. Many Progressive Era Americans felt that commercial displays should be excluded from copyright law or covered instead by trademark law. Furthermore, these posters were advertisements for a circus, a "lowbrow" form of popular entertainment. Waving away these mitigating factors, Holmes argues: "A picture is nonetheless a picture and nonetheless a subject of copyright that it is used for an advertisement." The posters were also artifacts of a new technology of mass reproduction: "chromo-lithography." As an 1896 dictionary explains, "chromo-lithography" is a "method of producing colored lithographic

[149] See Boyer, *Purity in Print*, and Anthony Comstock, *Morals Versus Art* (New York: J.S. Ogilvie, 1887).

pictures by the use of a number of prepared lithographic stones," in which the general outline or skeleton design is traced and then transferred to a keystone, after which copies are made, with tints added, color by color, with separate stones. The process as a whole consists of a "first impression," which is followed by a gradual filling-in of color, adjusted by means of a process called "the register," ensuring that the shades don't bleed into one another. Some printers conclude with a final process, in which the sheets are passed through an embossing-press, "to give them a canvas-like surface."[150]

For some Gilded Age intellectuals, "chromo-lithography" possessed tremendous allegorical weight. As with Marshall McLuhan's reflections in the 1960s on the rise of television, "chromo-lithography" struck many as a case of the medium embodying the message. As an apparatus for reproducing images that required intensive skill and effort that was not, at the same time, the special human creative labor of the painter or engraver, the "chromo-lithograph" confronted many viewers as a "mere copy," problematic to the extent that it fell short of the oil painting's auratic quality. The "chromo-lithograph" was therefore the medium of the *parvenu*; and the world it had brought into being was ersatz, superficial, and insincere. In his essay "Chromo-Civilization" (1874), liberal pundit and *Nation* editor E.L. Godkin invokes the lithograph in exactly this way, lamenting the "strange mental and moral conditions" endemic to urban life.[151] Godkin bemoans a number of recent trends. Newspapers and other cheap periodicals, in addition to lyceum lectures and small colleges, "have diffused through the community a kind of smattering of all sorts of knowledge, a taste

[150] William Dwight Whitney and Benjamin Eli Smith, *The Century dictionary and cyclopedia, a work of universal reference in all departments of knowledge with a new atlas of the world*, Volume II (New York: The Century Company, 1896), 988.
[151] Edwin Lawrence Godkin, *Reflections and Comments, 1865-1895* (New York: C. Scribner's Sons, 1895). See also, Alan Trachtenberg, *The Incorporation of America: Culture and Society in the Gilded Age* (New York: Hill and Wang, 1982).

for reading and for 'art'—that is, a desire to see and own pictures—which, taken together, pass with a large body of slenderly equipped persons as 'culture.'" True culture, Godkin insists—"*culture*, in the only correct and safe sense of the term"—must be the "result of a process of discipline, both mental and moral." Culture is "not a thing that can be picked up, or that can be got by doing what one pleases." Godkin continues: "the man of culture is the man who has formed his ideals through *labor* and *self-denial*."

Insufficient effort led to the "mischievous effects of the pseudo-culture." Culture "ought to affect a man's whole character" and not merely store facts in his memory. The new "chromo-civilization" posed severed dangers, then, to the "future of the Anglo-Saxon race" in America. "A large body of persons has arisen, under the influence of the common schools, magazines, newspapers, and the rapid acquisition of wealth," Godkin protests, "who are not only engaged in enjoying themselves after their fashion, but who firmly believe that they have reached, in the matter of social, mental, and moral culture, all that is attainable or desirable by anybody, and who, therefore, tackle all the problems of the day… with supreme indifference to what anybody else thinks or has ever thought, and have their own trumpery prophets, prophetesses, heroes and heroines, poets, orators, scholars and philosophers, whom they worship with a kind of barbaric fervor." The result? A "kind of mental and moral chaos, in which many of the fundamental rules of living, which have been worked out painfully by thousands of years of bitter human experience, seem in imminent risk of disappearing totally."[152]

If the very form of the circus posters inspired terror in liberal critics like Godkin, their content struck many as scandalous for more obvious reasons. The posters depicted humans in

[152] Godkin, *Reflections and Comments*.

states of near-nudity. A lower circuit judge had ruled that the posters were "frivolous" and "to some extent immoral in tendency," and opined that "unchaste acts of scenes calculated to excite lustful or sensual desires in those whose minds are open to such influences." Lawyers argued that such posters fell outside the penumbra of copyright law because the law "does not protect what is immoral in its tendency." For Holmes, such Victorian prudishness was an embarrassment to the law. To further enhance our understanding what was at stake in *Bleistein* in class terms, it is instructive to observe the ways in which Holmes's ruling has been interpreted in subsequent case law. Reading legal scholar Christine Haight Farley's summary of *Bleistein*'s legacy helps bring further into focus the political significance of what might seem at first glance a simple case concerning the reproduction of circus posters. Farley notes that in recent cases, *Bleistein* has often been invoked to underwrite statements like: "whether we personally regard (the Defendant's song) as repulsive trash or a work of genius is immaterial," and to ground assertions that "copyright laws apply equally to all expressive content, whether we deem it of trifling importance or utmost gravity." *Bleistein* is enlisted to buttress the view that whether "parody is in good taste or bad does not and should not matter to fair use." In contemporary obscenity cases, *Bleistein* often serves as the warrant for arguments that "the values of the First Amendment are best served by extending copyright protection to all art, without regard to official perceptions of its merit." One decision cites *Bleistein* as establishing that:

> Neither the Constitution nor the Copyright Act authorizes the Copyright Office or the federal judiciary to serve as arbiters of national taste. These officials have no particular competence to assess the merits of one genre of art relative to another. And to allow them to assume such authority would be to risk stultifying the creativity and originality the copyright laws were expressly designed to encourage.[153]

[153] Christine Haight Farley, "Judging Art." 79 *Tul. L. Rev.* 805, March 2005 (N. 36). The cases cited by Farley are these: *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d (9th Cir. 2003); *Parks v. LaFace Records*, 329 F.3d

Earlier rulings drew on *Bleistein* to dispel the idea that the word "art" in the Copyright Act "imported any idea of merit or high degree or appeal to the better educated classes," and to argue against the notion that a given film was "so trivial, vulgar, and of such little artistic value" as to fall below the threshold of copyright protection. Late Progressive Era judges read *Bleistein* as mandating that copyright law is "not confined to pictorial illustrations known as works of fine arts," and clarifying that in copyright infringement suits, "it makes no difference that the pictures… possessed little artistic merit."[154]

Holmes's ruling in *Bleistein* announced the arrival of a new legal position vis-à-vis the politics of taste. It took a firm stand against the law's fear of sexual frankness and prophylactic concern with the moral danger of demotic expression. Holmes's ruling blurred the boundaries between the "beautiful," the "morally uplifting," and the "valuable." Holmes rejected as old-fashioned any aesthetic theory that would demand a functionally "useless" object, brought into the world by an "artist" (and, emphatically, not created by an "artisan" or "worker"). Holmes, an aesthete and art lover, continued to revere European masterpieces, but was open to the possibility that other varieties of merit—perhaps new and unforeseen varieties ushered in by changing historical conditions—might happily supplement the existing standard.

437, (6th Cir. 2003); *SunTrust Bank v. Houghton Mifflin Co*., 268 F.3d [11th Cir. 2001]); *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. (1994); *Haberman v. Hustler Magazine, Inc*., 626 F. Supp. (D. Mass, 1986); *Gracen v. Bradford Exchange*, 698 F.2d (7th Cir. 1983); *Mitchell Bros. Film Group v. Cinema Adult Theater* 604 F.2d (5th Cir. 1979); *Esquire, Inc. v. Ringer,* 591 F.2d (D.C. Cir. 1978); *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.,* 169 F. Supp. (S.D.N.Y. 1959); *Vitaphone Corp. v. Hutchinson Amusement Co*., 28 F. Supp. (D. Mass. 1939); *Ansehl v. Puritan Pharm. Co*., 61 F.2d (8th Cir. 1932); *Nat'l Cloak & Suit Co. v. Kaufman,* 189 (C.C.M.D. Pa. 1911); *Stecher Lithographic Co. v. Dunston Lithograph Co*., (W.D.N.Y. 1916).

[154] Christine Haight Farley, "Judging Art."

Holmes thus insists that "ordinary posters" are "good enough" to be considered as falling within copyright law's scope: "works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if use means to increase trade and to help make money." Like his old friend Charles S. Peirce, Holmes lays stress upon the centrality of the "symbolization" process (what Peirce described as "the imaginary operations by which novel symbols are generated").[155] For Holmes as for Peirce, the human imagination is irrepressibly "symbolific." If "symbolization" could be understood as a species of work, akin to Clark's "form utility," then the distinctions between artist and craftsperson, mental and manual worker, and even, under certain circumstances, producer and consumer, might melt into thin air.[156]

Holmes's treatment of the pressing question of how new technologies ought to be processed by copyright law *Bleistein* also has consequences for the evolution of the idea of the cultural worker. Holmes recalls that the "authors" and "writings" addressed by the 1790 Copyright Act had been treated experimentally throughout the nineteenth century. Bleistein's lawyers took pains to remind the Court that designers, engravers, lithographers, and photographers had all been assimilated under copyright's umbrella over the course of the previous hundred years. In 1884, the Supreme Court had ruled in *Burrow-Giles Lithographic Co. v. Sarony* that photography might qualify as sufficiently artistic to merit copyright protection, with the requirement that some trace of authorial labor survived the production process— in the form of framing, dressing, posing, etc. *Burrow-Giles* established a binary

[155] Charles S. Peirce, quoted in Vincent Colapietro's entry on Peirce in John R. Shook and Joseph Margolis, eds., *A Companion to Pragmatism* (Blackwell: Malden, MA, 2006). See also Vincent Colapietro, "C.S. Peirce, 1839-1914" in Armen T. Marsoobian and John Ryder, eds., *The Blackwell Guide to American Philosophy* (Blackwell: Malden, MA, 2004). 83.
[156] See Clark, *Philosophy*, 26. For a related argument, see Jonathan Beller, *The Cinematic Mode of Production Attention Economy and the Society of the Spectacle* (Hanover, N.H.: Dartmouth College Press, 2006).

framework for the contemplation of the copyrightability of new technologies. Thus, in *Bleistein*, the default question was whether lithographed circus posters were more like a formal photographic portrait of a dignified subjects, or more like a humble snapshot, a mere snippet of "real life."[157]

In *Bleistein*, Holmes presents a subtle but consequential critique of the *Burrows-Giles* Court's aesthetic traditionalism. The old masters had often been rejected by reigning authorities of their times and places. Holmes's perspective was true to the Pragmatist "revolt against formalism": he looked askance at all transhistorical notions of greatness or value. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations," Holmes maintains, "outside of the narrowest and most obvious limits." At the one extreme, some "works of genius"—perhaps those of a Goya or Manet—would be "sure to miss appreciation" as their "very novelty would make them repulsive until the public had learned the new language in which their author spoke." At the other extreme, "copyright would be denied to pictures which appealed to a public less educated than the judge."[158]

Like Clark, Holmes defines "value" as simply a reflection of the collective judgment: "That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them." Commercial artworks are valuable because people like them, and "the taste of any public is not to be treated with contempt." Taste may be fleeting, but then again, so is everything else: "It is an ultimate fact for the moment, whatever may be our hopes for a change." Holmes refuses to countenance the defense's insistence that the circus posters are

[157] Beebe, "Bleistein, the Problem of Aesthetic Progress, and the Making of American Copyright Law."
[158] *Bleistein* v. *Donaldson Lithographing Co.*

not art because they apparent appeal to the attentional economy of sensation. Here, we see another sign of Holmes's entanglement in pragmatist theory. For Peirce and James, all of the objects and experiences in the world are "passing fancies." Ephemerality, after all, was the very essence of ontology (a notion that Pragmatist fellow traveler Alfred North Whitehead would later label "the specious present"). Holmes *approved* of the circus posters on precisely the terms that served for aesthetic traditionalists as grounds for an indictment. These posters were not designed for "close inspection or long-continued study, like an oil painting, a steel or wood engraving, or an etching" were therefore not to be judged by the same standards. Their design reflected the intention of catching the "eye of the passer on the street, or any one who merely glances at them," and to thereby "challenge his attention." They intended to "illustrate something, and to advertise it by appealing quickly to the imagination, and conveying instantly a strong and favorable impression." On their own terms, these posters, to be successful, required "artistic ability, and above all things creativeness or originality of a high order," but peculiar, insofar as their content must "stand out at once, and almost leap at you" and not be "lost in a mass of details and minor features."[159]

Holmes here captures some of the essential contours of twentieth century cultural work. The cultural worker would specialize in "catching the eye of the passerby" and "challenging the attention" of the distracted or benumbed commuter. The cultural worker would specialize in producing fast-acting aesthetic effects, "appealing quickly to the imagination," and in managing these impressions. In a world of standardization and

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[159] *Bleistein* v. *Donaldson Lithographing Co.* Nathan Houser, "Peirce's Post-Jamesian Pragmatism," *European Journal of Pragmatism and European Philosophy*, III-1, 2001. On Whitehead, see Joachim Klose, "Whitehead's Theory of Perception," in Harald Atmanspacher and Eva Ruhnau, eds, *Time, Temporality, Now : Experiencing Time and Concepts of Time in an Interdisciplinary Perspective* (Berlin: Springer, 1997).

repetition, the cultural worker would have to know how to differentiate his or her product, and properly gauge the quantity and type of "peculiarity" necessary to draw in the potential customer. The cultural worker would need to prioritize the gestalt over the ornament, to subordinate detail to uniformity. The cultural worker would develop new sort of knowledge that allowed for the image, sound, or slogan to "leap out at you," and thereby stir your desire and reach into your pockets. In *Bleistein*, Holmes diagramed the key features of commercial media and its distinctive varieties of cultural work.[160]

At the same time, Holmes's ruling reflects the increasing dominance of the work-for-hire paradigm. Catherine Fisk notes that Holmes's opinion in *Bleistein* speaks to the "difficulty of reconciling corporate ownership and individual artistic expression." While Holmes justified copyright protection on the basis of the "artistic genius and the uniqueness or singularity of the 'personality' or self-hood of the artist," Fisk emphasizes that he found unremarkable the case's default understanding of corporate ownership of copyright. "In determining that a lithograph for use as an advertisement was the sort of creative work that should be accorded copyright protection," Fisk continues, "Holmes wrote a paean to the individuality of artistic genius quite at odds with the previously asserted facts of corporate creation and control." The *Bleistein* decision accepts without comment the "fiction that the employer is the author," thereby eliding the "question of how a corporation could be entitled to copyright an advertisement if the justification for the copyright is the 'personal reaction of the individual upon nature.'"[161]

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[160] See Jonathan Crary, *Suspensions of Perception: Attention Spectacle and Modern Culture* (Cambridge Mass: MIT Press, 1999).

[161] Catherine Fisk, "Authors at Work: The Origins of Work-For-Hire Doctrine*," Yale Journal of Law and the Humanities*, Volume 15:1, 2003.

From *White-Smith v. Apollo* to *Herbert v. Shanley*

Beginning around the turn of the century, piano-rolls and phonographs began to challenge sheet music as the preferred commodity-form of popular music. Holmes's ruling on the copyrightability of this new form of mechanical reproduction in the musical field, *White-Smith v. Apollo*, would take a pragmatic approach to the metaphysical mysteries inherent in new musical commodities similar to that of *Bleistein v. Donaldson*. The federal government had done little to regulate copying, plagiarism, and piracy throughout the nineteenth century.[162] Beginning in 1905, music copyright owners—most famously composers John Philip Sousa and Victor Herbert—began to push for revisions to existing copyright legislation, culminating in the Copyright Act of 1909. [163] They invoked the language of property rights throughout the testimony leading up to the passage of the Copyright Act. In a hearing before the Joint Committee on Patents, June 6, 1906, for example, John Philip Sousa argued that composers of music wanted to be protected "in every possible form in our property." Sousa insisted that when piano-roll and phonograph companies took "his property" and made money from his music, he deserved a share of it. [164] Throughout his testimony, Sousa invoked discourses of "national interest" and concern for the fate of American culture. The talking machine companies, Sousa alleged, were going to

[162] The original Copyright Act ("An act for the encouragement of learning") of May 17, 1790 followed the framers'stated desire to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The 1790 Act granted a fourteen-year copyright to books, maps, and charts. Music was left out altogether. This omission (unremarkable at the time of the Constitutional Convention, since sheet music was neither central to the political economy of eighteenth-century music nor seen as the embodiment of a musical "work" deserving of copyright protection) was corrected in 1897 for musical compositions, and in 1909 for mechanical reproductions of musical works.
[163] Goldstein, *Copyright's Highway*, 65. Sanjek and Sanjek, *Pennies*, 22.
[164] John Philip Sousa testimony, in E. Fulton Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act*, Vol. 4 (South Hackensack, NJ: Fred B. Rothman & Co., 1976), 23.

"ruin the artistic development of music in this country." He contrasted pastoral images of his boyhood— "young people together singing the songs of the day" on summer evenings—with the contemporary reality of "infernal machines going night and day." Sousa warned that without strong copyright legislation, the body politic would "not have a vocal cord left."[165] Senator Alexander Campbell challenged Sousa, suggesting that desire for financial compensation, not concern for the nation's musical future, motivated Sousa's campaign for royalties from recordings. Campbell reminded Sousa that the original rationale for including copyright protections in the Constitution was to create incentives for cultural producers. In a moment of levity, Sousa answered, "Oh yes; I can compose better if I get a thousand dollars than I can for six hundred."[166]

Victor Herbert followed Sousa at the same hearing, and stressed that the two composers were there to represent "many hundreds of poor fellows who have not been able to come here—possibly because they have not got the price—brother composers whose names figure on the advertisements of these companies who make perforated rolls and talking machines, etc., and who have never received a cent, just as is the case with Mr. Sousa and myself."[167] Herbert charged that piano-roll and phonograph manufacturers reproduced "a part of our brain, of our genius, or whatever it might be." He contrasted the enormous sums of money paid by these companies to vocal stars, such as Caruso, to sing compositions for which composers "would not receive a cent."[168] The main problem, for Herbert, was the indeterminate status of the piano-roll and phonograph record as both "works" and

[165] Sousa testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act,* 24.
[166] Sousa testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act*, 31.
[167] Victor Herbert testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act,* 25-26.
[168] Herbert testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act,* 26.

commodities, especially the unsettled question of whether the piano-roll and phonograph were identical to the works embodied in sheet music, or copies, imitations, or reproductions. Since in 1906 the legal standard held that piano-rolls and phonograph records were not "imitations" of sheet music, Herbert suggested that without aggressive federal intervention composers had "absolutely no ground to stand on" in their quest for royalties.[169]

One of the most powerful arguments came from New York attorney Paul Fuller: "If a man engraves my music and sells it by the sheet, he is a counterfeiter, and I can get money from him and punish him, but if he does more than that—if he completes that counterfeit to the extent of the reproduction of the actual sound that the composer had in his brain when he put it there—they say he has not imitated… I say that the present law will protect these gentlemen from that piracy—because it is the ultimate form of piracy. It goes further than the reproduction of the composer's sheet music. It reproduces the sound. So that they have taken everything from the music man when they reproduce it on the disk."[170]

The 1909 Act attempted to resolve some of these difficulties. In some respects, the 1909 Act was "public-friendly." It allowed for substantial flexibility on the part of "second users," musicians who wished to perform or record compositions authored by others. This was facilitated by a "performance rights" provision which recognized that copyright owners were entitled to compensation (in the form of a two-cent tax per use of a copyrighted song) for the for-profit public performance of musical works. Notwithstanding this provision, the 1909 Act was also powerfully "corporate-friendly"—especially in its inclusion of the work-for-hire provision that rendered corporations the "authors" of the commodities they produced. The manner in which Congress opted to regulate copyright in music created myriad problems of

[169] Herbert testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act,* 26.
[170] Paul Fuller testimony in Brylawski and Abe Goldman, *Legislative History of the 1909 Copyright Act,* 31-32.

interpretation and enforcement. It was unclear which musical performances needed to be taxed. Moreover, the 1909 revisions did not provide any institutional support for composers and publishers seeking compensation. This created a paradox: while composers and publishers were legally entitled to compensation, it would cost them more to pursue such compensation than they could earn by collecting "performance rights" fees.

Copyright lawyers Nathan Burkan and George Maxwell (who had lobbied for the 1909 Copyright Act in the years before its passage) hatched the idea of a private agency in 1914 to collect compensation from "mechanical royalties" by representing songwriters and composers as a whole in dealings with music users. [171] The America Society of Composers Authors and Publishers represented songwriters and music publishers, pooling individual copyrights, and licensing its catalog to radio stations and live music venues. Burkan and Maxwell disguised their role, however, launching a publicity campaign awash in the language of "moral rights," which saw Victor Herbert reprising his role of the romantic artist robbed of the fruits of his labor.[172] In September of 1914, ASCAP informed shocked and outraged hotel and restaurant owners that it intended to collect ten to fifteen dollars per week for the public performance of songs in its catalog.[173] Over the course of the first decade of its existence, ASCAP, though bitterly contested and always resented, succeeded in establishing its legitimacy, primarily through a series of legal victories and the tacit assent of the Justice Department. The organization awaited the benediction of the courts of its demand for royalties from hotel owners and restaurant, however, and operated behind the scenes to prepare the test case of *Herbert v. Shanley*, which the Supreme Court would hear and upon

[171] John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy* (Lanham, MD: University Press of America, 1985).
[172] Ryan, *The Production of Culture in the Music Industry*, 17.
[173] Ryan, *The Production of Culture in the Music Industry*, 18.

which Holmes would rule in 1917.[174] This case again saw Herbert and Burkan working in tandem, suing a restaurant where one of Herbert's compositions had been performed without permission. Holmes's decision established the principle that any performance of music at a hotel, restaurant, or ballroom made profit for the entrepreneur. While the 1909 Copyright Act granted the owner of a copyright the exclusive right to perform the work publicly for profit, the question at the heart of *Herbert v. Shanley* was whether ambient or incidental music not specifically "purchased" by customers should be considered a performance "for-profit" in the eyes of the law.[175]

"Not Eleemosynary": *Herbert v. Shanley*

Consolidating two different test cases, *Herbert v. Shanley* required the Supreme Court to decide whether the performance of a copyrighted musical composition in a restaurant or hotel, without charge for admission, constitutes an infringement of the musical text's copyright. The first test case—*John Church Company v. Hilliard Hotel Company*—involved a march entitled "From Maine to Oregon," the copyright to which was owned by The John Church Company. The Hilliard Hotel Company arranged for the performance of "From Maine to Oregon" on a given night in 1917, hiring an orchestra to play the song in the dining room of its Vanderbilt Hotel "for the entertainment of guests during meal times" (as Holmes summarized in his *Herbert v. Shanley* ruling). This performance triggered a legal

[174] *Herbert v. Shanley*, 242 U.S. 591 (1917), 594.
[175] *Herbert v. Shanley*, 242 U.S. 591 (1917).

controversy: did the restaurant orchestra's performance of "From Maine to Oregon" properly constitute a "performance for profit" under the meaning of US copyright law?

Herbert v. Shanley's second test case involved the song "Sweethearts," penned by the famous songwriter Victor Herbert. Herbert, a longtime warrior for expanded copyright protections for composers of popular song, arranged for the Shanley Company, which owned a popular restaurant in Manhattan, to include "Sweethearts" on the restaurant orchestra's program. Immediately thereafter, Herbert sued for copyright infringement. The same question of the nature and limits of "performance for profit" at play in *John Church Company v. Hilliard Hotel Company* animated Herbert's challenge. It was Holmes's task to find a satisfactory answer to the questions of how to properly evaluate the character of the elusive artistic "work" in the age of mass culture. The problem was no longer that of the singular text and its enjoyment by consumers: it was rather the new dilemma of how to sort out the addition of various sorts of economic value to cultural commodities by a variety of skilled white-collar workers. What makes Holmes's ruling in *Herbert v. Shanley* unique is Holmes's insistence that cultural work is "not eleemosynary."[176]

The word "eleemosynary" is seldom encountered in modern English, and it was not in popular use in 1917. "Eleemosynary" derives from Medieval Latin and means: "Of or pertaining to alms or almsgiving," or "given or done as an act of charity; gratuitous."[177] William Blackstone used the term frequently in his famous *Commentaries* of 1770, and it appears sometimes today in contemporary American contract law jurisprudence.[178] Outside

[176] *Herbert v. Shanley*, 242 U.S. 591 (1917).
[177] "Eleemosynary," *Oxford English Dictionary*. Interestingly, the *OED* highlights as significant the appearance of "eleemosynary" in Charlotte Brontë's *Shirley*, published in the (not un-meaningful) year of 1849: "Eleemosynary relief never yet tranquillized the working-classes."
[178] William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979).

of legal writing, however, the word is an archaism.[179] By describing the labor of cultural workers as "not eleemosynary," Holmes seeks to affirm that cultural labor is productive, while at the same time indicating that there is something nevertheless exceptional, mysterious, or occult about it. We might read Holmes's choice of "not eleemosynary" as a declaration, in effect, that cultural work in fact remained in some fundamental sense extra-economic or incommensurable with monetary value. This ambivalence was not idiosyncratic on Holmes's part. We have seen it at work in the writing of Drone, Clark, and Putnam. Many modern thinkers identify the essence of art making and storytelling as consubstantial with the form of the "gift."[180] Moreover, intellectual property law, and its idea of the "public domain," rests upon the premise that artistic actions *are*, in some powerful if cloudy sense, "eleemosynary." Copyright doctrine imagines creative acts as "gifts" freely given by the author to the audience (and, more broadly, the nation). It is because art is "eleemosynary," in fact, that the state is required to create intellectual property's monopoly protections in the first place.

In his famous essay of 1893 "The Man as Letters as a Man of Business," William Dean Howells wrote: "People feel that there is something profane, something impious, in taking money for a picture, or a poem, or a statue. Most of all, the artist himself feels this." For the artist, "the work which cannot be truly priced in money cannot be truly paid in money." It was against such sentiments that Holmes sought to argue in his *Herbert v. Shanley* ruling. In the language of John Bates Clark, *Herbert v. Shanley* seeks to recognize

[179] *Herbert v. Shanley Co*., 242 U.S. 591 (1917).
[180] See Georges Bataille and Allan Stoekl, *Visions of Excess: Selected Writings, 1927-1939* (Minneapolis: University of Minnesota Press, 1985); Lewis Hyde, *The Gift: Imagination and the Erotic Life of Property* (New York: Vintage Books, 1983); Richard Sennett, *The Craftsman* (New Haven: Yale University Press, 2008).

the "form utility" imbued by the cultural worker into the cultural commodity. Holmes is convinced that the orchestra's music does indeed invest the dining hall with some kind of environmental enhancement that can be measured and ascribed economic value. By approaching the questions at the heart of *Herbert v. Shanley* in the spirit of skepticism and experimentation, Holmes is led to denaturalize the very concept of "the meal"—the fundamental commodity sold by hotels to diners, and to which the live performance of music by orchestras was a supplement. Holmes approaches the "repast" from multiple angles, contemplating whether a musically enhanced meal might "give a luxurious pleasure not to be had from eating a silent meal." By treating the "repast" as a novel assemblage of heterogeneous elements—food, service, lighting, music, mood, drinks, a certain kind of public space—Holmes reimagines the object of investigation as the sort of thing that his friend and fellow pragmatist William James referred to as a "conflux," a temporary and contingent combination of elements that might just as well have coalesced in some other formation.[181]

In his *Herbert v. Shanley* ruling, Holmes acknowledges that restaurant musicians do not "perform for profit" in a traditional sense. Tickets for the musical performance were not collected at the door. But Holmes underlines a crucial nagging fact: musicians did not show up every night at the Vanderbilt Hotel, well dressed and with instruments in hand, for their own edification. They were there to work. Similarly, diners at fancy hotel restaurants probably did not seek out these establishments solely for the background music. The possibility remained, Holmes jokes, that diners with "limited powers of conversation" or

[181] William James, *Essays in Radical Empiricism* (New York: Dover Publications, 2013); Alfred North Whitehead, David Ray Griffin, and Donald W. Sherburne. *Process and Reality: An Essay in Cosmology* (New York: Free Press, 1978).

sensitivity to "the rival noise" of clinking silverware might be so motivated. If the restaurant orchestra could not be isolated as the "sole object" luring prospective customers, Holmes reckons, neither still could the food. After all, a more satisfying feast could probably be acquired more cheaply elsewhere. Thus, Holmes insists, the Court was required to survey the ambience of the dining room in its totality. The "object" purchased by the consumer was not simply a meal, but a "repast in surroundings that… give a luxurious pleasure not to be had from eating a silent meal." The conclusion strikes Holmes as inescapable: "If music did not pay, it would be given up."[182]

Conclusion

"What is a writing, and who is an author, have been in the past, the cause of much dispute." So the University of Michigan law professor Edward S. Rogers observed as he introduced "Copyright and Morals," a 1920 article on recent developments in intellectual property jurisprudence that focuses upon Holmes's rulings in the key cases of *Bleistein v. Donaldson*, *White-Smith v. Apollo*, and *Herbert v. Shanley*.[183] US copyright law, Rogers reminds his readers, demands a "writing" that had been produced by an "author" which promoted the progress of science and useful arts. These limitations stimulate "a field of ingenious inquiry" and had given the courts ample opportunity to indulge in "refinements and speculations," broadening the meaning of the key terms in a striking manner. "Of course," Rogers continues, "a work utterly useless and worthless would not promote the progress of science and useful arts, but outside of obvious limits it is dangerous for persons trained only in the law to pronounce upon such matters." Rogers here commends Holmes's

[182] Edward S. Rogers, *Copyright and Morals*, 18 MICH. L. REV. 390 (1920).
[183] Rogers, *Copyright and Morals*.

aesthetic relativism, and highlights the importance of the legal transcendence of older canons of taste to economic development in the field of culture. As we have seen, class ideology lurked behind this struggle over the proper scope of copyright law. From the vantage point of mandarin traditionalists in the early twentieth century, questions of "usefulness" and aesthetic "quality" were not at all complicated: the "best people" recognized the "best art," and the law would reflect the distinctions thereby asserted. The new commodities of late nineteenth and early twentieth century popular culture, to this way of thinking, should never have even been considered as texts worthy of the protections of copyright law. According to the traditional theory of authorship, "writing" meant an original poem or story or essay, and an "author" a writer especially gifted with literary talent. We have seen how Holmes and others adjusted their thinking as a response to the torrent of attacks on these presuppositions by the technological and cultural innovations unleashed in the post-Civil War decades. Their work provided a crucial framework for the modern architecture of American show business as we know it: Hollywood, Tin Pan Alley, Broadway, Madison Avenue, the recording industry, and network radio and television, Motown and Nashville, and Las Vegas.

As we have seen, Holmes, and before him Drone, Clark, and Putnam, participated vigorously in the project of legitimating cultural work. Each helped, in different ways, to redefine aesthetic activity as a form of labor. While none of them were explicitly pro-worker in a socialist sense, they drew on the moral authority that "work" enjoyed in the American imaginary in order to revise older understandings of art and property with an eye to the coming corporate revolution in mass media. The veneration of "work," in the abstract, in a nation driven by Jeffersonian and Lincolnian variations on the "labor theory of value" meant that these writings could tie the charge that the fruits of labor were being stolen under the

reigning copyright regime to larger arguments regarding the need for government intervention to protect and promote national culture. As Drone insisted: the "security and happiness of the species in every part of the globe" depended upon the exertions of cultural workers engaged in "this profundity of mental abstraction."[184] George Haven Putnam, worrying about is the nation's failure to supports its "literary workers," agreed: "Americans also are beginning to appreciate how largely the intellectual development of their nation must be affected by all that influences the development of the national literature, and to recognize the extent to which such development must depend upon the inducements extended to *literary producers*, as well as upon the character of the competition with which these producers have to contend."[185] Putnam worried that the intellectual development of the US would lag in the absence of "inducements extended to literary producers" by the federal government. Several generations prior to the New Deal, these intellectuals drafted briefs for some forms of state sponsorship of the arts, even though they likely would have been horrified by any premonition of state-funded direct job creation for artists by agencies like the WPA.

Without question, there was something decidedly new about the labor theory of culture that animated these concerns. Their emphasis on the work at the heart of aesthetic production constituted a clear rejection of traditional aesthetic philosophy.[186] As we have seen, debates about the plausibility of cultural activity as a species of productive work assumed an unprecedented urgency in the years between 1870 and 1910. With each

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[184] Drone, *Treatise*, 8.
[185] George Haven Putnam, "Property," in John Joseph Lalor, ed., *Cyclopædia of Political Science, Political Economy, and of the Political History of the United States, Volume 3* (New York: Rand, McNally, 1884), 994.
[186] Michael Denning, *Culture in the Age of Three Worlds* (London: Verso, 2004). On traditional aesthetics and disembodiment, see David Lloyd, "Kant's Examples," *Representations* No. 28, Special Issue: Essays in Memory of Joel Fineman (Autumn, 1989), pp. 34-54. On the idea of a "revolt against formalism," see Morton White, *Social Thought in America; The Revolt against Formalism* (Boston: Beacon Press, 1957).

expansion of popular culture's mnemotechnical apparatus, new divisions of labor in detail were born, and new professional workforces emerged. Perhaps most importantly, each change in the mnemotechnical apparatus created new opportunities for capitalists to attempt to repackage old texts into new commodities, and for the creators of those texts to fight back. Over time, this history would come to define how cultural workers' unions organized their struggles against management and how the law would adapt to changes in the media of recording, exhibition, and storage.

Not unrelatedly, as we observe in the examples of Drone and Holmes, new intellectual property law doctrines dramatically reshaped the legal contexts of American show business.[187] The cultural worker served as modern intellectual property jurisprudence's core ideological support: facilitating its veneration of artistic originality, fueling its distinction between "mere" manual labor and higher-order mental production, and justifying the state's ostensibly non-commercial patriotic interest in incentivizing the cultivation of national culture. The economic potentials of intellectual property motivated new projects of legitimation and justification while simultaneously triggering nervous feelings among many Americans. As in recent years, the Gilded Age witnessed a campaign led by capitalist interests and star cultural producers to publicize a moral crisis of uncompensated labor and piracy. Then and now, we also see an articulation of this concern with international politics—and with the figuration of unauthorized reproduction of American cultural commodities as a diplomatic and even military emergency.

[187] Catherine L. Fisk, *Working Knowledge Employee Innovation and the Rise of Corporate Intellectual Property, 1800-1930* (Chapel Hill: University of North Carolina Press, 2009).

Chapter Two: James Weldon Johnson and the "The Art Approach to the Negro Problem"

Introduction

As we saw in Chapter One, by the late nineteenth century, the cultural worker had become an increasingly central character. Throughout the early decades of the twentieth century, debates on cultural work would take on a more overtly political cast. The political work undertaken by African American cultural workers in pre-Harlem New York was shaped by complex tensions between art and commerce. W.E.B. Du Bois wrote in 1903's *Souls of Black Folk*: "we black men seem the sole oasis of simple faith and reverence in a dusty desert of dollars and smartness." America would not be poorer, Du Bois muses, thinking of the African American sacred music that had recently become popular on the concert stage, "if she replaced... her vulgar music with the soul of the Sorrow Songs." To Du Bois, The emergent popular culture industry presented itself as a "dusty desert of dollars."[1]

Du Bois's longtime NAACP colleague James Weldon Johnson saw the world of African American cultural work as a less arid landscape. In his autobiography, *Along This Way*, James Weldon Johnson recalls the world of African American cultural workers in Manhattan that he encountered at the turn of the century. Johnson describes not a desert but rather "an alluring world, a tempting world, a world of greatly lessened restraints, a world of fascinating perils; but, above all, a world of tremendous artistic potentialities." Spending time with Bob Cole and other cultural workers in this milieu, Johnson began to feel a pull to

[1] W.E.B. Du Bois, Charles C Lemert, Manning Marable, and Cheryl Gilkes, *The Souls of Black Folk*, 100th Anniversary ed (London: Routledge Taylor & Francis Group, 2016 [1903]), 6-7.

seriously think through "the American Negro's cultural background and his creative folk-art, and to speculate on the superstructure of conscious art that might be reared upon them."[2]

Johnson authored a series of writings on cultural workers and African American politics in the years between 1912 and 1938, including his 1912 novel *Autobiography of an Ex-Colored Man*; his pioneering work of urban geography *Black Manhattan*, and his memoir *Along This Way*, both published towards the end of his life; in addition to prefaces to several anthologies of African American poetry and music, influential editorials and essays on the topic of African American cultural work for the NAACP's *Crisis*. In the 1928 essay "Race Prejudice and the Negro Artist," originally published in *Harper*'s magazine, Johnson delineates, if playfully, an "art approach to the Negro problem."[3] Reading through these essays and exchanges will allow us to consider relevant details from Johnson's earlier career as a leading cultural worker—a popular songwriter, poet, and playwright, who spent extensive periods of time within the milieu of traveling Black actors and singers, stars of the vaudeville, minstrel show, and Southern circus annex circuit. As we read through his writings, we seek to distill the essence of Johnson's thinking about the part that had been played, and that would continue to be played, by cultural workers within the broader struggle for civil rights. Johnson's argument, in brief, is simply that the Black cultural worker, operating within the interstices of capitalist popular culture—as distinct from traditional

[2] James Weldon Johnson, *Along This Way; the Autobiography of James Weldon Johnson* (New York: Da Capo Press, 1973 [1933]), 152.
[3] James Weldon Johnson, *Autobiography of an Ex-Colored Man* (Boston: Sherman, French & Company,1912); *Black Manhattan* (Knopf: New York, 1930), 119; *Along This Way; the Autobiography of James Weldon Johnson* (New York: Da Capo Press, 1973 [1933]); "Race Prejudice and the Negro Artist" (1928); James Weldon Johnson and Rudolph P Byrd, *The Essential Writings of James Weldon Johnson* (New York: Modern Library, 2008); James Weldon Johnson and William L Andrews, *Writings* (New York: Library of America, 2004); James Weldon Johnson, Maya Angelou, and Henry Louis Gates, *God's Trombone : Seven Negro Sermons in Verse* [Revised edition] (New York: Penguin Books, 2008); James Weldon Johnson and Sondra K Wilson, *The Selected Writings of James Weldon Johnson* (New York: Oxford University Press, 1995).

conceptions of the "artist" or the "intellectual"—was an active agent of emancipatory change. This conceptualization of the cultural worker, in Johnson's thought, was a pragmatist synthesis of older Romantic binaries that sought to transcend the limits imposed by those binaries.

As we will consider towards the end of the chapter, Johnson did not always succeed in transcending those binaries. In particular, as Cedric Robinson argues powerfully in *Forgeries of Memory and Meaning*, Johnson often reverted to a conventional bourgeois framing of aesthetics that mapped neatly to liberal narratives of a steady waning of racial prejudice in the United States.[4] He was more interested in mapping out strategies for the gradual acceptance of African Americans by whites who had learned the errors of their ways than in more militant forms of organizing. But we will argue that Johnson's writing on cultural work was never as bet-hedging nor as conciliatory as some of his critics maintain. To be sure, some of the arguments that Johnson articulated regarding the potential civil rights gains that might be helped along by the efforts of African American cultural workers seem overly optimistic, and in certain cases overlap with the accommodationist rhetoric of Booker T. Washington (one of Johnson's early influences and mentors). But Johnson did finally break with Washington as he became a leading figure in the early NAACP in the 1910s, and his point of view shifted in a decisive manner.[5] His writings about African American cultural work were extensive and diverse, encompassing a variety of strategies and angles. In many of the most powerful essays on the topic, Johnson points to the importance of African American

[4] Cedric J. Robinson*, Forgeries of Memory and Meaning Blacks and the Regimes of Race in American Theater and Film Before World War II* (Chapel Hill: The University of North Carolina Press, 2012), 150.
[5] On Johnson and Washington in the first decade of the century, see Eugene Levy, *James Weldon Johnson: Black Leader, Black Voice* (Chicago: University of Chicago Press, 1977), 102-06, 116. On Johnson's break with Washington, see David Levering Lewis, *W.E.B. Du Bois: Biography of a Race, 1868-1919* (New York: H. Holt, 1993), 519, 523.

cultural work as a novel sort of labor identity and collective practice, inhabiting new spaces and locations, creating a world in which the politics of culture could be analyzed, debated, and processed and in which new sorts of resistance to white hegemony might be mounted.

Importantly, Johnson's professional life straddled several eras. He began operating in the world of African American cultural workers in the late 1890s, at the height of blackface minstrelsy's popularity. He lived to see the rise of big-band jazz in the 1920s and 1930s and the ascendancy of cultural workers/political leaders like Paul Robeson. Having begun his travels in the world of African American cultural work at a time when most actors and musicians were required to present themselves as clowns underserving of the rights of citizenship, he survived to see the ascendance of highly professionalized tuxedoed orchestras of virtuoso African American musicians to the apex of the US popular music industry and to witness the wild success in the 1930s of Robeson's performance of dignity and polymathic brilliance singing in multiple languages and conquering the Shakespearean stage on his own terms.[6] Johnson's writings, therefore, provide a uniquely illuminating guide to the evolution of African American cultural work as it professionalized and became a leading arm of the cultural front.

Situating James Weldon Johnson as a Theorist of African American Cultural Work

[6] See Martin Duberman, *Paul Robeson: A Biography* (New York: New Press, 1992).

John Hope Franklin once observed that the life of James Weldon Johnson was a "succession of exciting and highly significant episodes" covering a dazzling array of activities:

> He became a successful lawyer, song writer for Broadway shows, journalist, novelist, poet, diplomat, civil rights leader, and university professor. He would have made his mark if he had done no more than edit the *New York Age*, or written the *Shoo-Fly Regiment*, 'Lift Every Voice and Sing,' and *The Autobiography of an Ex-Colored Man*, or become the first black executive secretary of the National Association for the Advancement of Colored People. To have done all these things and many more marks him as one of the very unusual men of this century.[7]

Franklin's survey of Johnson's accomplishments gives us a good sense of the scope of his involvement in the cultural sphere as both a creator and intellectual. References to Johnson's work as a newspaper writer and editor, musical composer, and dramaturge attest to the range of his creative pursuits.

James Weldon Johnson was born in 1871 in Jacksonville, Florida. His father James Johnson, born in 1830, was the child of free parents in Richmond, Virginia. His mother Helen Johnson (*née* Dillet) was born to a prominent family in Nassau in the Bahamas. In the late 1850s, as a young man, James Johnson traveled to New York to work as a waiter, where he met and courted Helen Dillet. At the onset of the Civil War, James Johnson followed Dillet and her family to their home in Nassau in the Bahamas, securing a job as head waiter at Nassau's largest hotel. The couple were soon married. In Nassau, the Johnsons set down roots and purchased some property. In the aftermath of the Civil War, encouraged by the victory of the Union side and seeking to escape the damage wrought by hurricanes and economic depression in the Bahamas, the Johnsons moved to Jacksonville, Florida. James

[7] John Hope Franklin, "Introduction" to Eugene Levy, *James Weldon Johnson: Black Leader, Black Voice* (Chicago: University of Chicago Press, 1973), ix.

Johnson secured employment as a headwaiter at the St. James Hotel in Jacksonville, a comparatively elite position that allowed the family to purchase property and live in relative comfort, while his mother worked as a teacher at the Stanton School, where Johnson would briefly serve as principal in the 1890s. Johnson's younger brother, J. Rosamond Johnson, was born in 1873. A musical virtuoso, Rosamond trained in music in New England and went on to have an illustrious career as a composer and performer, inside and outside the groves of classical music. In 1900, Rosamond formed a partnership with African American vaudeville veteran Bob Cole, author of the "Colored Actor's Declaration of Independence of 1898." James Weldon's work with Rosamond and Cole encouraged him take seriously the world of capitalist cultural work, and to begin to map its connections to the rising tide of Jim Crow in the US South.[8]

The worst manifestations of Jim Crow came relatively late to Jacksonville. Imani Perry stresses that in the immediate post-Civil War decades, African American wishing to purchase homes were aided by homesteading laws in Florida, in contrast to the experience of aspiring homeowners in other southern states. Perry notes that the burgeoning tourist industry, which drew the Johnson family to Florida, offered comparatively ample employment to skilled African American workers, and that tourism itself sometimes mitigated the ferocity of white violence, as racist vigilantism was seen as bad for business. Perry further highlights the importance of Florida's history of sponsoring public schools

[8] James Weldon Johnson, *Along This Way*, 21-22; "Cole and Johnson Abroad." New York *Age*, July 26, 1905. Box 98, Folder 1. General 1894-1918. James Weldon Johnson and Grace Naill Johnson Papers, Beinecke Library, Yale University. See also "Popular Composers" in the *Appeal*, February 21, 1903. "*Goyescas* Brings Colored Man to Front in New Role," Interview with James Weldon Johnson by R.G. Doggett, *Colored American Review*, March 1, 1916. James Weldon Johnson and Grace Naill Johnson Papers, Beinecke Library, Yale University. Box 82, folder 633.

stretching back before the Civil War, which created a different set of possibilities for the education of African American children than was the case elsewhere in the South. In 1868, Jacksonville's African American residents, aided by the Freedmen's Bureau, established the first public school for African American students in the state, which they christened the Edwin McMasters Stanton School as a tribute to Lincoln's secretary of war. James Weldon Johnson's mother Helen Louise Dillet Johnson was hired to teach at Stanton, and he would work there as a principal in his early adulthood.[9]

These always provisional but nevertheless real sources of hope for the African American residents of what was then Florida's largest city must have heightened Johnson's growing sensitivity to the steady worsening of life for African Americans over the course of the 1890s, which culminated in disfranchisement, de jure segregation, and white propensity for murderous violence in the form of lynching.[10] The trauma of witnessing the movement towards an apartheid South, punctuated by several close brushes with white mobs seeking to punish the violation of unwritten social protocols, would feed Johnson's literary work throughout his life. Johnson meditated deeply on the politics of African American cultural work throughout his career, which included stints working as an educator, lawyer, songwriter, novelist, foreign diplomat stationed in various posts in South America, editor of the New York *Age*, NAACP executive, academic, and compiler of collections of poetry and spirituals.[11]

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[9] Levy, *James Weldon Johnson*, 3-20; Imani Perry, *May We Forever Stand*, 2-3.
[10] See James B. Crooks, *Jacksonville After the Fire 1901-1919: A New South City* (Jacksonville: University of North Florida Press, 1991); Robert Cassanello, *To Render Invisible: Jim Crow and Public Life in New South Jacksonville* (Gainesville: University Press of Florida, 2013).
[11] James Weldon Johnson, *Along This Way*, 171.

"Race Prejudice and the Negro Artist"

Johnson's most effective distillation of his thoughts on African American cultural work are to be found in his 1928 essay "Race Prejudice and the Negro Artist."[12] For Johnson, recent developments in the commercialization of Black popular culture—the "new evolution" of the Negro's "folk-art creations" in the form of ragtime, blues, and jazz—had contributed to the heightened impact of Black expressive activity on the terrain of the national struggle for civil rights. Just as the Fisk Jubilee Singers had "touched and stirred the hearts of people" and smoothed down the "rougher edges of prejudice against the Negro," so too might new experiments in music and theatre inspire admiration among whites for the "creative genius of the race." "I do not think it too much to say," Johnson writes, "that through artistic achievement the Negro has found a means of getting at the very core of the prejudice against him, by challenging the Nordic superiority complex." The thrust of Johnson's argument is that the African American cultural worker might serve as a new sort of agent of emancipatory change. The challenge to white racism was being issued not by this or that exceptional performer, but by the community of African American cultural workers acting as a bloc.[13]

In a New York *Age* column of April 8, 1915, entitled "The Proof of Equality," Johnson had previewed these arguments, writing that artistic and intellectual achievements by African Americans would serve as "proof… given so frequently and in so many various ways as to create a general opinion."[14] He points to African American cultural work as the mechanism

[12] James Weldon Johnson, "Race Prejudice and the Negro Artist," *Harper's*, November 1928. A version of this essay was also included in Alain Locke, ed., *The New Negro* (New York: Touchstone, 2014 [1925])
[13] Johnson, "Race Prejudice."
[14] James Weldon Johnson, "The Proof of Equality." New York *Age*, April 8, 1915.

that will alert "thousands of white readers" to what will, in many cases, be for them a "startling fact": "that a Negro has brains that can accomplish the same things which are accomplished by brains located in the heads of white men." Here, Johnson is preparing the main argument of the "art approach to the Negro Problem." By establishing the fact of African American creative genius "with sufficient frequency and in sufficient variety," cultural workers might "undermine and overthrow the kind of prejudice which is our main handicap," and in particular, "the feeling and the belief that he is mentally and intellectually an inferior being."[15]

Johnson describes African American music, for example, as demonstrating something from the "store" of African American "racial genius": "warmth, color, movement, rhythm, and abandon; depth and swiftness of emotion and the beauty of sensuousness."[16] The emphasis here is on cultural creation as a collective tradition, not as the accomplishment of one or two select geniuses. This conceptualization of the politics of African American aesthetics foreshadows Clyde Woods's identification of blues music as fundamentally a group "epistemology" rather than a genre, as that term is commonly understood.[17] It calls to mind James Baldwin's essay "Many Thousands Gone" (1951), wherein Baldwin writes: "It is only in his music, which Americans are able to admire because a protective sentimentality limits their understanding of it, that the Negro in America has been able to tell his story… which otherwise has yet to be told and which no American is prepared to hear."[18]

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[15] Johnson, "The Proof of Equality."
[16] Johnson, "Race Prejudice and the Negro Artist."
[17] Clyde Woods, *Development Arrested: The Blues and Plantation Power of the Mississippi Delta* (New York: Verso, 1998).
[18] Cited in Brent Hayes Edward, *Epistrophies: Jazz and the Literary Imagination* (Cambridge Massachusetts: Harvard University Press, 2017), 9. Edward traces these insights of Baldwin—and by extension, Johnson—back to Frederick Douglass. "The idea that music contains not only emotional surges and rhythmic propulsion but also the 'character of cognition'—commentary, insight, and even lucid critical analysis—can be traced at least

For Johnson, African American cultural work stood as a living refutation of the "common idea" that "the Negro reached America intellectually, culturally, and morally empty, and that he is here to be filled—filled with education, filled with religion, filled with morality, filled with culture." The genius of African American cultural workers, and of the genres and forms that they had pioneered and popularized negated the stereotype that "the Negro is nothing more than a beggar at the gate of the nation, waiting to be thrown the crumbs of civilization." By means of "artistic efforts," the African American cultural worker was "smashing this immemorial stereotype faster than he has ever done through any other method he has been able to use." In this way, Johnson argues, "the Negro is bringing about an entirely new conception of himself; he has placed himself in an entirely new light before the American people." Johnson proposes that when the reader considers "how many of the subtler prejudices have crumbled, and crumbled rapidly under the process of art creation by the Negro," they will regard as justified the assumption of "a hopeful outlook toward the effect that the increase of recognized artists fivefold, tenfold, twentyfold, will have on this most perplexing and vital question before the American people."[19] Johnson does not stop at documenting the political potency of the African American cultural worker as a salvific vis-à-vis the white mind. He suggests that the popularity of the labor of African American cultural workers had inspired a surge of pride among African Americans more generally, a premise that would gain currency during the civil right movements of the 1930s through the

as far back as Frederick Douglass's musings on the meaning of the 'wild songs' sung by slaves, songs in which 'the thought that came up, came out—if not in the word, in the sound."

[19] Johnson, "Race Prejudice."

present day, peaking in significance in the Popular Front Era and the Black Power Movement of the 1960s and 1970s.[20]

The advent of a fully integrated national capitalist apparatus for the dissemination of popular culture had left the palpable impression among the public at large that the "only things artistic that have sprung from American soil and out of American life, and been universally recognized as distinctively American products, are the folk creations of the Negro." By the late 1920s, the time had arrived for the "individual Negro artist, the conscious artist," as exemplified by Marian Anderson, Paul Robeson, J. Rosamond Johnson, Ethel Waters, the blues singers Bessie and Clara Smith, Josephine Baker, and the left-wing visual artist Aaron Douglas. Typically cautious, Johnson is here gesturing at the potential firepower of the emergent marriage of the tradition of African American cultural work that had developed since the days of the Fisk Jubilee Singers with a focused radical politics, a force that would transcend moral suasion and in fact engage in counter-hegemonic movement-building.[21]

"Race Prejudice and the Negro Artist" was published amid a flurry of writing on the topic of art and African American politics." 1926 saw the publication of George Schuyler's *Nation* essay "The Negro-Art Hokum."[22] Johnson then recommended to *Nation* editor Freda Kirchwey that his younger friend Langston Hughes be enlisted to write an "independent positive statement of the case for a true Negro racial art" in response. Meanwhile, W.E.B. Du Bois was busy drafting his essay "The Criteria of Negro Art" while overseeing a seven-

[20] See James Edward Smethurst, *The Black Arts Movement: Literary Nationalism in the 1960s and 1970s* (Chapel Hill: University of North Carolina Press, 2005).
[21] Johnson, "Race Prejudice."
[22] Schuyler, "The Negro-Art Hokum," *The Nation* 16 June 1926: 662–63. At the time, Schuyler was a left-affiliated iconoclast, a would-be "black Mencken," but "The Negro-Art Hokum" reveals the conservatism that would come to define his worldview in later years. See Yogita Goyal, "The Black Nationalist Hokum: George Schuyler's Transnational Critique." *African American Review*, Volume 47, Number 1, Spring 2014.

month-long *Crisis* symposium on African Americans and the arts, organized around a questionnaire distributed to a wide variety of participants. That exercise proved chaotic, and accidentally offered white correspondents the opportunity to express skepticism that African American authors face any special difficulties. The symposium affirmed, for Du Bois, the need to redirect *The Crisis* away from a focus on the arts and towards more traditional political matters.[23]

In "The Negro Art-Hokum," Schuyler spares no prisoners as he took aim at the very idea of American "Negro art." He writes: "to suggest the possibility of any such development among the ten million colored people in this republic is self-evident foolishness." While not denying that "from dark-skinned sources have come those slave songs based on Protestant hymns and Biblical texts known as the spirituals, work songs and secular songs of sorrow and tough luck known as the blues, that outgrowth of ragtime known as jazz (in the development of which whites have assisted), and the Charleston," Schuyler insists that such creative developments did not reflect any collective cultural spirit, but were local contributions of a "caste in certain sections of the country": the "peasantry of the south." Within the fields of literature, painting, and sculpture, Schuyler avers, the primary influences remain European, and thus cannot provide evidence of African American genius. He generalizes this more broadly, claiming that there can be no such thing as "Negro" or "Aframerican" that had survived centuries of assimilation into the main stock of American culture. Without naming names, Schuyler blames writers of limited imagination for focusing upon the "imbecilities of the Negro rustics and clowns" and palming them off as "authentic and characteristic Aframerican behavior," which has resulted in an overemphasis on the

[23] David Levering Lewis, *W.E.B. Du Bois: The Fight for Equality and the American Century, 1919-1963* (New York: H. Holt, 2000), Chapter 5.

"difference" of African Americans. "The mere mention of the word 'Negro' conjures up in the average white American's mind a composite stereotype of Bert Williams, Aunt Jemima, Uncle Tom, Jack Johnson, Florian Slappey, and the various monstrosities scrawled by the cartoonists."[24]

Adumbrating his turn to the reactionary right, Schuyler experiments with various formulations of "color-blind" ideology. Denying any significant material or legal differences that might shape the lived experience of African Americans as distinct from that on whites, Schuyler asks: "How, then, can the black American be expected to produce art and literature dissimilar to that of the white American?" Begging the question in at least two ways, he wonders why African Americans should have developed a distinctive culture when "Negro artists in other countries have not done so?" Alleging that in recent decades "education and environment were about the same for blacks and whites," Schuyler charges that any affirmation of difference constituted a concession to race scientists like Madison Grant and Lothrop Stoddard. "On this baseless premise, so flattering to the white mob, that the blackamoor is inferior and fundamentally different," Schuyler concludes, "is erected the postulate that he must needs be peculiar; and when he attempts to portray life through the medium of art, it must of necessity be a peculiar art." Schuyler's response anticipates, in many ways, the arguments of Adolph Reed, who contends that popular culture cannot not be properly considered as politics and that those who would promote cultural endeavors as para- or infra-politics are in fact false friends if not something worse.[25]

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[24] Schuyler, "The Negro-Art Hokum."
[25] See, e.g., Adolph Reed Jr., "Black Particularity Reconsidered," *Telos* 39 (spring 1979); *Class Notes: Posing as Politics and Other Thoughts on the American Scene* (New York: New Press, 2000); http://www.newsworks.org/index.php/local/the-remix/77347-adolph-reed-on-azealia-banks-reparations-and-pop-culture-idiocracy

In response to Schuyler, Langston Hughes responded with economy: "What's the use of saying anything—the true literary artist is going to write about what he chooses anyway regardless of outside opinion." He followed up several months later with "The Negro Artist and the Racial Mountain," pointing out the suffocating grip of bourgeois respectability on the "Nordicized Negro intelligentsia," and suggests that artists ought to be free to work among the "so-called common element." He concludes "We younger Negro artists who create now intend to express our individual dark-skinned selves without fear or shame."[26]

In October 1926, *The Crisis* published Du Bois's "The Criteria of Negro Art." The essay, which followed the lines of a talk that Du Bois had given to the NAACP annual convention in Chicago in late June 1926, attacked the positions of both Schuyler and Hughes. Its most famous lines affirmed that all art is "propaganda and ever must be, despite the wailing of the purists." Du Bois describes his own writing as "propaganda for gaining the right of black folk to love and enjoy." He underlines also the dangers of colorblind racism: "Just as soon as true art emerges; just as soon as the black artist appears, someone touches the race on the shoulder and says, 'He did that because he was an American, not because he was a Negro… He is just human; it is the kind of thing you ought to expect.'"[27]

Du Bois also questions the wisdom of writers who focus on the lurid and the sensational, leaving themselves at risk of "distortion and exploitation" by unnamed others (Hughes and Claude McKay were surely high on Du Bois's list of such writers). Du Bois assails the "surprising number of white people who are getting great satisfaction out of these younger Negro writers because they think it is going to stop agitation of the Negro question." Anticipating Johnson's "Race Prejudice and the Negro Artist," Du Bois writes: "Too many

[26] Langston Hughes, "The Negro Artist and the Racial Mountain."
[27] Du Bois, "Criteria of Negro Art," *The Crisis*, Vol. 32, No. 6, October 1926, 290-97.

were whispering, Here is a way out. Here is the real solution to the color problem." Such an argument, to Du Bois, amounts to anti-political quietism: "Keep quiet! Don't complain! Work! All will be well!"[28]

In the wake of this furious exchange of opinion, Johnson's "Race Prejudice and the Negro Artist" filed a brief for the significance of African American cultural work point to a number of different dimensions of its political capacities. He drew upon extensive first-hand knowledge. While the *Crisis* contributors were mostly discussing fiction and poetry published by major publishing houses, Johnson takes a wider view, reflecting upon experiences accumulated over the previous thirty years. Johnson's first forays into the world of African American cultural work came in 1899, while he was making his living as a high school principal and preparing to take the Florida state bar exam. His brother Rosamond's entreaties to travel to New York, bolstered by a royalty check for one of their co-written songs, lured James Weldon to join Rosamond at the Marshall Hotel on West 53rd Street, the center of African American cultural work in the pre-Harlem period. In *Black Manhattan*, Johnson writes of the Marshall Hotel's part in bringing about a "revolutionary change in New York artistic life."[29] Elsewhere Johnson celebrates the "sudden social change" brought about by the Marshall and similar hotels, introducing "a fashionable sort of life that hitherto had not existed." Prior to their opening, Johnson emphasizes, there were very few decent restaurants in New York at which African American diners were welcome.[30]

Johnson is here describing a substantial qualitative shift in sociality and habitus within the world of African Americans in New York that had been caused by the clustering

[28] Du Bois, "Criteria of Negro Art."
[29] Johnson, *Black Manhattan* (Knopf: New York, 1930), 119.
[30] Johnson, *Along This Way*, 171.

of a new kind of workforce in a new place.[31] He seeks to account for the kind of political effects that the collective pressure of that community of workers might trigger, highlighting "its importance as the radiant point of the forces that cleared the way for the Negro on the New York stage." Importantly, Johnson prioritizes the internal life of the community (the provision of spaces of conviviality and pleasure) as equally important, in a political sense, as the work of attacking white racial prejudice: "The sight offered at these hotels, of crowds of well-dressed colored men and women lounging and chatting in the parlors, loitering over their coffee and cigarettes while they talked or listened to the music, was unprecedented."[32]

In his 1912 novel *Autobiography of an Ex-Colored Man* (into which we delve more thoroughly below), Johnson describes the African American nightclubs of New York's Tenderloin district, in detail, providing a vivid picture of this central node of African American cultural work: a "center of colored Bohemians and sports." The walls are adorned with autographed photographs or lithographs of "every colored man in America who had ever 'done anything,'" from Frederick Douglass to the "lesser lights of the prize-fighting ring," famous jockeys, stage celebrities, and "down to the newest song and dance team." In a back room, the floor is given over to dancing, while in another room, "song and dance teams practiced their steps, acrobatic teams practiced their tumbles, and many other kinds of 'acts' rehearsed their 'turns.'" The club serves as a hub for the "noted minstrels, whose names and faces were familiar on every bill-board in the country," and draws a "multitude of those who love to dwell in the shadow of greatness." The narrator explains that at that time, there were no organizations then "giving performances of such order as are now given by several colored companies" because no theater impresario could then imagine "audiences would pay

[31] Paul Gilroy, *After Empire: Melancholia or Convivial Culture?* (London: Routledge, 2004).
[32] Johnson, *Black Manhattan*, 151.

to see Negro performers in any other role than that of Mississippi River roustabouts." He describes the world of African American cultural workers that generated Bob Cole's "Colored Actor's Declaration of Independence": "I often head the younger and brighter men discussing the time when they would compel the public to recognize that they could do something more than grin and cut pigeon-wings." One professional minstrel (presumably based upon Ernest Hogan) refused to perform anything but Shakespearean monologues when asked to perform. "Here was a man," the narrator observes, "who made people laugh at the size of his mouth" while carrying in heart the "burning ambition to be a tragedian," who did, in the end, "play a part in a tragedy."[33]

Johnson's narrator rhapsodizes the world of African American cultural work, the world of "notables of the ring, the turf, and the stage," celebrities who drew mixed-race crowds of admirers. He witnesses the infamous "slumming parties," which saw wealthy white men and women out for sight-seeing tours of the Tenderloin.[34] His narrator takes note of "another set of white people who came frequently": variety performers and "others who delineated 'darky characters.'" These prospectors sought to "get their imitations first hand from the Negro entertainers they saw there."[35]

While some, like Du Bois in "Criteria for Negro Art," would caricaturize Johnson as an advocate of expressive culture's magical abilities to bring about racial equality, in his description of these semi-autonomous spaces he is trying to get at a point at once more subtle and more profound. Under conditions of extreme subordination and the retreat of government

[33] Johnson, *Autobiography*, 102. See Louis Chude-Sokei, *The Last "Darky": Bert Williams, Black-on-Black Minstrelsy, and the African Diaspora* (Durham: Duke University Press, 2006).
[34] See Chad C. Heap, *Slumming*: *Sexual and Racial Encounters in American Nightlife 1885-1940* Chicago: University of Chicago Press, 2009).
[35] Johnson, *Autobiography*, 104.

from the supervision of formal equality, it was not at all a given that spaces for congregation and intellectual exchange would emerge. African American show business in turn-of-the-century New York had given birth to such spaces, which offered partial or mitigated privacy from the literal or metaphorical policing gaze of white interlopers. Such an event, for Johnson, had to be regarded as historically meaningful.

African American Cultural Work and Intellectual Property

Thinking about the efforts of Johnson and his peers to manage the intrusive white gaze (or, more accurately, the white eavesdropping ear), brings us back to the topic of intellectual property. In his memoir *Along This Way*, Johnson recalls that he and his brother Rosamond left Jacksonville in 1899 to try to establish themselves as songwriters in New York City, with a newly composed work of musical theatre in hand. At a sendoff party in Jacksonville in 1899, Mr. Kerrison, a local white businessman, pulls the brothers aside and advises them that their compositions in progress constituted a "valuable piece of work which was not copyrighted" and that they should be careful "because New York was full of pirates just waiting for the chance to plunder."[36] Once settled in New York, they used a letter of introduction given to them by a white patron to visit the offices of the music publishers M. Witmark and Sons. Johnson recalls that as Isidore Witmark listened to them play their songs, two white composers, Harry B. Smith and Reginald DeKoven, popped into the room and joked: "let's hear it; we might be able to steal something from it." The Johnsons brothers do not get the joke—"if it was a joke"—and, remembering Kerrison's warning, gather up their

[36] Johnson, *Along This Way*, 150.

precious manuscript and make a quick exit. Later, Johnson writes, he and his brother came to understand that Smith and DeKoven had probably not meant any harm, but the incident reveals the complex anxieties—exacerbated by intellectual property's racial conceits—that the newly developing copyright regime had set in motion.

The Johnson brothers were correct to guess that their artistic output might be highly valuable. In concert with the popular entertainer Bob Cole, they set up a songwriting shop and immediately were able to sell a song, "Louisiana Lize" to the Jos. W. Stern and Co. for fifty dollars. In a poignant footnote to the story, Johnson recalls that they were rebuffed in their initial attempt to deposit the cheque by a racist bank teller.[37] They then set up their songwriting laboratory in the Marshall Hotel. The political economy of the song publishing industry shaped their practice. As Johnson recalled later, they studied the sources of the popularity of songs and attempted to formalize a theory that would allow them to create hits. "In those days," Johnson reminisced in 1930, "a song was popular and profitable only when it reached the point where people bought it to play and sing at home." The Johnson brothers and Cole figured that the "royalties of a writer depended largely upon the young fellow who would buy a copy of the song and take it along with him when he went to call on his girl, so that she would play it while the two of them gave vocal vent to the sentiments." They "worked as one man" to try to churn out new variations on familiar themes to entice sheet music consumers. They also arranged the distribution of royalties as an equal split between the partners, regardless of the individual contributions of each to a given piece of music. Johnson recalls "an almost complete absence of pride of authorship" that made their partnership a curiosity in the context of the mores of the time and the typical ego struggles of

[37] Johnson, *Along This Way*, 153.

artistic collaborators. Over the partnership's seven years, Johnson calculates they wrote some two hundred songs for the Broadway stage and touring "road" companies.[38]

Johnson remembers Bob Cole excitedly telling them of a meeting with Ben Teal, stage director for the Klaw and Erlanger theatrical concern—at that point, "already the most powerful factors in the whole theatrical business." Teal had asked Cole if he could help locate the Johnson brothers, whose music for the Rogers Brothers had impressed Klaw and Erlanger, in order to enlist their services on a show called *The Sleeping Beauty and the Beast*. Cole and the Johnson brothers had suddenly found themselves considered "top-notchers" by theatrical producers. *The Sleeping Beauty and the Beast* was produced at the old Broadway Theater; it inaugurated a new era of Broadway spectacle. However, Johnson recalls that the spectacle "dwarfed the individual musical numbers," leaving their songs "well applauded" but selling poorly. This reversal of fortune was soon corrected by the success of a Cole and Johnson Brothers song entitled "The Maiden with the Dreamy Eyes"—"a song that was to send our reputation to the top and make us some money"—made popular by Anna Held in the play *The Little Duchess*. Held was married to Florenz Ziegfeld, and the success of "The Maiden with the Dreamy Eyes" led to employment with the Ziegfeld organization. Johnson paints a vivid picture of the injuries that attended this stroke of good fortune: the brothers would be forced by racist clerks to use the service elevator to attend meetings at Ziegfeld's hotel offices.[39]

During 1901, the Johnson brothers composed their best-known musical contribution, the song "Lift Ev'ry Voice and Sing," now often called the "Black national anthem." James Weldon later reflected: "Nothing that I have done has paid me back so fully in satisfaction as

[38] Johnson, *Along This Way*, 156.
[39] Johnson, *Along This Way*, 180.

being the part creator of this song." The song was passes along by teachers and choir leaders sharing mimeographed copies. Later, Johnson reflected that within twenty years the song was being sung in schools and churches throughout the South. "Within that time," he observed "the publishers had recopyrighted it and issued it in several arrangements."[40] Sometime after that, the NAACP adopted it as the "Negro National Hymn." In an intriguing passage in *Along This Way*, Johnson writes, that while the song's publishers consider it a "valuable piece of property," he and Rosamond understood that strict copyright regulations regarding re-use were ill-suited to politically vital songs such as "Lift Every Voice." Johnson writes of taking pleasure in seeing "printed or typewritten copies of the words pasted in the backs of hymnals and the songbooks used in Sunday schools, Y. M. C. A.'s, and similar institutions," and commends this method as ensuring the widest circulation of a song that had become a community resource. He writes of the pleasant surprise of having recently encountered white students at the summer labor school at Bryn Mawr College singing the song fervently from their mimeographed folio of songs, concluding that none of his literary efforts (some of which had generated considerable profits) had "paid… back so fully in satisfaction as being the part creator of this song."[41]

The multiplication of successes in 1901 seemed to promise a rosy future for Cole and the Johnson brothers. Johnson remembers gathering the manuscripts of fifteen songs, all of which had been slated to be used in productions of the 1901-2 seasons, to present to the partners of Jos. W. Stern and Co. At that meeting, they signed a three-year contract to write exclusively for Jos. W. Stern and Co., with a cash guarantee to be paid monthly and deducted

[40] See Imani Perry, *May We Forever Stand: A History of the Black National Anthem* (Chapel Hill: University of North Carolina Press, 2018)
[41] Johnson, *Along This Way*.

from royalties. Although they were not the first Black songwriters to achieve success on Broadway, this contract marked Cole and Johnson as unique. Despite the comparative security of their arrangement with Jos. W. Stern and Co., the Johnson brothers and Cole could not survive on the cash they received from the firm. Johnson had earlier been impressed by the steady royalty checks received by his mentor Paul Laurence Dunbar when the poet stayed for a spell in Jacksonville. When the Johnson brothers and Cole received their first royalty statements, however, they were devastated to learn that they had not in fact earned any money, but were in fact in arrears, owing the firm nearly $1,300.[42] Faced with this bleak financial situation, James Weldon Johnson would move into other professional arenas, building a resume as an educator, lawyer, writer, diplomat, and civil rights leader, returning to the ranks of the African American cultural worker as a writer. His brother Rosamond would frequently send him letters urging a return to songwriting, writing James Weldon that economic conditions for Black songwriters had improved. Cristina L. Ruotolo finds archival evidence for Johnson's wrestling with the temptation to return to the lucrative cultural work in which he engaged between the late 1890s and 1906. While abroad in South America during the Taft years, Johnson received letters from his brother and his wife urging him to return to songwriting and to New York. In one, his brother Rosamond reminds him there is "easy money" in vaudeville and insists that "there is no future for you in the consular service compared with your possibilities in putting up some good musical plays."[43]

Autobiography of an Ex-Colored Man

[42] Johnson, *Along This Way*, 153, 181-83.
[43] See discussion in Christine L. Ruotolo, "James Weldon Johnson and the Autobiography of an Ex-Colored Musician." *American Literature*, 253. "From J. Rosamond Johnson" in James Weldon Johnson and Grace Nail Johnson Papers, Box 42, folder 38, Beinecke Library, Yale University..

While James Weldon resisted his brother's entreaties, he continued to dwell upon his experiences with the mysteries of intellectual property in Black show business while composing his novel *Autobiography of an Ex-Colored Man*, first published anonymously in 1912, and reissued with Johnson's name attached in the 1920s.[44] The novel is, in many ways, a lightly fictionalized account of Johnson's education in the world of African American cultural workers in Manhattan and a meditation upon the contradictions of intellectual property and race. In one important scene, for example, the *Autobiography*'s narrator finds himself hearing ragtime music for the first time at a Manhattan club in the early 1890s. Reflecting back on the experience, the narrator riffs pedantically on the history of ragtime: "This was ragtime music, then a novelty in New York, and just growing to be a rage, which has not yet subsided." He traces its history to the ostensibly untutored musicians of Memphis and St. Louis "guided by natural musical instinct and talent," and through its migrations to Chicago and New York. Ragtime's inventors "often improvised crude and, at times, vulgar words to fit the melodies." He continues: "Several of these improvisations were taken down by white men, the words slightly altered, and published under the names of the arrangers. They sprang into immediate popularity and earned small fortunes, of which the Negro originators got only a few dollars." Intellectual property concerns are here front and center, and, in fact, come to serve as allegorical ballast for the rest of the novel's story of passing.[45]

[44] See Levy, *James Weldon Johnson*, 161-62, 305. See also "The Ebony Flute," *Opportunity*, January 1927. In "Scrapbooks and clippings, 'The Stage' (in Series V, Personal Papers). Scrapbooks and clippings, "The Stage" (in Series V, Personal Papers). Box 136, folder 1146 The James Weldon Johnson and Grace Nail Johnson Papers are the physical property of the Beinecke Rare Book and Manuscript Library, Yale University.
[45] Johnson, *Autobiography of an Ex-Colored Man*, 96.

The *Autobiography* is not always treated as a meditation on African American cultural work in the years between 1890 and 1912, but that is certainly one of the novel's dominant themes. As Ruotolo points out, surprisingly little critical attention has been directed toward the crucial role of music in the narrator's experience. Students of the novel have mostly been "uninterested in the narrator's principal means of supporting himself, which is also, arguably, his principal means of crossing racial boundaries."[46] By situating this dominant theme in this way—by highlighting the narrator's "principal means of supporting himself"—Ruotolo argues convincingly for the centrality of Black cultural work in *The Autobiography of an Ex-Colored Man*.

The narrator of *Autobiography* journeys towards his ultimate tragi-comic decision to try to live as a white man by way of several cultural work initiatives. First, he develops the compositional practice of "ragging the classics," that is, adapting themes drawn from the great composers of Western classical music to the syncopated and improvisatory format of ragtime. He then sets out to compile materials from African American folk sources and transform them into a grand symphonic composition. Johnson selected the milieu of the *Autobiography* carefully. He drew upon memories of the contradictions he encountered in New York in the early 1900s, and the slippage between the ostensibly stable categories of "white" and "black" within both popular culture and everyday life.[47]

As Johnson witnessed first-hand, around the turn of the century, Tin Pan Alley publishers and theatrical impressarios began to see large profits in ragtime. At the same time, the broader discourse on American music was dominated by arguments regarding the authentic location of the national musical spirit. White intellectuals frequently pointed to

[46] Cristina L. Ruotolo, "James Weldon Johnson and the Autobiography of an Ex-Colored Musician," 249.
[47] Levy, *James Weldon Johnson*, 126-33.

African American music as the nation's true store of original materials and thus uniquely representative of national character. The putative legitimation of African American music through these two tendencies further incentivized white cultural speculators to speculate in the fields of folk expression and popular music. It also inspired some African American cultural workers in Johnson's circle to craft compositions drawing on the vernacular and sacred music of the South as the basis of new works of classical music.[48]

Perhaps the most important such figure was Harry T. Burleigh, a frequent participant in the Marshall Hotel discussions, who served as one source of inspiration for the "Ex-Colored Man." A child prodigy and virtuoso, Burleigh composed works based on African American sources for New York's St. George's Episcopal Church (a predominantly white congregation). Burleigh negotiated constantly his desire to work free from constraints and his audience's frequent demands that he program and perform "Negro music." Further connecting Burleigh and the "Ex-Colored Man" were rumors that he was composing popular songs under a pseudonym, and thus, as Ruotolo puts it, "reaping financial rewards without damaging his emerging reputation as a 'serious' musician."[49] Like Burleigh, Rosamond Johnson was also a child prodigy and adult virtuoso, and served as a second model for certain aspects of the "Ex-Colored Man." He straddled the worlds of the New England Conservatory of Music and the *Oriental America* company, and charmed his way into the competitive New York theatrical scene.[50]

The *Autobiography*'s narrator is born in a little town in Georgia, a few years after the close of the Civil War, and grows up in Connecticut with a shaky sense of his racial identity.

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[48] See Abbot and Seroff, *Out of Sight*, 273-76.
[49] See David Gilbert, *The Product of our Souls: Ragtime, Race, and the Birth of the Manhattan Musical Marketplace* (Chapel Hill: University of North Carolina Press, 2015), 33, 37, 40.
[50] Johnson, *Autobiography*, 84.

He is raised by an African American mother and only meets his absentee father, a white Southern grandee, once during his childhood. His mother dies when he is a teenager, and a series of misadventures derail his plan to go study at Atlanta University. Traveling south, he has his first encounter with African American proletarian culture, in particular, the world of Pullman porters and the poor folks who staffed the African American hotels and restaurant, and reacts as a foreigner witnessing strange customs. He relocates to Jacksonville, Florida, gets a job as a cigar roller, and then as a music teacher. In Jacksonville, at a hotel ball, first sees the performance of the "cake-walk," the dance "which some Parisian critics pronounced the acme of poetic motion." This provides the *Autobiography*'s first major example of an African American art form coopted and monetized by white culture, and also recognized by international aesthetic authorities as an achievement that brought honor to its creators. While a "great many colored people" were ashamed of the cake-walk, the narrator suggests that they should be proud of it, instead. The cake-walk, along with the Uncle Remus stories and the Jubilee songs, "to which the Fisk singers made the public and the skilled musicians of both America and Europe listen," served to "refute the oft-advanced theory that they are an absolutely inferior race." At the same time, the narrator takes pains to awkwardly acknowledge that these are "lower forms of art" that might someday be "applied to the higher forms," a distinction that will become important as the narrative progresses.[51]

[51] Johnson, *Autobiography*, 84. See also James Weldon Johnson and the Fisk Jubilee Singers, under the direction of Mrs. J.A. Myers. (Draft of radio broadcast typescript). Box 81, folder 601. James Weldon Johnson and Grace Naill Johnson Papers. Series II: Writings. James Weldon Johnson, "How To Understand and Enjoy Negro Spirituals." "How to Understand and Enjoy Negro Spirituals," draft, typescript carbon, undated, Box 68, folder 317. James Weldon Johnson and Grace Naill Johnson Papers.

The action then shifts to New York: "the most fatally fascinating thing in America." The narrator feels the "dread power of the city; the crowds, the lights, the excitement, the gaiety, and all its subtler stimulating influences." He finds lodging in a house on 27th Street, just west of Sixth Avenue, and enters the sporting world of the Tenderloin's African American demimonde, a space in which cultural workers enjoy a privileged position. The gambling scenes allow the narrator to play amateur anthropologist, which he will do throughout the text, to learn the argot of gamblers and detail their complex rituals and rules. From the gambling joint he travels to a club on 6th Avenue, a house that "bore a rather gloomy aspect" from the outside but contained within "a veritable house of mirth." There, he hears "mingled sounds of music and laughter, the clink of glasses, and the pop of bottles." He is struck by "the display of diamond rings, scarf-pins, ear-rings, and breast-pins, the big rolls of money that were brought into evidence when drinks were paid for, and the air of gaiety that pervaded the place." The narrator is "dazzled" and "dazed" and "positively giddy." In a large back room, he hears "a young fellow singing a song, accompanied on the piano by a short, thickset, dark man." The singer dances for the crowd, triggering "a shower of small coins at his feet."[52] He watches the piano player, and has his second encounter with an unfamiliar African American musical form, ragtime, "then a novelty in New York, and just growing to be a rage, which has not yet subsided."[53]

The narrator traces its history to the ostensibly untutored musicians of Memphis, St. Louis, and Chicago. Its players improvised variations on established patterns, only to have these improvisations "taken down by white men, the words slightly altered, and published under the names of the arrangers." These stolen songs "sprang into immediate popularity and

[52] Johnson, *Autobiography*, 95.
[53] Johnson, *Autobiography*, 96.

earned small fortunes, of which the Negro originators got only a few dollars."[54] The more recent sophisticated updates on the ragtime form (the author undoubtedly had his brother's music in mind) had also begun to attract "a large number of white imitators and adulterators." Meditating upon the "naturalness" of a local pianist helps to set up a determining contrast that dominates the rest of the novel. Had the natural musician received training, the narrator decides, "he would not have been so delightful as he was in ragtime." To be converted into masterworks, the raw materials of ragtime would need to be converted into notated compositions by experts schooled in Western conventions.[55]

At the club, the narrator finds himself immersed in ragtime music and learning to navigate its complex syntax. He gains employment with white patrons who hire him to entertain wealthy guests at parties, and is taken as a traveling companion by a monied white lover of music whose friendship and affection for both the narrator and for African American music coexists easily with his unreconstructed racism. As he moves through these milieus, the narrator first adopts the practice of "ragging the classics," syncopating and dressing up canonical musical works in the current style, and then launches an ambitious plan to study the music of the African American South and mine it for the creation of new classical compositions. Traveling through the South, the narrator gets to work "jotting down in my note-book themes and melodies, and trying to catch the spirit of the Negro in his relatively primitive state."[56] Witnessing a lynching while on his Southern sojourn, the narrator finally decides to live the rest of his adult life as a white man. He feels a "great wave of humiliation and shame" at "being identified with a people that could with impunity be treated worse than

[54] Johnson, *Autobiography*, 96.
[55] Johnson, *Autobiography,* 98.
[56] Johnson, *Autobiography,* 169.

animals."[57] He abandons his artistic ambitions for the pursuit of a stable life as a white businessman (stable, of course, only so long as his secret is not discovered).

The literary critic and oral historian Alessandro Portelli provides a useful gloss on the *Autobiography*.[58] The narrator, per Portelli, "identifies with folklore as an expression of black identity, and yet is repelled by its bearers in terms of class distinction." The narrator's psyche has been captured by class prejudice, as exemplified by his comments on ragtime and the cake-walk. While authenticity is seen to abound in the expression of African American proletarians—members of what the narrator refers to as the "desperate class," men who work in lumber and turpentine camps, ex-convicts and bar-room loafers—the interventions of trained cultural workers are required for that authenticity to be transformed into high art. The final lines indicate something of Johnson's attitude towards the narrator: "When I sometimes open a little box in which I still keep my fast yellowing manuscripts, the only tangible remnants of a vanished dream, a dead ambition, a sacrificed talent, I cannot repress the thought that, after all, I have chosen the lesser part, that I have sold my birthright for a mess of pottage."[59] We hear in this phrase an echo of Ida B. Wells charge that those who would accept a "Colored Folks' Day" as a fitting response to the 1893 World's Fair's racism and exclusion of African Americans had sold the "self-respect of the race" for a "mess of potage."[60]

Johnson's New York *Age* Columns

[57] Johnson, *Autobiography,* 187.
[58] Alessandro Portelli, "The Tragedy and the Joke: James Weldon Johnson's The Autobiography of an Ex-Coloured Man" in Fabre and Feith, eds., *Temples For Tomorrow: Looking Back at the Harlem Renaissance* (Bloomington: Indiana University Press, 2001.
[59] Johnson, *Autobiography,* 207.
[60] Ida B. Wells, "Afro-Americans At The Fair. The Race At Chicago Opposed To Colored Folks' Day Aug. 25" (Special correspondence of the New York *Age*). Reprinted in the Topeka *Call*, July 15, 1893.

Among the many forms of cultural work in which Johnson engaged was his stint as editor and columnist for the New York *Age*. It is instructive to read his *Age* columns, written during the mid-to-late 1910s, to gain a sense of the scope of his cultural criticism and what might be called his cultural activism. For example, in a column entitled "Uncle Tom's Cabin and the Clansman" (March 4, 1915), Johnson wrote of a recent dispatch from Atlanta regarding protests against a stage production of *Uncle Tom's Cabin*.[61] This protest had led to the remaking of the play into a new one entitled *Old Plantation Days*, with the offensive parts expurgated, Simon Legree "transfigured into a sort of benevolent patriarch," and Uncle Tom "made into a happy old darkey who greatly enjoyed being a slave and who ultimately died of too much good treatment." With his trademark dry humor, Johnson summarizes: "so a performance was given that was no doubt a great success and offended nobody's sensibilities. All of which is very amusing."[62]

Johnson then turns to the scandalous decision of the Wilson White House to give a screening *The Birth of a Nation*, D.W. Griffiths's adaptation of Thomas Dixon's novel, *The Clansman*. Johnson reminds his readers: "*The Clansman* did us much injury as a book, but most of its readers were those already prejudiced against us." When it was turned into a play, it did even further injury. "Made into a moving picture play," Johnson warns, "it can do us incalculable harm." The new medium of the motion picture would heighten every detail of the story, "vividly portrayed before the eyes of the spectators." For example: "A big,

[61] James Weldon Johnson, "Uncle Tom's Cabin and the Clansman," New York *Age*, (March 4, 1915), in James Weldon Johnson and Sonya K. Wilson, *The Selected Writings of James Weldon Johnson, Volume One*, 12.
[62] Lawrence J. Oliver and Terri L. Walker, "James Weldon Johnson's 'New York *Ag*e' Essays on 'The Birth of a Nation' and the 'Southern Oligarchy.' *South Central Review*, Winter, 1993, Vol. 10, No. 4 (Winter, 1993), pp. 1-17.

degraded looking Negro is shown chasing a little golden-haired white girl for the purpose of outraging her; she, to escape him, goes to her death by hurling herself over a cliff." It was not difficult to imagine the effect such a salacious spectacle have on the white movie-going public.[63]

Johnson therefore praises the efforts of Prof. Joel E. Spingarn to urge the Board of Censors to block exhibition of the film, but laments: "the Board has no legal authority, and the producers can proceed without its approval." Searching for a relevant comparison, Johnson recalls the successful efforts of Irish-Americans to stop the performance of a farce comedy called *McFadden's Flats*, which featured "Irish" caricatures in green whiskers raising pigs in the parlor. Should not the same fate be visited upon "a stupendous moving picture play that seriously attempts to hold the American Negro up before the whole country as a degraded brute, and further, to make him the object of prejudice and hatred?" Johnson end his column with a call for *Birth of a Nation* to be re-edited or its exhibition prohibited. "Let the 100,000 colored citizens of this city stand united and determined to see that this picture shall not be produced in such a manner as will misrepresent and vilify us as a race."[64]

Johnson observes with a raised eyebrow the publicity effort initiated by the producers of *The Birth of a Nation* aimed at "showing their kindly feelings toward the Negro": a proposal for a special screening of the film at Hampton Institute. This would be a trap into which, Johnson is sure, "the Hampton people will be too wise to walk." After all, "No good will toward the Negro need be expected or hoped for from Tom Dixon and his associates," who had repeatedly proven their "blind hatred for the race." This gesture on the part of the

[63] Johnson, "A Trap," New York *Age* (May 6, 1915), in James Weldon Johnson and Sondra Kathryn Wilson, *The Selected Writings of James Weldon Johnson. Vol. 1 the New York* Age *Editorials (1914-1923)* (New York: Oxford University Press, 1995), 16.
[64] Johnson, "A Trap," 16.

"*Birth of a Nation* gang" seemed to indicate that the protests of the African American community were having an impact. The producers had evidently been "feeling the attacks made on their hell-inspired production." Johnson's reputation as a milquetoast accommodationist is belied by his unequivocal condemnation of *Birth of a Nation*: "The whole representation was conceived only in hatred for the North and contempt for the Negro; so let it die! Kill it!"[65]

Johnson forges a particularly sharp polemic in his column of September 23, 1915, "The Poor White Musician."[66] He writes of a recent editorial published by the *Globe* written by one Eugene De Bueris. This letter discloses the frequent discussion among white musicians of the question: "Why does Society prefer the Negro musician?" Bitter at the fact that upper-crust party organizers had taken to hiring the "Negro 'so-called' musician" instead of his "Caucasian" counterpart, even though the former was alleged to lack "the slightest conception of music," De Bueris frets of a time wherein the "poor white musician" will be "obliged to blacken his face to make a livelihood or starve." In response, Johnson chuckles: "Was a more pitiful wail ever uttered?" De Bueris, Johnson guesses, is a white New York musician who is mystified by the very possibility that something other than a sinister conspiracy underlies the intensification of competition in his field of work. Johnson considers, and then dismisses, the possibility that African American musicians were offering lower rates of compensation, but notes that if such were the case, such a wage differential would be public knowledge. In fact, there was a wage differential, but one that rewarded African American musicians with more generous compensation. Johnson writes of a "society

[65] Johnson, "A Trap," 16.
[66] James Weldon Johnson, "The Poor White Musician," New York *Age*, (September 23, 1915), in James Weldon Johnson and Sondra Kathryn Wilson, *The Selected Writings of James Weldon Johnson. Vol. 1 the New York* Age *Editorials (1914-1923)* (New York: Oxford University Press, 1995), 284.

lady" who accidentally rang up an African American talent agency looking for a band to play her party, taking her interlocutor for a white man. When given a quote, she exclaimed in amazement: "Why I can get colored musicians for that price!"[67] The anecdote illustrates the fact that African American musicians tended to charge higher prices than their white counterparts.

Johnson then takes De Bueris to task for his patronizing belittlement of African American musicians. If African American performers were only "so-called musicians," it was difficult to see how they could have been at the forefront of pioneering the modern styles of social music and dancing. Continuing with some musicological reflections, Johnson reminds his readers that since ragtime had "swept the world and become universally known as American music," various cultural prospectors had made "attempts to rob the Negro the credit of originating it." This was "in accord with an old habit of the white race." As soon as any art form is recognized as great, white intellectuals and entrepreneurs "set about to claim credit for it." In this manner, "the white race has gathered to itself credit for originating nearly all the great and good things in the world." This tendency to arrogate and steal the accomplishment of others belied the fact that "the pure white race has not originated a single one of the great, fundamental intellectual achievements which have raised man in the scale of civilization."[68] Returning to the argument he had placed in the mouth of the narrator of the *Autobiography*, Johnson points to the artistic achievements of African Americans within the field of popular culture as the "greatest proof which the race has yet brought against the

[67] Johnson, "The Poor White Musician," 284.
[68] Johnson, "The Poor White Musician," 285.

common charge of inferiority, because they are not the work of one or two gifted individuals, but of the race as a whole."[69]

The New York *Age* columns demonstrate the inter-connectedness, for intellectuals of Johnson's milieu, of the fight against the vulgar forgeries of the white popular culture industries and the fight against the resurgent race science in the American academy of the 1910s. In "Nature and Some Sociologists" (January 6, 1916), Johnson calls attention to a recent letter written to *The New Republic* by one John Jay Lindley. In this letter, Lindley asserts that "students of sociology" know that "there is a barrier which must forever exist between the whites and blacks." This was guaranteed, Lindley insisted, by certain immutable laws of nature. Johnson replies that a certain "class of sociological students" pretended to "know more about the human race than God." He calls attention to "these pseudo-scientific theories which darkly hint at the existence of some mysterious, eternal bar-sinister which shuts the Negro off from the rest of humanity; a thing which no atomist or chemist or psychologist has yet been able to find." "Still, in spite of their absurdity such theories as the one set forth by Mr. Lindley find many believers. Such a belief works a subtle injury to us which is more damaging than lynchings or other violent insults of prejudice, because its effect is to put us outside the human pale, to assign us to a place somewhere just this side of the most advanced apes."[70]

A column entitled "Crushing Out Radicalism" (November 29, 1919) addresses the Red Scare of 1919. "Crushing out radicalism," Johnson quips, "is now the favorite indoor and outdoor sport all over the country," a favorite pastime of the government, the reactionary

[69] Johnson, "The Poor White Musician," 287.
[70] James Weldon Johnson, "Nature and Some Sociologists," New York *Age* (January 6, 1916), in Johnson and Wilson, eds., *The Selected Writings of James Weldon Johnson. Vol. 1*, 21.

press, various "legions" of this and that, and ""certain individuals who have set themselves up as special guardians of the safety of the nation." This game of "crushing out radicalism" was guided by a single rule: "You may do anything you please, lawful or unlawful, so long as you do it in the name of crushing out radicalism." This counter-subversive campaign had inspired many lynch mobs, "acting as mobs always do, without any inquiry into the guilt of their victims" and "with the approbation of a majority public opinion and with the silent sanction of legally constituted authority." Johnson points to the real beneficiaries of such vigilantism: those who are "in possession of the wealth, the luxury, the leisure, the positions of preferment, the sinecures and assured futures," who "blindly fight all change, feeling that change of any kind will affect their possessions." Johnson ends with a veiled, apparently positive reference to the "economic interpretation of history," which may indicate his most clear endorsement of some sort of Marxian philosophy.[71]

In "A Thorn in the KKK's Side" (April 9, 1921) Johnson reads through a copy of *The Searchlight*, official publication of the Ku Klux Klan. He observes that the magazine identifies the NAACP as the KKK's "bitterest and strongest enemy," and calls this a "good sign," one that is "in line with the truth that this writer has been trying to impress at every opportunity, the truth that the Negro in America will never get his full rights until those who wish to deny them to him are afraid to do it." In a column of February 10, 1923, entitled "Let Them Come," Johnson writes of reports of the steady migration of southern African Americans to the North, "activities to which the Ku Klux Klan are adding strength and speed." However treacherous the causes, Johnson welcomes the migration, reminding his

[71] James Weldon Johnson, "Crushing Out Radicalism," New York *Age* (November 29, 1919), in Johnson and Wilson, eds., *The Selected Writings of James Weldon Johnson. Vol. 1*, 41.

readers: "The only time in his history in this country that the Negro has been able to exercise a power which forced the South to retreat from its traditional position was when during the great war the Negro left that section in large numbers."[72]

As Johnson was writing these columns, he was becoming increasingly active in the NAACP. Much of Johnson's activism was directed at stamping out the cancer of lynching, which had grown in virulence since the end of World War One, with seventy-six deaths by lynching in 1919, fifty-three in 1920, and fifty-nine in 1921, and a total of 3,436 victims of lynching between 1889 and 1921. Half of Johnson's New York *Age* columns addressed mob violence against African Americans. His immersion in the world of cultural work came into play in his anti-lynching activism, in the insistence that organizing support for the cause required "the fullest publicity." Most famously, in 1917, Johnson helped organize a silent parade, during which he and W.E.B. Du Bois marched with 12,000 fellow citizens down Fifth Avenue in complete silence, save for the sound of muffled drums. This silent parade must be seen, at least in part, as an act of performance, a mobilization of aesthetic resources for the accomplishment of a political goal that would be more poorly served by more conventional means.[73]

As Harlem came to definitively displace the Tenderloin as the center of African American cultural work, a new cadre of cultural workers flooded the neighborhood. Many pioneered new forms of resistance. Johnson's long essay on the African American theater in *Black Manhattan* chronicles the radicalism of musical productions like *Shuffle Along*, and

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[72] James Weldon Johnson, "A Thorn in the KKK's Side," New York *Age* (April 9, 1921), in Johnson and Wilson, eds., *The Selected Writings of James Weldon Johnson. Vol. 1*, 45.

[73] On the silent parade, see Levy, *James Weldon Johnson*, 188. Johnson also worked on the Dyer Anti-Lynching Bill, with L. C. Dyer of St. Louis. Although the bill failed, Johnson did not see the effort as a complete loss: "The Dyer Anti-Lynching Bill did not become a law, but it made the floors of the Congress a forum in which the facts were . . . brought home to the American people as they had never been before." See Levy, *James Weldon Johnson*, 264-65.

highlights the importance of James Reese Europe and his Clef Club. By the early 1920, the great innovative genius Duke Ellington had set up shop in Harlem. In Johnson's telling, an autonomous African American aesthetics rooted in the lifeworld of New York's cultural workers reached a peak of creativity in the late 1910s, which began to reverse with WWI, the Palmer Raids and Red Scare of 1919, the rise of nativism and the resurgence of the Klan in the 1920s.[74]

This up-and-down course of developments shaped Johnson's sense of the political possibilities of the African American cultural worker. Johnson lived to see, in the 1930s, Paul Robeson's rise to fame and the growth of big-band jazz, which demonstrated to the world the artistic power and intellectual ferocity of highly professionalized African American musicians who had seized at least some control of the means of artistic production. He also lived to see the emergence of a new generation of literary innovators, including Langston Hughes, Claude McKay, Zora Neale Hurston, and Richard Wright. If he did not make the same public shift to the left as his longtime colleague Du Bois, he was a more supportive mentor to Hughes and McKay as they faced criticism for their radical politics and concentration upon African American proletarian life.[75] While Johnson has often been dismissed as an assimilationist, Brahmin conservative, and elitist, those judgments are at best incomplete and at worst at odds with the historical evidence we have reviewed in this chapter. By foregrounding the theme of cultural work and the cultural work in Johnson's writings, we can glimpse the more complex reality of his political commitments, and

[74] James Weldon Johnson, *Black Manhattan*, 154.
[75] On Johnson's relationship with Hughes and McKay, respectively, see Levy, *James Weldon Johnson*, 309-12, and, 309-18.

appreciate the considerable extent to which his engagement with aesthetic politics made him an ardent sort of fellow traveler.

Chapter Three: Joseph Freeman and the Left Cultural Worker in the 1920s

Introduction

We are inclined to think of the 1930s as the first moment in which the cultural worker fully enters the stage of American history. Guided by influential accounts like those of Malcolm Cowley or Max Eastman, many historians treat the left cultural worker as having emerged *ex nihilo* in the early years of the Depression Era. It is certainly true that, buoyed by the spirit of the Popular Front, thousands of New Deal-era left-wing and fellow-traveling intellectuals won salaried jobs at newspapers, magazines, tabloids, in the radio and film industries, and in the commercial theatre. At the turn of the decade, explicit references to the "cultural worker" began to populate the little magazines of the period like *The New Masses*. By the time of FDR's election in 1932, many left voices were singing the praise of the "cultural worker": not merely seeking to enlist previously unaffiliated writers and artists to affiliate with the resistance to capitalism and incipient European fascism but also to act as agents of hegemonic change.[1]

[1] Malcolm Cowley, *And I Worked at the Writer's Trade: Chapters of Literary History 1918-1978* (New York: Viking Press, 1978); *The Dream of the Golden Mountains: Remembering the 1930s* (New York: Viking Press, 1980); Max Eastman, *Artists in Uniform: A Study of Literature and Bureaucratism* (New York: Alfred A. Knopf, 1934). Michael Denning, *The Cultural Front: The Laboring of American Culture in the Twentieth Century* (London: Verso, 1997); Susan Quinn, *Furious Improvisation: How the WPA and a Cast of Thousands Made High Art Out of Desperate Times* (New York: Walker & Co., 2008); Jerry Mangione, *The Dream and the Deal: The Federal Writers' Project, 1935-1943* (Syracuse: Syracuse University Press, 1996); Jason Scott Smith, *Building New Deal Liberalism: The Political Economy of Public Works* (New York: Cambridge University Press, 2006); John E. Vacha, "The Federal Theatre's Living Newspapers: New York's Docudramas of the Thirties." *New York History*, January 1986, Vol. 67, No. 1, pp. 66-88; Rania Karoula, *The Federal Theatre Project, 1935–1939: Engagement and Experimentation* (Edinburgh: Edinburgh University Press, 2021); Elizabeth A. Osborne, *Staging the People: Community and Identity in the Federal Theatre Project* (New York: Palgrave, 2011); Jane De Hart Mathews, "Arts and the People: The New Deal Quest for a Cultural Democracy." *The Journal of American History*, Sep., 1975, Vol. 62, No. 2 (Sep., 1975), pp. 316-339; Roy Rosenzweig and Barbara Melosh, "Government and the Arts: Voices from the New Deal Era." *The Journal of American History*,

Despite the appeal of this standard narrative, it is not quite correct. Much of what would congeal into the figure of the left "cultural worker" originated in earlier initiatives clustered around committed young artists and intellectuals in New York City in the 1910s and 1920s. In this chapter, we look closely at the memoirs of one such artist/intellectual: Joseph Freeman's *An American Testament: A Narrative of Rebels and Romantics*. This text is particularly valuable, for us, because Freeman is both a diligent and fastidious chronicler of events and a reliable bibliographer of the interregnum left, guiding us to many now forgotten texts concerning cultural work that animated the intra-left debates of the period.[2]

An American Testament

Freeman's long memoir provides an account of the movement from a Jewish childhood in the pogrom-riddled Ukraine, to adolescence in the tenements of Brooklyn, and into the young adulthood of a left intellectual committed to the revolutionary potentials of cultural work. Throughout *An American Testament*, Freeman expresses a deep interest in the question of how people became socialists. The text's structure, he explains, was inspired both by classical conversion narratives like St. Augustine's *Confessions* and by columns that used to run in *Comrade* (a literary magazine published by American socialists early in the 20th century): brief autobiographies by leftists describing their journeys to political commitment, meant to inspire young radicals.[3]

Sep., 1990, Vol. 77, No. 2 (Sep., 1990), pp. 596-608; Cedric Larson, "The Cultural Projects of the WPA." *The Public Opinion Quarterly*, Jul., 1939, Vol. 3, No. 3 (Jul., 1939), pp. 491-496; Lauren Rebecca Sklaroff, *Black Culture and the New Deal: The Quest for Civil Rights in the Roosevelt Era* (Chapel Hill, University of North Carolina Press, 2009).

[2] Joseph Freeman, *An American Testament: A Narrative of Rebels and Romantics* (London: Victor Gollancz, Ltd., 1938).

[3] Freeman, *An American Testament*, 619.

This literary subgenre had become increasingly dominant in the Left of the 1920s. On an extended sojourn in the Soviet Union in 1926 as a young revolutionary, Freeman discovered that one "could hardly pick up a novel or a collection of poems without finding an autobiographical sketch in which the author explained how he came to communism."[4] In his own epoch, Freeman writes, "mankind was again making a basic turn in its development," and it was the cultural worker who was to serve as the new epoch's archetypical intellectual. In *An American Testament*, Freeman sought to "discover those points at which the experiences of the intellectual touched the experiences of the worker" and to meticulously document the process whereby the left came to a temporary agreement that the defining characteristic of progressive socialist art and media would be its superintendence by a skilled workforce of committed white-collar specialists laboring collectively to bring into being an alternative to a rapacious and murderous capitalist order. Arts and entertainment would no longer be seen as isolated, depoliticized pursuits. "When Marxism became the dominant philosophy," Freeman writes, "the whole country accustomed itself to thinking of everything in relation to everything else, and of all things in relation to socialism."[5] This observation captures Freeman's fundamental perspective on cultural work, as it evolved and was clarified in the hothouse atmosphere of the immediate-post 1917 international left.

Freeman was born in Ukraine in 1897 and moved with his family to New York at the age of 7, escaping the growing wave of anti-Semitic violence in Eastern Europe. His father, Isaac Freeman, eventually built a successful real estate business in Brooklyn over the course of several decades, but Freeman's childhood was that of a typical turn-of-the-century Jewish working-class proletarian. His neighborhood abounded with political agitation of various

[4] Freeman, *An American Testament*, 619.
[5] Freeman, *An American Testament*, 574.

stripes, from anarchism to Marxist socialism to labor Zionism. Freeman enrolled at Columbia in 1916, joining a small group of left-leaning Jewish students who commuted from ethnic enclaves to Morningside Heights. They congregated with other students also interested in radical politics: including Matthew Josephson, Louis Hacker, and Kenneth Burke. By this time, Freeman's father had become a prosperous real-estate speculator. Many of the most memorable scenes in *An American Testament* recount arguments between the radical son and embourgeoised father, which play on melodramatic tropes of the standard Jewish American assimilation narrative while putting a radical twist on the form.[6]

Freeman's radicalization was accelerated by the reactionary thrust of mobilization for war on the Columbia campus and by the Palmer raids and waves of repression following the war's end. He and his friends wrestled with the contradictions of literary Romanticism and communist theory. Much of the material in *An American Testament*'s early sections dramatizes this conflict. As it would turn out, Romanticism's arsenal of effects, techniques, and commitments would substantially spill over into the new world of aesthetic modernism: the celebration of rebellion, the cult of the new, the preference for vivid evocations of extreme emotional experience, the veneration of spontaneous inspiration and a keen interest in sex. What would shift, in Freeman's consciousness, was a default distaste for specialization. In their turn to new visions of cultural work, Freeman and other like-minded artists and intellectuals adopted from their Russian counterparts a workerist orientation towards "technique" and technical specialization.

In his early years at Columbia University, Freeman and his fellow student radicals imbibed a Romantic ethos. "Artists said it meant selling your talent to Mammon; socialists

[6] Freeman, *An American Testament*, 134.

said, to capitalism." They associated "success" with "philistinism" and made a cult of failure.[7] Freeman graduated Phi Beta Kappa in 1920, coming to political consciousness as a student activist protesting the jingoism and attacks on academic freedom that attended the mobilization for World War I. After graduation, Freeman began his long apprenticeship in the world of "hack work": that branch of cultural labor that stretched back to London's Grub Street in the early 18th century, which tasked writers with the churning out of endless reams of disposable copy for the capitalist culture industries. Freeman obtained a job at *Harper*'s, ghost-writing popular historical books while stealing away to write poetry. Freeman traveled to Paris in July of 1920, with his childhood friend and fellow radical Robert Smith along with Smith's wife. He soon obtained a job on the Paris editions of the Chicago *Herald* and *Tribune*. Surrounded by other expatriate radicals who worked the night shift for American newspapers, Freeman divided his time between the "real world of newspaper work" (running errands, delivering copy, working the re-write desk) and the fantasy world of "idealistic poetry and philosophy." The newspapers were then dominated by larger-than-life journalistic figures—Floyd Gibbons, Leon Stolz, Stephen Vincent Benet, Lee Wood, Percy Winner, and John O'Brien.[8]

At this time, radical and left-wing young artists and intellectuals competed fiercely for European newspaper hackwork jobs. They knew that once in Europe, they could take advantage of favorable exchange rates and enjoy the relative distance from the probing eyes of the police agencies of the state and get to work on honing their literary and artistic projects. Still, the time demands of hackwork posed constant problems for young radicals who wanted simultaneously to work on artistic projects and engage in political organizing.

[7] Freeman, *An American Testament*, 82.
[8] Freeman, *An American Testament*, 177.

Freeman writes: "I tried newspaper work, ghosting and business, and found that you could not spend eight hours a day in an office without being affected by its routine and its ideas." He and his comrades found it "hopeless to attempt sustained writing and socialist activity after a grueling day at a job upon which you expended not only the energy of effort, but the even greater energy of hatred."[9]

While "learning to work steadily every day at the profession of journalism," Freeman and his peers developed a deepening sense of internationalism. He describes their shared sensibility: "We were exiles in Paris, London, Venice in the same way and for precisely the same reason that we were exiles in New York. We were outside the organized bourgeoisie and not yet part of the organized working class."[10] Trading letters with friends in the US who had joined the new Communist Party, Freeman learns of the steady "spread of revolutionary ideas among young intellectuals."[11] From New York, Freeman's old friend, Benjamin Ginzburg urged Freeman to surrender himself to Bolshevism and to join him in writing, translating, and organizing. This invitation to serve the Soviet cause through cultural work was not entirely new: socialist cadres had prioritized newspaper work and pamphlet writing since the beginning of the movement. But the notion that such a vocation might be suitable to large numbers of young intellectuals and that, in fact, such a bloc of cultural workers might be essential to the success of the radical cause in the US was markedly novel.

For the moment, Freeman resisted, travelling to England toward the end of January 1921, continuing to work for the *Tribune*. Hackwork in London meant working from four in the afternoon to midnight. He moved from the re-write desk to the journalistic front lines,

[9] Freeman, *An American Testament*, 170.
[10] Freeman, *An American Testament*, 186.
[11] Freeman, *An American Testament*, 168.

covering stories directly. Freeman's understanding of the character of the news media in modern capitalist societies deepened: he was not allowed to cover working-class struggle or strikes, which his editors dismissed as "propaganda." At the same time, he recalled, looking back 15 years later, that he had struggled to grasp "that the Press is an industry subject to many of the basic laws which affect the manufacture of automobiles or the extraction of oil."[12]

Exchanging letters with friends from New York, Freeman learned that many of his peers had turned against "art in general." His old friend Mac Windsor mocked him for continuing to write poetry, triggering the defensive reply from Freeman: "I am still a communist."[13] Freeman pointed out to Windsor that even amid civil war and overlapping crises, the government in Moscow was running theatres, art exhibits, concerts and printing millions of books. He concluded one letter: "As I understand communism, it is a movement to distribute the good things of life among all the people, not to abolish them because only a few can enjoy them now. A comfortable house, good food, good education—these are at present bourgeois privileges—and it would be just as sensible to urge their abolition as to urge the abolition of art."[14] In private, however, Freeman had made little headway in carving out a space within the radical left for artistic self-fashioning.

It was in this moment of consternation and internal conflict that Freeman's conceptualization of something like the concept of left-wing cultural work began to crystallize. The "pressure of the revolutionary current in Europe" altered his views about the political potentials of art and literature. He began to approach writing as stemming from a

[12] Freeman, *An American Testament*, 214.
[13] Freeman, *An American Testament*, 223.
[14] Freeman, *An American Testament*, 224.

need to orient himself toward the social revolution which he now accepted as the "central fact" of his life. That would require, he believed, living among the masses of organized workers and participating in the revolutionary movement. "I was not in that position in London in the year 1921," Freeman recalled. "I was then a person who fancied himself in love with art, who from earliest childhood was interested in 'social justice' who now saw 'social justice' embodied in communism and who was trying to clear his system of intellectual and emotional debris which stood between him and his possible usefulness to the revolutionary movement."[15]

Freeman slowly and awkwardly transformed his writing, plagued by "doubts, vacillations, speculations, introspections." Letters from New York continued to arrive, urging him to take on a role within the Party press. Freeman's friend Louis Smith promised that his would be a "valuable contribution to open the eyes of the rank and file."[16] He heeded these entreaties in the fall of 1921, returning to New York to serve among the first cadre of left cultural workers in the city. Freeman's old friend Louis Smith invited him to work for the *Liberator*, the immediate successor to the *Masses* magazine, the latter of which had been beaten into submission by a series of costly legal challenges arising from the magazine's resistance to American entry into World War I. While getting his feet wet with Party work and earning money as a "make-up man" at a weekly bourgeois magazine, Freeman began working on the *Liberator*. Max Eastman, formerly editor of the *Masses*, presided as the *Liberator*'s *eminence gris*.[17] By that time, it was already clear that Eastman had broken with the left and was drifting rapidly to the right. Eastman tells Freeman that socialist revolution

[15] Freeman, *An American Testament*, 225.
[16] Freeman, *An American Testament*, 225.
[17] On Eastman, see Christopher Phelps, *Young Sidney Hook* (Ithaca: Cornell University Press, 1997), 38.

in America is "at least fifty years away."[18] In time, Eastman would write *Artists in Uniform*, which savagely attacked the CP's veneration of committed professional artists and writers, a text to which we will return at the end of this chapter.[19]

Soon thereafter, Freeman met Floyd Dell, another giant of the prewar "lyrical Left" and *Masses* veteran.[20] With Dell, Freeman charted out some of the dilemmas of the left "intelligentsia"—"writers, artists, economists, and journalists who were more or less 'advanced' in their ideas"—the term that would serve as a placeholder for the emergent notion of the "cultural worker."[21] Dell represented one pole of the older intelligentsia, retreating from politics into psychoanalysis and from the city to an estate in Croton-on-Hudson. Nevertheless, Dell was influential in several important respects regarding the emergent figure of the cultural worker. For Freeman, his was a consistent voice advocating for the salience of art to the socialist movement, and a pioneering advocate of the importance of popular culture, cheering on the leftist appropriation of "the poster, the bill-board, the movie and even the radio, then beginning to roar its inanities through America's cities."[22]

In the *Liberator* offices, Freeman encountered a group of crucial figures in the formation of the left cultural worker ideal: Mike Gold, Claude McKay, William Gropper, Robert Minor, Lydia Gibson, Arturo Giovannitti, Stuart Chase.[23] "I felt that on a small scale

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[18] Freeman, *An American Testament*, 242.
[19] Max Eastman, *Artists in Uniform* (New York: Knopf, 1934).
[20] See Douglas Clayton, *Floyd Dell: The Life and Times of an American Rebel* (Chicago: Ivan R, Dee, 1994).
[21] Freeman, *An American Testament*, 243.
[22] Freeman, *An American Testament*, 245.
[23] See James D. Bloom, *Left Letters: The Culture Wars of Mike Gold and Joseph Freeman* (New York: Columbia University Press. 1992); Patrick Chura, *Mike Gold: The People's Writer* (Albany: SUNY Press, 2020); Gary Edward Holcomb, *Claude McKay: Code Name Sasha: Queer Black Marxism and the Harlem Renaissance* (Gainesville: University Press of Florida, 2007); Joseph Anthony Gahn, *The America of William Gropper, Radical Cartoonist* (PhD Dissertation), Syracuse University, 1966; Patricia Phagan, *William Gropper and 'Freiheit': A Study of his Political Cartoons, 1924-1935* (PhD Dissertation), City University of New York, 2000; Rachel L. Schreiber, "The Graphic Satire of Robert Minor and Art Young: Text and Image in Political Cartoons" *The Journal of Modern Periodical Studies*. Penn State University Press. Volume 13, Number 1,

the *Liberator* group represented that ideal society which we all wanted," Freeman recalled, "that society in which no racial barriers could possibly exist."[24] Faced with a virtual beheading of left intellectual leadership in New York City (with John Reed dead, Max Eastman turning apostate, and Floyd Dell retiring to Croton), the young *Liberator* staffers were free to creatively define the spirit in which they would conduct their work and the character of that work itself. With Robert Minor withdrawing from art, young cartoonists like William Gropper and Hugo Gellert worked diligently to shape the oppositional aesthetic of the left in the 1920s. At the same time, the *Liberator* offices served as the headquarters of the two towering proletarian literary giants of Freeman's generation: Mike Gold and Claude McKay.[25]

As associate editor of the *Liberator*, Freeman would come to assume the responsibility of keeping the anti-productive forces of bohemianism at bay. Greenwich Village was proving an unsuitable environment for full-time work literary toward revolution: "At the earliest opportunity I moved those offices to the Times Square district to prevent them from being the hang-out of unoccupied bohemians." At this stage, art and work remained in conflict. "The cult of learning," Freeman reflected, "considered the artist too sacred to work."[26] Within the milieu of the *Liberator*, Freeman also met most of the

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2022; and *Gender and Activism in a Little Magazine: The Modern Figures of* The Masses (Farnham: Ashgate Pub, 2011). On Gibson, see Julia L. Mickenberg and Philip Nel, eds., *Tales for Little Rebels: A Collection of Radical Children's Literature* (New York: New York University Press, 2008), 26. On Giovannitti, see Bruce Watson, *Bread and Roses: Mills, Migrants, and the Struggle for the American Dream* (New York, NY, Viking, 2005). On Chase, see, Richard G. Vangermeersch, *The Life and Writings of Stuart Chase (1888–1985): From an Accountant's Perspective* (Amsterdam: Elsevier JAI, 2005).

[24] Freeman, *An American Testament*, 246.

[25] See James D. Bloom, *Left Letters: The Culture Wars of Mike Gold and Joseph Freeman* (New York: Columbia University Press. 1992); Patrick Chura, *Mike Gold: The People's Writer* (Albany: SUNY Press, 2020); Gary Edward Holcomb, *Claude McKay: Code Name Sasha: Queer Black Marxism and the Harlem Renaissance* (Gainesville: University Press of Florida, 2007).

[26] Freeman, *An American Testament,* 249.

important Communist political operators of the early 1920s, including Bill Dunne, one of the founders of the Communist Labour party in 1919; William Z. Foster, left labor leader in the steel industry who would assume leadership of the Party in 1946; and C. E. Ruthenberg, Socialist Party organizer.[27] Freeman recalled the discussions of that moment between the young intellectuals and the full-time political organizers:

> But we were writers, artists, poets, critics, and we wanted to serve the revolutionary movement in our own fields. How could we do so? On this point the Party had no policy now. It was too busy, with immediate organizational tasks to pay much attention to the so-called cultural front. For the time being, we would ourselves have to answer as best we could certain questions of the utmost importance to us, questions affecting our relations as writers and artists to the revolutionary movement.[28]

As he attempted to solve these problems for himself, Freeman developed an uncanny knack for securing temporary employments with key figures of the pre-Depression liberal left, including Scott Nearing (with whom he authored 1926's *Dollar Diplomacy*) and Roger Baldwin in the original incarnation of the American Civil Liberties Union.[29] Such connections were professionally useful, as the *Liberator* quickly fell apart. Claude McKay departed for Russia, Mike Gold left for California to work on a novel, and the Jazz Age public did not seem to be keen on a left little magazine of the traditional variety. In 1923, the *Liberator* was turned over to the Communist Party and moved to Party headquarters on East Eleventh Street.[30]

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[27] See Vernon L. Pedersen, "The Most Dangerous Man in Montana: Corruption, Communism, and Bill Dunne" *Montana: The Magazine of Western History*, 67 (2), Summer 2017; Edward P. Johanningsmeier, *Forging American Communism: The Life of William Z. Foster* (Princeton: Princeton University Press, 1994); James R. Barrett, *William Z. Foster and the Tragedy of American Radicalism* (Urbana: University of Illinois Press, 1999); Oakley C. Johnson, *The Day is Coming: Life and Work of Charles E. Ruthenberg, 1882–1927* (New York: International Publishers, 1957).
[28]Freeman, *An American Testament*, 272.
[29] Scott Nearing and Joseph Freeman, *Dollar Diplomacy; a Study in American Imperialism* (New York: Arno Press, 1970 [1925]).
[30] Freeman, *An American Testament*, 286.

Freeman's friends among the ranks of organizers tried to persuade him that cultural work might have a place within the movement. Ruthenberg told him: "Journalism is important; lecturing is important." It is at this moment that other figures came to join John Reed and Robert Minor in the pantheon of left cultural work: figures who had not forsaken artistic activity in favor of politics but who were understood to be contributors to the larger struggle through their creative activities. Upton Sinclair, Jack London, and Floyd Dell became heroes to young artists and intellectuals, as did Clarissa Ware, Rose Pastor Stokes, Mother Bloor, Rose Wortis, and Genevieve Taggard.[31] Freeman began to plot the creation of a new left literary journal with other young leftists, including Mike Gold, who remained in California, working on his novel *Jews Without Money*. "Deprived of a specifically literary magazine," he recalls in *An American Testament*, "we wrote each other long letters, half solemn, half ironical, about 'art and revolution.'" In the brief interregnum between war and depression, it had become difficult to sustain revolutionary ardor. Nevertheless, this correspondence and conversations in New York City would lead to the founding in 1926 of the *New Masses*, the key organ of the emerging left cultural worker sensibility.[32]

By the mid-1920s, Freeman had gained employment as a correspondent for the Telegraph Agency of the Soviet Union (TASS). He sailed to Europe in 1926 on the first

[31] Anthony Arthur, *Radical Innocent: Upton Sinclair* (New York: Random House, 2006); Kevin Mattson, *Upton Sinclair and the Other American Century* (John Wiley & Sons, 2006); Earle Labor, *Jack London: An American Life* (New York: Farrar, Straus and Giroux, 2013); Douglas Clayton, *Floyd Dell: The Life and Times of an American Rebel* (Chicago: Ivan R, Dee, 1994); Kathleen A. Brown, The 'Savagely Fathered and Un-Mothered World' of the Communist Party, U.S.A.: Feminism, Maternalism, and 'Mother Bloor,'" *Feminist Studies*, Vol. 25, No. 3 (Autumn, 1999), pp. 537-570; Patrick Renshaw, "Rose of the World: The Pastor-Stokes Marriage and the American Left, 1905–1925." New York History, vol. 62, no. 4, 1981, pp. 415–38; Arthur and Pearl Zipser, *Fire and Grace: The Life of Rose Pastor Stokes* (Athens, Georgia: The University of Georgia Press, 1989); Daniel E. Bender, *Sweated Work Weak Bodies: Anti-Sweatshop Campaigns and Languages of Labor* (New Brunswick N.J: Rutgers University Press, 2004); Donna M. Allego, "Genevieve Taggard's Sentimental Marxism in 'Calling Western Union.'" *College Literature*, vol. 31, no. 1, 2004.
[32] Freeman, *An American Testament*, 318.

American ship to travel to Russia after the Bolshevik Revolution, sending reports from Moscow to *The New Masses*.[33] In the late 1920s, Freeman worked as a TASS agent in Mexico City, where he met his first wife, Ione Robinson, and became friendly with Diego Rivera. Freeman and Robinson divorced in 1931. In 1932, Freeman married Charmion von Wiegand, also a modernist painter. Into the 1930s, Freeman (along with Joshua Kunitz and Louis Lozowick) helped to compile *Voices of October*, the first English-language anthology of Russian left-wing writing on the arts.[34] He wrote frequently for the *New Masses* and the *Partisan Review* (which he helped to cofound in 1934). *An American Testament* was written in the years 1934-1935. Though he retained a marked fidelity to the Soviet project throughout the 1930s, in the eyes of the Party, he had erred by shining too favorable a light upon Leon Trotsky in the pages of *An American Testament*. Freeman was aware of the danger he had courted as he composed his autobiographical text. In a 1940 manuscript he mused that Trotsky served for him as Satan served Milton during the composition of *Paradise Lost*. He could not hide his admiration of Trotsky's "energy and magnificence" even while he tried to tow the party line.[35] In 1953, Freeman recalled that official Party efforts to denounce him as a "Trotskyite" began immediately upon publication of *An American Testament*. In 1939, Freeman wrote: "Moscow did denounce me as a Trotskyite because my book revealed that I understood certain evils in the movement quite clearly, that while I was willing to accept Stalin's political leadership, I was not one bit enthusiastic about him, that I had a soft spot in my heart for Trotsky and the old Bolsheviks."[36]

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[33] Freeman, *An American Testament*, 435.
[34]Joseph Freeman, Joshua Kunitz and Louis Lozowick, eds. *Voices of October Art and Literature in Soviet Russia* (New York: Vanguard Press 1930).
[35] Gary McConnell, "Joseph Freeman: Artist in Uniform", *Modern Age*, Winter 1999, 45.
[36] McConnell, "Joseph Freeman," 46.

Freeman returned to Mexico in 1937, dodging telegrams from Party officials urging him to return to New York to write editorials defending the second Moscow trials. He wrote to Floyd Dell that this was a main factor contributing to his excommunication two years later. Meanwhile, Freeman was given one last chance. The *New Masses* editors Joseph North and Abe Magill assigned him a piece defending the Molotov-Ribbentrop pact. In his letter to Dell, he summarized this life-changing moment: "I refused and that was my last contact with the *New Masses* and the Left." By refusing he had resigned himself to "closing the door to my Left past." Following his exile from the Party in 1939, Freeman worked for a spell in the nascent public relations industry. During the World War II years, he joined Edward Bernays, Sigmund Freud's nephew, at Executive Research, Inc., but he fell out almost immediately with the notoriously difficult Bernays. Freeman also wrote several novels, including 1943's *Never Call Retreat*, which was critically well received. In 1945, he worked for the USO, and produced advertising materials for the American Paper and Pulp Association.[37]

Despite his prodigious literary output and the sophisticated character of *An American Testament*, Freeman is not a figure familiar to most historians of the 20th-century left. To the extent that his name is recognized, it is as a character in Daniel Aaron's classic study, *Writers on the Left*.[38] Daniel Aaron takes up Freeman's story in Chapter Three ("Expatriates and Radicals"), highlighting a notice in a July 1922 issue of *The Liberator* announcing that "Joseph Freeman, poet, trade union professor of history and economics and book reviewer

[37] Larry Tye, *The Father of Spin: Edward L. Bernays & the Birth of Public Relations* (New York: Crown, 1998); Joseph Freeman, *Never Call Retreat* (New York: Farrar & Rinehart 1943).
[38] As Alan Wald recalls, Aaron wrote the book while teaching English at Smith College in the late 1950s and early and 1960s, originally at the behest of the Ford Foundation as part of a series on the impact of Communism on literature. Wald writes that Aaron "developed a close association with Joseph Freeman, the fallen *New Masses* editor who served as Aaron's 'Virgil' in his journey through the left-wing cultural world on both coasts. Alan M. Wald, "Introduction" to the Morningside Books Edition of Daniel Aaron, *Writers on the Left: Episodes in American Literary Communism*. New York: Columbia Univ. Press, 1992 (1961).

extraordinary" would soon join the staff of the magazine, an indication of Freeman's outsized reputation as a leading left cultural worker even just a few years out of college. Aaron also emphasizes Freeman's typicality: his Jewishness, his immigrant background, his intellectual seriousness were all shared features of the milieu of the *New Masses* and the early CPUSA.[39]

By the time of the New Left's advent, Freeman's had earned a reputation as a disillusioned Red, who had turned from socialist realism and agitprop to a successful career in public relations after the *annus horribilis* of 1939. When he passed away in August of 1965, at the age of 67, the New York *Times* ran an obituary that highlighted his tenure as "one of the country's best-known editors and reporters for left-wing and Communist publications" during the 1920s and 1930s, who was subsequently denounced as a "romantic" and "enemy of the working classes" following the publication of *An American Testament*.[40]

The Influence of William Morris

Freeman took pains to provide an inventory of texts, freshly published and newly rediscovered, that helped to pave the way for the new vision of cultural work. Freeman and his comrades read Lenin in translation in the *Liberator*, taking inspiration from Lenin's *Letter to American Workingmen* (1919). Freeman recalls in *An American Testament* that he and his friends "clipped that letter, read it and re-read, it, got to know it by heart," feeling that "never before in history had a political leader talked so simply, honestly and wisely to the mass of mankind." Lenin's writings suggested a vital role to be played in constructing the Soviet experiment by cultural workers. Similarly, Maxim Gorky wrote of the conjoined force

[39] Daniel Aaron, *Writers on the Left*, 68.
[40] "Joseph Freeman, Author, Dies," New York *Times*, August 11, 1965.

of the "proletariat and intellectuals," indicating for Freeman "a social unity which alone showed the way toward a new life." Cultural workers, these Soviet texts seemed to promise, could work as teachers of "new social ideals and emotions." At the same time, Freeman recalls feeling that he and his peers were "groping blindly," lacking any "clear notion of how writers could be useful to the revolutionary movement."[41]

William Morris had in 1896 defined socialism as a "condition of society" in which there are "neither brain-sick brain workers nor heart-sick hand workers." By thus generalizing "labor" and by refusing to distinguish between aesthetic comforts and material necessity, he guaranteed his status as patron saint to most 20th century left-wing theories of cultural work. The discourse on cultural work that runs through *An American Testament* owes a great deal to Morris. For example, Morris's "The Aims of Art" treats the labor that goes into the production of art as "not confined to the production of matters which are works of art only, like pictures, statues, and so forth," but as inherent in all productive activity to some extent. An avid reader of Marx, Morris was among the earliest to voice historical materialist vision of art as an index of the society that produced it: "art is and must be, either in its abundance or its barrenness, in its sincerity or its hollowness, the expression of the society amongst which it exists." [42]

The American socialist intellectual V.F. Calverton, writing in 1928, described Morris as avatar of a "revolt of the aesthetes" of the 1890s, a forerunner of the "proletarian trend" that had crystallized in recent years. [43] Morris, for Calverton, represented a first step towards

[41] Freeman, *An American Testament*, 159.
[42] William Morris, "The Aims of Art" (1886) in *The Collected Works of William Morris, Volume 23* (Cambridge: Cambridge University Press, 2012).
[43] V.F. Calverton, "Literature and Economics: Later Developments of the Proletarian Trend," *Communist*, 6 (June 1928): 378-81. See also Leonard Wilcox, *V.F. Calverton: Radical in the American Grain* (Philadelphia: Temple University Press, 1992).

a "distinct anti-bourgeois literature," and a turn away from the "crowd of useless, draggle-tailed knaves who, under the pretentious title of the intellectual part of the middle classes, have in their turn taken the place of the medieval jester." Morris appears also in "The Main Problems of the Art Sections of the Soviets of Workmen's Deputies," published in English in the early 1920s. Identifying four fundamental problems facing Soviet society in regard to art and culture, this text advocates the "socialization of art," via the beautification of cities on the model of Morris's utopian novel *News From Nowhere*.[44]

Among the texts singled out by Freeman, Algie M. Simons' *The Economic Foundations of Art* (1912) owes a great debt to Morris and provides ample illustration of the continuing impact of Morris's writings on the US left in the Progressive Era.[45] A largely forgotten figure today, Simons was a popular left-wing author and speaker who had published, as a young man, an autobiographical sketch for *Comrade* magazine, an account of the sort that would later inspire Freeman to write *An American Testament*. Born in a rural Wisconsin farming community, Simons attended University of Wisconsin where he studied with Frederick Jackson Turner and Richard T. Ely. As a young adult, he converted to socialism and became a settlement house worker in Chicago, conducting studies of the meatpacking industry which formed the basis of Upton Sinclair's *The Jungle*.[46] Addressing Morris's contemporary adherents among the Fabian followers of Sidney and Beatrice Webb, Simons urged those who sought to make modern society "artistic" to prioritize making "the work of those who perform the great productive processes at once pleasant and educative." Simons complained that Fabians often ignored the capitalist mass production process,

[44] Suggs, *Anthology*, 39.
[45] Algie M. Simons, *The Economic Foundations of Art* (Chicago: Charles H. Kerr, 1912).
[46] Kent and Gretchen Kreuter, *An American Dissenter: The Life of Algie Martin Simons, 1870–1950* (Lexington: University of Kentucky Press, 1969).

focusing instead on creating small handicraft workshops as nostalgic refuges from modernity. He focused upon the effects of the then-regnant monopoly form of capitalism, blaming it for the aesthetic standardization of typical of World War I-era western society. The replacement of craft production by "wage-slavery" had led to the "withdrawal of initiative and care on the part of the worker." At the same time, exploitation had deprived workers of the "hope of ever possessing anything of actual beauty or artistic merit."[47]

Morris, Simons reminds his readers, was known "as well for his activity in the political socialist movement, as for his efforts in the revival of artistic work." Artists on the left, Simons argues, might be uniquely positioned to counter capitalism's "hostile attitude toward all efforts to restore the conditions of healthful, pleasurable, beautiful workmanship." Drawing on his long experience working at settlement houses and consulting with John Dewey and other educational reformers, Simons lamented that most projects aimed at aesthetic uplift tended to degenerate into fads, or to "become training schools for servants and subordinates." Simons zeroed in on the working class as the "only real, vital portion of present society, as indeed of every other society":

> Under these conditions any movement toward the revival of the beautiful, the pleasant, and the good,—in short of the artistic—which does not connect itself with the great revolutionary movement of the proletariat, has cut itself off from the only hope of realizing its own ideal. It has condemned itself to a narrow, incomplete, and unsymmetrical synthesis, to a most inartistic and uncraftsmanlike attitude, to a stultification in fact of everything for which it claims to stand.[48]

Reading these lines, Freeman and his peers received a powerful jolt towards the synthesis of cultural work and radical politics. They also were inspired to regard craftsmanship and,

[47] Simons, *The Economic Foundations of Art*.
[48] Simons, *The Economic Foundations of Art*.

indeed, even the cultivation of beauty, as not merely the decorative embellishment of bourgeois reality but as a subversive and perhaps even revolutionary force.

Also bearing the imprint of Morris's influence was Upton Sinclair's *Mammonart: An essay in economic interpretation* was published in 1925.[49] Freeman describes meeting Sinclair at Dell's salon in Croton in the early 1920s. The famous author lectured for an hour on a variety of far-out metaphysical theories then sweeping California, and was treated by the assembled guests as an "oracle." Only a few years later, Sinclair's political edge had begun to sharpen again, and his book-length text on the material underpinnings of literature would have a significant impact on the developing ideology of cultural work. *Mammonart'*s second chapter ("Who Owns The Artists?") announced Sinclair's intention to study the artist "in his relation to the propertied classes." In this attempt to construct a historical materialist analysis of the role of the artist in capitalist society, Sinclair sketched out a provisional definition of the cultural worker: "one who represents life imaginatively by any device, whether picture or statute of poem or song or symphony or opera or drama or novel." Sinclair sought to study these artists from a novel point of view: by asking "how they get their living, and what they do for it." Analyzing the arts "from the point of view of the class struggle," Sinclair put to cultural workers the question: "who owns you, and why?"[50]

Waving away the "art for art's sake" conceit, Sinclair wanted to establish the artist as a laborer who expects to earn monetary remuneration for their creations. Taking issue with the notion that art serves only the wealthy elite, Sinclair argued for the cultural worker as a satisfier of mass needs. Against the contrary notion that modern culture is an instrument of

[49] Upton Sinclair, *Mammonart: an essay in economic interpretation* (Pasadena, California, self-published, 1925).
[50] Sinclair, *Mammonart*.

"entertainment and diversion," Sinclair put forward a pragmatist argument for art's true purpose as the alteration of reality: "Art is a representation of life, modified by the personality of the artist, for the purpose of modifying other personalities, inciting them to changes of feeling, belief and action." Finally, dismissing cautions against the instrumentalization of art and culture for political purposes, Sinclair, like W.E.B Du Bois in "Criteria for Negro Art," declares all art to be "propaganda" and insists that artists need not be ashamed of that appellation. "The distinction between 'art' and 'propaganda' is purely a class distinction and a class weapon; itself a piece of ruling-class propaganda, a means of duping the minds of men, and keeping them enslaved to false standards both of art and of life."[51]

Eden and Cedar Paul's *Proletcult*, published in 1921, provided another influential Morrisite brief for cultural work, based on the imperative for radical left-wing adult education.[52] The Pauls, a British married couple who spent long stretches of time on the continent, worked as translators of both left wing and Soviet texts and of the literature of European modernism in the early decades of the 20th century. They were deeply involved with the Plebs League and with the radical wing of the workers' education movement in Great Britain. *Proletcult* remains fascinating as a text adumbrating a new vision of left-wing cultural work and as a guide to the official discourse surrounding "proletarian culture" that Freeman and his peers would come to encounter.[53]

Like Morris, the Pauls saw in the Medieval craft ideal a possible guide to a new age of creative labor: "The work of the artist craftsman of the middle ages was not the product of

[51] Sinclair, *Mammonart.*
[52] Eden and Cedar Paul, *Proletcult* (New York: Seltzer, 1921).
[53] See Mike Carey, "Cedar and Eden Paul's Creative Revolution: The 'new psychology' and the dictatorship of the proletariat, 1917-1926" in *Twentieth Century Communism* (Lawrence and Wishart), 17 (17): 122–165.

leisure plus imagination, but of labor plus imagination." Was it not possible, they pondered, whether in a communist society characterized by the "generalization of leisure" as a universal, rather than a class privilege, that there might not arise a "revival of that conjuncture of labor and imagination"? Striking a utopian tone borrowed rather directly from Morris, the Pauls anticipate a "quickening and enfranchisement of the spirit" as capitalism's characteristic conflicts recede, leading to a "blossoming of art" such as the world had never known. The influence of Morris is also particularly strong in the Pauls' discussion of adult education. They advocate for the expansion of this particularly vital sector of cultural work. They argued that the modern proletariat had become "class conscious even before their adult education begins." Workers were "keenly aware of the limitations imposed by the deficiencies of such 'general culture' as they secured in childhood at the elementary schools," and were hungry for instruction and education that would prepare them for the work of making revolution. A trained workforce of cultural workers would supervise this "revolutionary education."[54] Freeman wrote in *An American Testament*: "We read *Proletcult* by Eden and Cedar Paul, and felt that the first duty of the radical "man of letters" was to participate in all the educational activities of the Party."[55] Like many of his peers, Freeman regarded the Party's Workers' School, founded toward the close of 1923, as a medium equally as important as the Party press in "circulating communist ideas among the workers."[56]

Perhaps the most intriguing section of *Proletcult* concerns a new "phaseology of culture" which aims to supplement the traditional Marxian map of the "modes of production"

[54] Eden and Cedar Paul, *Proletcult*.
[55] Freeman, *An American Testament*, 324.
[56] Freeman, *An American Testament*, 219.

with one marking the development from aristocratic and theocratic culture, up through democratic culture, culminating in the "ergatocratic" culture—the age of workers' rule—of the early twentieth century. (This "ergatocratic" culture, for the Pauls, was to be understood as synonymous with "Proletcult"). Like Sinclair, the Pauls depict the emergent culture of opposition to bourgeois decadence as driven by culture work and the cultural worker, as a moment wherein traditional artists and intellectuals serve the purpose of proletarian revolution while working men and women discover their own aesthetic capacities, long stifled by capitalist exploitation.[57]

Soviet Debates, American Contradictions

Reading these various Morrisite texts primed American cultural workers for a new role vis-à-vis revolutionary politics. Immediately, however, Freeman and his peers were thrust into a series of wrenching debates. Were leftists meant to "proletarianize" (however that might be defined) and, as members of a revolutionary class that would abolish all classes, forge a new proletarian culture in tandem with workers? Were traditional artists and intellectuals to treat the folk and demotic expression of poor people as the raw material of an insurgent proletarian culture? Or were they to work to universalize access to the great achievements of pre-revolutionary art and literature in order to allow for the emergence of a proletarian Goethe or Beethoven?[58]

[57] Eden and Cedar Paul, *Proletcult*.
[58] See James F. Murphy, *The Proletarian Moment: The Controversy Over Leftism in Literature* (Urbana: University of Illinois Press, 1991).

Freeman and other members of his generation organized their understanding of these questions by identifying each position with a single iconic figure or cluster of figures within the Soviet Union.[59] As we briefly discussed in this dissertation's Introduction, the "Proletcult" line was associated most strongly with A.A. Bogdanov. In 1910, Bogdanov had postulated that a cultural road to Communism ran alongside the economic and political one. Freeman summarized Bogdanov's view: "The struggle for the cultural emancipation of the proletariat is the struggle for 'real and complete emancipation'; it is the struggle for the control of all the results and methods of bourgeois science, technique, and art; *i.e.*, all branches of knowledge." To the extent that cultural workers joined the ranks of the proletariat, they might participate in the proletariat's historic role: "the complete reorganization of the life of humanity." Art, according to Bogdanov, was "capable of organizing not only the opinions of the people, but also their knowledge, thoughts, feelings, and dispositions." Freeman and his fellow cultural workers read with interest Bogdanov's assertion that art was "not only more far reaching than science" but was in fact "more powerful than science as a weapon for the organization of the masses, because the language of living symbols is nearer and more comprehensible to the masses." Despite his emphasis on the radical itinerary of proletarian art, Bogdanov did not reject the old altogether, appealing instead to the importance of universal aesthetic values. Freeman reflects wryly: "[u]nder Bogdanov's leadership, Proletcult did in fact seek to dominate all fields of Soviet culture, but failed to control any." Despite the rebuke of Soviet officialdom—which concluded that "proletarian culture could not be created in a laboratory," Bogdanov influenced many young writers and artists.[60]

[59] See "Art and Literature in the Soviet Union," in Freeman, Kunitz, and Lozowick, *Voices of October*.
[60] Freeman, "Art and Literature in the Soviet Union," 106.

Bogdanov's most prominent critic was Leon Trotsky. In Freeman's presentation, Trotsky's *Literature and Revolution* represented a "landmark in Soviet literary criticism." (It was for this act of praise that Freeman was later expelled from the Communist Party). Trotsky contrasted the bourgeoisie, arriving on the historical stage "fully armed with the culture of its time" with a proletariat that enters battle "fully armed only with the acute need of mastering culture." Thus, per Trotsky, the problem of a "proletariat which has conquered power" consisted in the taking into its hands the "apparatus of culture—the industries, schools, publications, press, theatres, etc," of which it did not previously have control and therefore could not properly superintend.[61]

In Freeman's words, Trotsky "repudiated the possibility of proletarian culture." Trotsky also disputed the notion that proletarian culture might develop within the hothouse of post-revolutionary Russia. Such a vision was impossible, given the need to divert resources from all aspects of civil society to shoring up the Revolution in the immediate decades following 1917. Not only were the historical circumstance unripe for the flowering of proletarian culture. Such a vision also failed to understand what Trotsky saw as the necessity for cultural work of a more didactic, some might say paternalistic, variety: guiding and teaching the masses, and exposing them to the great works and achievements of the past.

Freeman reminds his readers that Lenin, too, was critical of Bogdanov, owing not merely to philosophical disagreement but to many years of political conflict in the period running up to the Revolution. Lenin rejected theories about "proletarian culture" as secretly concealing an opposition to Marxism. Freeman wrote: "Lenin believed that proletarian culture could not be manufactured in laboratories or studios, but would evolve where the

[61] Freeman, "Art and Literature in the Soviet Union"; Leon Trotsky, *Literature and Revolution* (Ann Arbor: University of Michigan Press, 1960).

actual struggle against the old ways of life was going on." Speaking to the vanguard of the Communist youth at the Third Congress of the Young Communist League in 1920, Lenin said: "Proletarian culture is not something arising from an unknown source; it is not the invention of people who call themselves specialists in the realm of proletarian culture. Such a notion is pure nonsense."[62] It might be expected that such statements would have proved discouraging to the cultural workers in Freeman's milieu, but it does not seem that this was the case. At least part of the explanation for this lies in the fact that Lenin made many statements on culture, which frequently contradicted one another and did not seem to reflect any firm Party line. Freeman's summary of the Leninist line on art in *Voices of October*, for example, provides substantial ballast for a robust cultural workerism: "A cultural revolution is a long drawn out and difficult period of persistent work in all fields, from alphabet to astronomy, from bath tubs to air fleets, from trade schools to academies of fine arts, from the abolition of the old-fashioned forms of agriculture to the establishment of factories for artificial fertilizers, from top to bottom in all fields, everywhere there must be a seething of constant, uninterrupted toil, not only in cultural institutions, schools, and universities, libraries and factories, but throughout the entire country at every worker's bench."[63] One can see easily how the cultural workers of the 1920s would be inspired to situate their work within this general matrix of cultural revolution outlined by Lenin.

The Cultural Worker in Early Soviet Russia

[62] Freeman, et al., *Voices of October*, 37.
[63] Freeman, et al, *Voices of October*, 20.

The confusion engendered by these various debates provided a powerful spur to American cultural workers to travel to the Soviet Union and investigate conditions there for themselves. In *An American Testament*, Freeman writes of his 1926 trip to Russia as motivated by precisely this sort of curiosity. Once inside the Soviet Union, American artists and intellectuals tended to report powerful (often quasi-religious) experiences that would reshape their conceptions of cultural work and its revolutionary potentials. Freeman found inspiration even in the apparently trivial details of home décor. He recalled a meeting of writers and artists at the apartment of Sergei Dinamov, taking note of the common practice of writers to prominently display photographs of themselves wearing Red army uniforms: "Most of the younger Soviet writers had such photographs of themselves; they were the civil war generation, the thirty-year-old veterans of the armed struggle for socialism, and they were prouder of their uniforms than of their novels." For these writers, the uniforms "symbolized their identification with the working class which furnished them the inspiration, the theme, and the audience for their creative work as it furnished the direction of their lives." Crucially, for Freeman, these intellectuals "were not writers doing the proletariat the favor of supporting it," but rather "they were often workers themselves in whom the revolution first awakened the creative literary instinct." They had come to see this "creative literary instinct" as a common human faculty, and not some "special characteristic of unique individuals." The hard line separating aesthetics from politics had begun to wither. There was no longer a "caste system which segregated men of letters from politicians."[64]

This scene cannot help but evoke the polemic of Freeman's one-time hero, Max Eastman, against "artists in uniform," published in 1934 as Freeman was writing *An*

[64] Freeman, *American Testament*, 574.

American Testament. While declaring himself "on the side of the soviets and of the proletarian class struggle," Eastman sought to take a stand against Stalinism and its "corps of obedient pen-pushers dressed up in blue blouses and ready to write whatever any Russian politician tells them to." Writing of the Kharkov Congress, Eastman castigated the bureaucratization of art and literature in the Soviet Union. "Not only must all art be propaganda in Soviet Russia, whether the artist will or no, but according to the prevailing view this propaganda should be created or carried on in a systematized fashion, like any kind of commodity production or public engineering work, under the direct control and guidance of the political power." Eastman cast aspersions upon terms then in fashion like "the five-year plan in poetry," "poetic shock troops," "the art job," "the turning out of literary commodities," and "poetry as socially responsible labor." He quotes with concern the poet Ilya Selvinsky's call to his fellow writers: "Let's ponder and repair our nerves/And start up like any other factory," and despairs of Sergei Mikhailovich Tretyakov's vision of "Fordizing and Taylorizing" art:

> We foresee the operation of literary workshops where the functions are divided… That is, the workshop will contain specialists of an extra-literary order, having valuable material at their disposal… alongside them fixators will be at work gathering necessary material, happenings, notes, documents (this work is analogous to newspaper reporting). The mounting of the received materials in this or that sequence, the working up of the language in dependence upon the public for which the book is being written—this is the job of the literary formulators… We can't wait forever while the professional writer tosses in his bed and gives birth to something known and useful to him alone. We assume that book production can be planned in advance like the production of textiles or steel.[65]

While Eastman presumes that his readers on the left will recoil, with him, in mock horror as they read lines such as these, Freeman's writing suggests that no small number of them were,

[65] Max Eastman, *Artists in Uniform*, 4-5.

on the contrary, inspired by them. For the moment, they seemed to resolve the inexorable dilemmas of the politically committed artist, and they promised not only streamlined coordination with a larger revolutionary project but also freedom from the isolation and anomie of the artist's garret. As reflected in Freeman's encounter with his Russian friends' framed photographs in military garb, the notion of "artists in uniform" did not automatically trigger a panic over the authoritarian control of cultural production by the state. It could as easily serve as a promise of a new kind of cultural workerism.

Conclusion: Walter Benjamin's "The Author as Producer"

As we conclude, it is useful to turn to another appraisal of Tretyakov issued at about the same time that Max Eastman published *Artists in Uniform* and that Freeman was composing *An American Testament*. Walter Benjamin's "The Author as Producer" identifies in Tretyakov's vision of the cultural worker potentials that are hopeful, rather than dire. "The Author as Producer" was delivered as a lecture to the Institute for the Study of Fascism in Paris on April 27, 1934, and takes as its theme the question of the artist's responsibility in the age of Hitler and Mussolini.[66] Benjamin begins his lecture by invoking Plato's infamous decision to expel poets from his Republic. "The question of the poet's right to exist has not often, since then, been posed with the same emphasis," Benjamin muses, but "today it poses itself." While the Soviet state would not contemplate banishing the poet, it would "assign him tasks that do not permit him to display in new masterpieces the long-since-counterfeit

[66] Walter Benjamin, "The Author as Producer," translated by Edmund Jephcott, in *Selected Writings, Volume 2, 1931-34* (Cambridge, Mass: Belkin Press, 1999).

wealth of creative personality."[67] The revolutionary author was compelled to reflect deeply on the conditions of present-day production and to produce "products that must have, over and above their character as works, an organizing function, and in no way must their organizational usefulness be confined to their value as propaganda."[68]

The present social situation, Benjamin stresses, demands that the writer decide in whose service he is to write. In this regard, the "bourgeois writer of entertainment literature" was failing. It was not mysterious why writers shied away from declaring their commitments openly: critics attacked those who announced their solidarity with the proletariat in this fight for having given up their autonomy.[69] Eastman's *Artists in Uniform*, we might observe, is exactly such a critique. The writer's renunciation of autonomy was frequently linked with the abandonment of artistic standards. Against this line of thinking, Benjamin argues that there is no tension between honoring commitments to both the "correct political tendency" and artistic integrity. To appreciate why this should be so, Benjamin urges his listeners to recall historical materialist first principles—that social conditions are determined by conditions of production—and to dialectically interrogate the interpretive question that often follows: how does a given work stand vis-à-vis the social relations of production of its time? A more productive question might be: what is the *position* of a given work within the social relation of its time? "This question," Benjamin proposes, "directly concerns the function the work has within the literary relation of production of its time."[70] And, returning us to our discussion of proletarian aesthetics in this dissertation's Introduction, this question hinges on the political character of literary *technique*. "In bringing up technique," Benjamin continues, "I have

[67] Benjamin, "The Author as Producer," 777.
[68] Benjamin, "The Author as Producer," 777.
[69] Benjamin, "The Author as Producer," 769.
[70] Benjamin, "The Author as Producer," 770.

named the concept that makes literary products accessible to an immediately social, and therefore materialist, analysis." The concept of technique "provides the dialectical starting point from which the unfruitful antithesis of form and content can be surpassed" and "contains an indication of the correct determination of the relation between tendency and quality." Progress or regression of literary technique, in turn, correlates with the political valence of a literary work.

To illustrate this point, Benjamin turns to Tretyakov, and his vision of the "operating" writer ("operating," here, serves as one pole of the binary opposition "operating" and "informing," the latter of which names writing that reports on, rather than actively intervening in, political struggles). This operating writer, for Benjamin, "provides the most tangible example of the functional interdependence that always, and under all conditions, exists between the correct political tendency and progressive literary technique." For Benjamin, unlike Eastman, Tretyakov's attempts to fuse literary work with the collectivization of agriculture (by calling for mass meetings, collecting funds to pay for tractors, persuading independent peasants to enter the collective farm, inspecting the reading rooms, creating wall newspapers, reporting for Moscow newspapers, and introducing radio and mobile movie houses) constitute a heroic, rather than capitulatory, gesture.[71] Benjamin emphasizes that he has chosen the example of Tretyakov deliberately, "in order to point out… how comprehensive the horizon is within which we have to rethink our conceptions of literary forms or genres, in view of the technical factors affecting our present situation, if we are to identify the forms of expression that channel the literary energies of the present." He reminds listeners that the realist novel did not always exist and would someday likely

[71] Benjamin, "The Author as Producer," 770-71.

disappear, just as tragedies and great epics had come into being and faded away with changing historical conditions. Minor forms, from commentary, to translation, to rhetoric, and even to plagiarism, had enjoyed pride of place in the literary worlds of bygone eras. "All this is to accustom you," Benjamin continues, to the "thought that we are in the midst of a mighty recasting of literary forms, a melting down in which many of the opposites in which we have been used to think may lose their force." Thinking again of Tretyakov, Benjamin turns to changes in the literary character of newspapers, which were once filled with long-form writing of a literary cast and which now answered mostly to the impatience of bourgeois readers looking for stock tips and gossip. In a telling dialectical reversal, while the daily newspaper had declined in the West, it had been revived in Soviet Russia: "it is at the scene of the limitless debasement of the word—the newspaper, in short—that its salvation is being prepared." As a result, Benjamin suggests, "the conventional distinction between author and public, which is upheld by the bourgeois press, begins in the Soviet press to disappear." Benjamin confirms what Freeman was to hear from many of the cultural workers he met in Russia, that "the reader is at all times ready to become a writer—that is, a describer, or even a prescriber."[72]

It is not, however, Benjamin's intention to limit his discussion of the "author as producer" to the news media. Rather, the press serves as the clearest example of the "mighty process of recasting" that scrambles the "conventional distinction between genres, between writer and poet, between scholar and popularizer" and even between author and reader. The rest of the lecture concerns the contradictions inherent in the major German left-wing literary movements of the post-1917 moment: Activism, New Objectivity, the Weimar cabaret, and

[72] Benjamin, "The Author as Producer," 772.

Brecht's theatre of alienation. In these experiments, Benjamin observes, the expression of revolutionary content is often hampered by fidelity to counterrevolutionary forms that situate the author as a being above the working masses rather than as a fellow-producer. In such an articulation of the relationship of creator and audience, the author positions himself, patronizingly, as a kind of "ideological patron" or "benefactor."[73]

Benjamin next turns to another character whom we will recall from this dissertation's Introduction, the literary "hack" who serves as the avatar of cultural work under capitalist conditions of production. For Benjamin, the hack writer is a writer who "abstains in principle from alienating the productive apparatus from the ruling class by improving it in ways serving the interests of socialism." Under the pen of the hack writer, the "bourgeois apparatus of production and publication can assimilate astonishing quantities of revolutionary themes—indeed, can propagate them without calling its own existence, and the existence of the class that owns it, seriously into question." The hack writer serves as a counterrevolutionary force because he or she specializes in the techniques that merely "wring from the political situation a continuous stream of novel effects for the entertainment of the public." Benjamin drew parallels between the hack writer as cultural worker and the literary experiments conducted under the banner of the New Objectivity, which focused on artistic deployments of techniques of "reportage," including photojournalism. New Objectivity artists were to be commended for responding to the increasing popularity of new technologies of publication: the radio and the illustrated press. But rather than think critically with the implications of these new technologies, New Objectivity artists transformed scenes of capitalist depredation into beautiful objects. "What we require of the photographer," Benjamin writes, "is the

[73] Benjamin, "The Author as Producer," 774.

ability to give his picture a caption that wrenches it from modish commerce and gives it a revolutionary use value."[74]

Benjamin like Freeman believed that "technical progress is for the author as producer the foundation of his political progress." But that progress could only commence once the cultural worker had made the journey from a "supplier of the productive apparatus into an engineer who sees it as his task to adapt this apparatus to the purposes of the proletarian revolution." Most artists come from bourgeois backgrounds, and "even the proletarianization of an intellectual hardly ever makes a proletarian." Why? Because the bourgeois class gave him, in the form of education, a "means of production that," owing to educational privilege, makes him feel "solidarity with it, and still more it with him." The challenge confronting the radical cultural worker was the refusal of this solidarity with the bourgeoisie by way of work to socialize the "intellectual means of production" and to "organize intellectual workers in the production process."

Turning to music, Benjamin notes that in the development of music, and in technologies of musical production and in reproduction, an ever-increasing process of "rationalization" had spurred the development of new commodity forms: phonograph records, sound films, jukeboxes purveying "canned" music. "The consequence of this process of rationalization," Benjamin concludes, "is that musical reproduction is consigned to ever-diminishing but also ever more highly qualified groups of specialists." Like Baumol lamenting the "cost disease" afflicting the performing arts in the 1960s, Benjamin identified a "crisis of the commercial concert" that is at its heart a "crisis of an antiquated form of production made obsolete by new technical inventions." The properly Marxist solution to this

[74] Benjamin, "The Author as Producer," 775.

dilemma must include the elimination of two antitheses: between performers and listeners, and between technique and content.[75] In the same way as he earlier reminded listeners that literary forms are historical and temporal and subject to come into being and go into extinction along with the material formations in which they emerge, Benjamin cites the hypothesis offered by Hans Eisler, Brecht's composer, that orchestral music had "attained its great importance and its full extent only under capitalism" and that new political conditions required the "collaboration of the word," which, alone, could trigger the transformation of concert into political meeting.[76]

Brecht's Epic Theatre, for Benjamin, provided the clearest example of a successful commitment to the ideal of "author-as-producer." He quotes Brecht: "The lack of clarity about their situation that prevails among musicians, writers, and critics, has immense consequences that are far too little considered." Thinking that they control the apparatus of production, they are in fact possessed, and they "defend an apparatus over which they no longer have any control and that is no longer, as they still believe, a means for the producers, but has become a means against the producers." The theatre, so like a factory with its complicated machinery, gigantic supporting staff, and sophisticated effects, had become a "means against the producers."[77] Theatrical workers were close to factory workers in another way, recently thrust into a cutthroat battle with newly emergent competing industries, radio and cinema. Benjamin applauded Brecht for creating a theater that sought to learn from these new forms of mass communication, and to distill from this study a new sense of what is

[75] Benjamin, "The Author as Producer," 776.
[76] Benjamin, "The Author as Producer," 777.
[77] See young Mike Gold on Meyerhold: "He is the leader of the young Russian theater. His bare, immense stage is stripped for action, like a steel mill or a factory… All that was static in the old theater is stamped out. This is the theater of dynamics… Drawing room plays have no place here. This theater is the battle-field of life; it is a trench, a factory, the deck of a ship in [a] storm. And the young workers and soldiers adore the futurist director, Meyerhold." Quoted in Chura, *Michael Gold: The People's Writer*, 109-10.

essential and unique to the theatrical experience. By dedicating itself to "situations" rather than plots, and to interruption rather than continuity, Brecht had made his own the technique of montage that was the special innovation of the mass media technologies of the 1920s and 1930s, transforming it from an "often merely modish procedure to a human event."[78]
In these ways, Benjamin claimed, Brecht has moved from the "total artwork" model of late Romanticism to the proletarian form of the "dramatic laboratory," using it not to express himself nor to add beauty to the world, but rather to "expose what is present." Brecht's theatre is "concerned less with filling the public with feelings, even seditious ones, than with alienating it in an enduring way, through thinking, from the conditions in which it lives." Brecht thus serves for Benjamin as a key example of the "author as producer," faithful to the task of reflection upon his or her position in the process of production. "We may depend on it," Benjamin concludes," because "this reflection leads, sooner or later, for the writers who matter (that is, for the best technicians in their field), to observations that provide the most factual foundation for solidarity with the proletariat."

We have dwelled with "The Author as Producer" in this conclusion to our consideration of Freeman's *An American Testament* for several reasons. First, we wish to illustrate the degree to which US Communist intellectuals were participating in an international conversation regarding the proper articulation of cultural work. Second, we hope to reinforce the high stakes of these conversations by highlighting the fact that, for Benjamin, the correct positioning of the cultural worker played a pivotal role in the fight against a murderous fascism. Third, we want to set *An American Testament* and "The Author as Producer" together as companion texts, which, read side-by-side, reveal elective affinities

[78] Benjamin, "The Author as Producer," 779.

and common purposes. We are very accustomed to thinking of left-wing literary theory as a more or less radical form of bourgeois literary theory, but in the writings of both Freeman and Benjamin, we see a qualitative shift away from belles-lettres and towards a philosophy of aesthetic praxis.

Chapter Four: John Howard Lawson and the Screen Writers' Guild in the 1930s

In the 1930s, New Deal policymakers, trade union militants, and activist consumers challenged corporate prerogatives vis-à-vis property: in new forms of taxation, in the recognition of collective bargaining rights, in price controls, and in attacks on monopoly power. Parallel to these developments, a militant and unionized "cultural apparatus" emerged in Hollywood, New York, Chicago and other centers of cultural production.[1] Cultural workers began to amass legal victories in the wake of the Supreme Court's upholding of the Wagner Act. Both John Howard Lawson's Screen Writers' Guild and Heywood Broun's Newspaper Guild emerged as militant defenders of the labor rights of cultural workers, while organized musicians inaugurated a series of campaigns to forestall technological unemployment. In this chapter, we focus on the Hollywood writers. In the next we examine the union struggles of editorial employees in the news industry during the 1930s, followed by a consideration of one attempt by elite musicians to assert control over their recorded output.

Value Incommensurability and the Fight Over Intellectual Property Rights in the Golden Age of Hollywood

The Screen Writers' Guild (SWG) emerged as a viable force in the years 1933-36 under the leadership of left wing playwright-turned-screenwriter John Howard Lawson. Intellectual property (IP) issues were central to the early efforts of the SWG, particularly during the era of the National Recovery Administration (NRA), 1933-35, during which

[1] See C. Wright Mills, "The Cultural Apparatus," in Irving Louis Horowitz, ed., *Power, Politics, and People: The Collected Essays of C. Wright Mills* (New York: Ballantine Books, 1963), 405 and Michael Denning, *The Cultural Front*, 38-39.

screenwriters and film producers battled over the provisions of the NRA Motion Picture Code. Lawson and the SWG were able to agitate for expansive IP protections because the process by which corporations came to be seen as *de facto* owners of workplace knowledge remained incomplete. Catherine Fisk, who has written an exemplary study of the SWG's battle for IP protections, observes that as late as 1880, this process was barely underway: many of the pillars of modern corporate IP law had yet to be devised, most knowledge could not be owned, and employers had very few legal rights to control the creative products of their employees.[2] Craftsmen, not corporations, were considered to be the owners of knowledge and skill, and the law presumed that the employee-inventor owned his patents and the employee-author his copyrights.[3] While many developments between the 1880s and the 1930s worked to usher in the contemporary IP regime, Lawson and the SWG nevertheless had considerable room to move as they experimented with an IP-based professional writers' labor politics.

Lawson and the SWG's work in the 1930s fits comfortably within the pattern of labor organization characteristic of modern white-collar cultural workers. Critical IP scholars have highlighted two central poles of cultural workers' labor politics: authorship and attribution.[4] In addition to questions of wages, working conditions, and job security, cultural workers are driven by the desire to secure the prerogatives and privileges that go along with the Romantic vision of the uniquely gifted creative producer ("authorship"), and frequently

[2] Catherine L. Fisk, *Writing for Hire: Unions Hollywood and Madison Avenue* (Cambridge Massachusetts: Harvard University Press, 2016); "Credit Where It's Due: The Law and Norms of Attribution," *Georgetown Law Journal*, 2006; and "Authors at Work: The Origins of the Work-for-Hire Doctrine," *Yale Journal of Law & the Humanities*, (Winter 2003), 15 Yale J.L & Human. 1.
[3] Fisk, *Working Knowledge,* 1.
[4] Robert Merges, "One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000," *California Law Review*, (December, 2000), 88 Calif. L. Rev. 2187.

push for accuracy and fairness in the determination and publication of each group member's contribution to collectively created works ("attribution").[5]

Consider the following testimony offered by Lawson on the proposed Duffy copyright bill before the House Committee on Patents in 1936:

> If we turn to page 23, line 10, we find another limitation. Section (4) says: "The merely incidental and not reasonably avoidable inclusion of a copyrighted work in a motion picture or broadcast depicting or relating to current events—that there shall be no liability, civil or criminal, under this act. In other words, the act gives us a certain protection, and then it takes it away in a particular case, which is defined and in a very unclear way. What constitutes a 'merely incidental and not reasonably avoidable inclusion of a copyrighted work'? Why has this gratuitous limitation been introduced, and whom does it benefit? Does it benefit the man whose brain created the material who requires the protection, for whom such a bill is designed to give him that protection? On the contrary, by weakening the effect of this copyright protection, it can help no one except the man who uses the product of the creative brain, where for nothing, or for less than its proper value, that can be achieved by a contract.[6]

Lawson's words here prompt us to zero in upon an important sub-theme within the politics of authorship and attribution: "value incommensurability." We have borrowed the term "value incommensurability" from the legal scholar Margaret Radin to describe a cluster of values and beliefs that insist on the difference in kind of various aspects of the human experience from the objects bought and sold on the market. In other words, "value incommensurability" names the ethical claim that certain activities cannot be quantified and measured without doing damage to human flourishing. The term "moral rights," on the other hand, refers to a specific legal doctrine, imported from Europe by American artists and their

[5] Fisk, "Credit Where It's Due: The Law and Norms of Attribution."
[6] John Howard Lawson testimony in *Revision of Copyright Laws. Hearings Before the Committee on Patents House of Representatives Seventy-Fourth Congress Second Session*. Revised Copy for Use of the Committee on Patents. Washington D.C. February 25, 26, 27, March 3, 4, 5, 10, 11, 12, 17, 18, 19, 24, 25, 26, 27, 31, and April 1, 2, 3, 7, 8, 9, 10, 13, 14, 15, 1936 (Washington: U.S. Govt. Print. Off. United States, 1936).

legal advocates in the 1930s, to argue for the "value incommensurability" of creative work and the capitalist wage.[7]

"Value incommensurability" is a complicated concept, and in Radin's work its explication consumes many pages of detailed argumentation. Despite its complexity, "value incommensurability" is an extremely valuable theoretical tool for labor historians because it helps to illuminate aspects of labor-management antagonism that are difficult to get at via other means. Consider, for example, the following statements from opposing sides of the Hollywood cultural workers' unionization campaign of the 1930s. In 1933, Screen Actors Guild (SAG) head Eddie Cantor wrote to President Roosevelt "you cannot compel creative people to work for any stated wage *nor can you measure in dollars the value of their services*."[8] Several years later, Hollywood producers issued a strongly worded statement meant to discredit the SWG: "Not by the wildest stretch of imagination can a writer, *whose ability and value cannot even be standardized*, place his interests and problems on a plane with a man who joins a union not only to protect his job but to establish standard wages, working conditions, and hours of labor."[9] The striking similarity in the formulation by cultural workers and studio executives of the dilemma of pricing creative work points to both the centrality and the ambiguity of "value incommensurability" in the Hollywood labor conflicts of the 1930s.

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[7] Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996). "Incommensurability" is a keyword in the philosophy of science, prominent in the writings of Thomas Kuhn and Paul Feyerabend. See Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1973) and Paul K. Feyerabend, *Explanation, reduction, and empiricism*. University of Minnesota Press, Minneapolis, 1962. Retrieved from the University of Minnesota Digital Conservancy, https://hdl.handle.net/11299/184633. Radin's writings resonate with aspects of that discourse, particularly regarding the sources of historical change.

[8] Telegraph from Eddie Cantor to James Farley, Oct 8, 1933, emphasis added. Records of the National Recovery Administration, National Archives, College Park, Maryland.

[9] Nancy Lynn Schwartz, *The Hollywood Writers' War*, 61, emphasis added.

Radin's work on "value incommensurability" unfolds within a discussion of legal dimensions of commodification: to wit, "the social process by which something comes to be apprehended as a commodity." In particular, Radin is concerned with practices that fall under the umbrella of what she calls "contested commodification," or "instances in which we experience personal and social conflict" about the becoming-commodity of a given activity or object.[10] Although veiled, hidden, or mystified, we apprehend this becoming-commodity as a historical and contingent process. Because we can all recall that certain activities and things that were once not considered commodities have, over time, assumed the commodity form, we understand that anything that currently lurks outside of the market realm might one day be brought into the order of commodities.[11]

Out of this historical dynamic of capitalist propertization emerge two conflicting impulses. On the one hand, we often feel deep anxiety about the sort of world that "universal commodification" has produced or might produce in the future. On the other hand, we might be tempted to see in the tendency towards "universal commodification" ballast for the ideologically pregnant claim that everything in life boils down to consumer choice, ratifying the correctness of a "hedonic calculus" oriented towards the maximization of pleasure, and cost-benefit analysis. The former tendency drives many liberal and left-wing reform and regulatory projects, while the latter tendency provides the theoretical core of neoclassical economics, libertarian utilitarianism, and the influential movement within legal thought called Law and Economics. Radin's articulation of "value incommensurability" is motivated

[10] Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996), xi.
[11] Radin, *Contested Commodities*.

by commitments to the former, and by a strong desire to challenge the flattened worldview of Law and Economics.[12]

"Universal commodification" is linked to the notion that all values can be rendered as sums of money, expressed through a "reductionist" claim ("there is one 'stuff' of value to which all other values can be reduced"), a "scalar" claim ("all values can be arrayed in order from least valuable to most valuable on a continuous curves"), or both.[13] "Value incommensurability," in contrast, rejects both claims, and looks instead to widely shared, if often implicit or unrecognized commitments to incommensurability.[14] The legal and policy corollary of "value incommensurability" is "market-inalienability": the proscription of the buying and selling of certain aspects of human experience. "Market-inalienability" marks out certain borders beyond which traditional property rights do not apply, and often leads to the "non-commodification" or "non-salability" of objects and activities. While these terms suggest a highly binary conceptualization of "contested commodification," Radin cautions against an overly Manichean perspective. "Market-inalienability," she writes, "poses more than a binary choice whether something should be wholly inside or outside the market, completely commodified or completely noncommodified." It would be more productive, however, to think of many things as instead "incompletely commodified": neither fully commodified nor fully removed from the market.[15]

Radin includes "human labor" in the category of "things" that remain "incompletely commodified," a list that includes infants and children, human reproduction, sperm, eggs,

[12] Radin, *Contested Commodities*, 8.
[13] Radin, *Contested Commodities*, 10-11.
[14] Radin, *Contested Commodities*, 9.
[15] Radin, *Contested Commodities*, 20.

embryos, blood, human organs, human sexuality, and human pain.[16] Creative labor is even more troublesome as a "thing" to be commodified because, as Radin notes, the more something takes on the indicia of an attribute or characteristic of the self, the more problematic it seems to alienate it.[17] All work contains a "noncommodified human element," and despite the intense degradation of work over the past centuries, work is still understood as not fully separate from life and self, but as a "part of the worker, and indeed constitutive of her." The unease that many feel as a result of the decline of "humane ideals of work" and the ascent of market rationality speaks to a deep antipathy towards the looming specter of the complete commodification of labor. For Radin, collective bargaining, minimum-wage requirements, maximum-hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labor, and antidiscrimination requirements all speak to legal recognition of the imperative to adopt an "incompletely commodified understanding of work." Although Radin stresses welfare-state reforms, "value incommensurability" can also be seen in more radical strains of labor politics. Many forms of U.S. "craft syndicalism," for example, sought protections of shop-floor autonomy that are more productively analyzed as defenses of "value incommensurability" than as asterisked exceptions to traditional labor history's themes of "bread and butter" unionism and orientation towards job scarcity.[18] The Hollywood writers of the 1930s provide a potent, if somewhat outlying, example of this combination of "craft syndicalism" and the politics of "value incommensurability." They deployed the rhetoric of "moral rights" to argue that

[16] This list appears in Radin, *Contested Commodities*, 21. For Radin, "things" that are "incompletely commodified" are recognizable as such by virtue of the absence of four "typically indicia of property": i) objectification; ii) fungibility; iii) commensurability; iv) money equivalence. Radin, *Contested Commodities*, 118.
[17] Radin, *Contested Commodities*, 60
[18] Radin, *Contested Commodities*, 105-08.

aesthetic productions were not ordinary commodities, and that cultural work was not ordinary labor. Zechariah Chafee, Jr. observed in the mid-1940s that the "inclination of Hollywood producers to take extensive liberties with the books and plays that they have purchased has caused several indignant authors to long for this moral right."[19]

As we briefly explored in this dissertation's Introduction, "moral rights" (or "*droit d'auteur*"), refers to a strain of French copyright jurisprudence that offers expansive protections to artists vis-à-vis the fruits of creative labor.[20] Modern "moral rights" doctrine is encapsulated in Article 6 *bis* of the 1928 Rome revision of the Berne Convention: "the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation, or other modifications of the said work, which may be prejudicial to his honor or to his reputation."[21] British copyright historians Lionel Bently and Brad Sherman observe that some European legal codes provide additional "moral rights": the right to publish or divulge a work, to correct the work, the right to object to the alteration or destruction of the original of a work, to object to excessive criticism of the work, and the right to withdraw a work from circulation.[22]

Many American legal thinkers dislike the doctrine of "moral rights," with Bently and Sherman characterizing opposition to "moral rights" as at times bordering on the hysterical.[23]

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[19] Zechariah Chafee, Jr., "Reflection on the Law of Copyright"

[20] In an influential law review article from 1940, American copyright lawyer Martin Roeder distinguished between copyright law, which protects the economic interests of the creator, and the doctrine of moral right, which follows from the notion that when an artist creates, "he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use." Accepting such a premise means that there are "possibilities of injury to the creator other than merely economic ones." Martin A. Roeder, "The Doctrine of Moral Right: A Study of the Law of Artists, Authors, and Creators," *Harvard Law Review*, Vol. 53, No. 4 (Feb., 1940), 554-55.

[21] Roeder, "The Doctrine of Moral Right," 556. The inclusion of this "moral rights" provision was an important reason that the United States did not join the Union for the Protection of Literary and Artistic Works, governed by the Berne Convention. Most of the opposition came from motion picture producers, and "other large exploiters of creative works." 557-58.

[22] Bently and Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2008), 231.

[23] Bently and Sherman, *Intellectual Property* Law, 232, fn. 13.

Most critics tend to object to "moral rights" protections as unjustified legal interventions into the working of the free market.[24] Such hard-line opposition to "moral rights" may help explain why lawmakers and courts in the US have only rarely considered extending these protections to artists, writers, and musicians. Additionally, cultural workers have not always known that "moral rights" defenses were even available as arrows in their quiver, and have tended to draw upon them only when reminded of this fact by labor-friendly lawyers. Because the development of copyright law in the U.S. has lagged behind both technological change and new developments in popular culture, "moral rights" claims have tended to emerge haphazardly in the course of cultural workers' struggles in the face of new means of mass reproduction. This was certainly the case with Lawson and the SWG in the 1930s, as the rise of the "talkie" and expansion of the motion picture industry stimulated a new phase of organization among professional writers.

The NRA Era

On March 25, 1936, John Howard Lawson testified at a Congressional hearing about the proposed Duffy bill to amend U.S. copyright law.[25] Lawson's eloquent protest against the Duffy bill spoke to the intense education he had received over the preceding three years in the overlapping politics of cultural labor and IP law. Lawson's 1936 testimony is a fitting starting point for a consideration of the emergence of a copyright-based politics within the

[24] Bently and Sherman, *Intellectual Property Law*, 233.
[25] "Copyright Reform and the Duffy Bill." *The Yale Law Journal*, Vol. 47, No. 3 (Jan., 1938), pp. 433-450. The Duffy Bill would have formalized US entry into international copyright agreements, and was hated by many cultural workers because it did away with the "minimum damage" provision of the 1909 Copyright Act. On "minimum damage" provisions, see "Copyright Law Revision: Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, Pursuant to S. Res. 240: Studies 22-25." (Washington, DC: GPO, 1960).

SWG. Given that Lawson was, in 1936, best known as a screenwriter and labor unionist, his presence at the Congressional hearings must have struck some observers as odd. Literary authors and musicians, members of the constituencies most deeply invested in the fate of copyright policy, provided most of the testimony at the hearings. In fact, Lawson was invited to speak largely because of his continuing fame as a playwright. Born in 1896 into a wealthy assimilated Jewish family in New York City, Lawson began to build a reputation in the theatre world in the late 1910s. He fell into the politically radical and formally experimental milieu of the radical New Playwrights collective, winning acclaim for politically charged plays like *Roger Bloomer,* the *International*, and *Processional* in the 1920s. [26]

The Depression politicized Lawson even further. He was particularly affected by the arrest and trial of the Scottsboro Boys in the early 1930s, and often cited his visit to Alabama as part of the International Labor Defense's advocacy for the Scottsboro Boys as a turning point in his political maturation. This mixture of a deeply ingrained artistic ethic and evolving radical commitments (Lawson publicly came out as a member of the CP in 1934) informed Lawson's framing of copyright and labor issues upon his arrival in Hollywood in the late 1920s and shaped his leadership of the SWG during the years 1933-35.[27]

In his testimony before the House Committee on Patents, Lawson laid out a thorough and insightful brief for the IP rights of professional writers in Hollywood, premised on a laborite articulation of "moral rights" doctrine and deeply rooted in ethical commitments to "value incommensurability." "Moral rights" discourse colored Lawson's insistence that copyright legislation protect the author against "deformation or mutilation of his material,"

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[26] Gerald Horne, *The Final Victim of the Blacklist*: *John Howard Lawson, Dean of the Hollywood Ten* (Berkeley: University of California Press, 2006), 85-87.
[27] Lawson announced that he had joined the CP in *New Theatre* magazine in 1934. Schwartz, *Hollywood Writers War*, 59.

and that Congress should honor above all "the elementary principle of the (writer's) right to protect himself against material being garbled, against it being completely distorted by the man who buys, leases, and who produces that material." Copyright law should protect "the man who creates the material." Hollywood screenwriters faced a situation wherein the author lacked protections against "mutilation or deformation."[28]

Lawson's commitment to "value incommensurability" is evident in complaints regarding the status of the professional writer in Hollywood: "we have in the motion-picture industry a situation where we find that the writer has none of the protection, none of the dignity, as yet, that he has attained in the other fields." Lawson lamented that the writer's "creative energy is not allowed free play" and castigated the studio system's devaluation of the writer's "technical abilities." The cultural worker, hired for his or her capacity to inject "certain definite creative values" into Hollywood production, is thus "deprived of the right to give those values."[29] The Duffy bill, in Lawson's view, posed a "serious threat" to the long struggle "which has been carried on by authors for the preservation of their rights as creative workers." The "interests of the creator of the material," Lawson urged, "should be more urgently protected than the interests of those who are the exploiters of the material." Lawson insisted on a link between creators' rights and the aesthetic quality of the movies. "Do you suppose," Lawson asked, "that it is the writers who want to put the absurdities, the repetitious paragraphs, the indecent allusions, which one often finds in motion pictures?" He answers in the negative: "It is the executive who wants to get some sort of entertainment value which he

[28] John Howard Lawson testimony, March 25, 1936. House Committee on Patents, *Revision of Copyright Laws*, 74th Cong., 2d sess., 530-31.
[29] John Howard Lawson testimony, 531.

has failed to get because he has failed to recognize the importance and value of the creative workers who are there to give him that very entertainment value."[30]

Lawson's language revealed some of the nuances and contradictions of "value incommensurability" raised by Radin. Recall, for example, Radin's stress on the non-binary character of "value incommensurability" and "market-inalienability." Lawson's invocation of abstract and Romantic notions such as the "dignity" and "creative energy" of the writer served as ballast for his insistence on a set of exceptions to the standard employment contract. Because a more full-throated argument for complete "non-commodification" of creative work would suggest that writers could never be properly assimilated into the order of capitalist production, Lawson opted for a compromise whereby extra-economic concerns might be honored as legitimate stakes in contractual disputes.

Three years prior to Lawson's appearance before the House Committee on Patents, Lawson launched his public career as a Hollywood labor union leader and IP policy critic. Lawson emerged as a defender of creative workers' rights at a famous SWG meeting in early April 1933 with the powerful pronouncement that "writers are the owners of their material."[31] While this statement reveals Lawson as already a militant defender of IP rights in 1933, there is no question that the struggles that played out in the three years between the

[30] John Howard Lawson testimony, 530, 532.

[31] Lawson's "writers are the owners of their material" quote is discussed in Schwartz, *The Hollywood Writers' War*, 21. There was some precedent for more militant screenwriters' unions: for example, the Photoplay Authors' League of New York of 1914-16, and an early version of the Screen Writers Guild in Hollywood in the period 1920-27. Writers for the stage in New York had also built a legacy for the pursuit of "moral rights" claims: in the 1919 "Battle of Broadway," the playwrights of the Dramatists Guild won a standard contract guaranteeing writers final say over script changes and a fairer system of managing the adaptation of plays into films. Prior to the 1930s, however, Hollywood screenwriters were too few in number and beholden to the studios to make much headway. Larry Ceplair and Steve Englund, *The Inquisition in Hollywood: Politics in the Film Community, 1930-60* (Urbana: University of Illinois Press, 2003), 17-18. On the 1919 strike, see Sean P. Holmes, "All the World's a Stage! The Actors' Strike of 1919," *The Journal of American History*, Vol. 91, No. 4, March 2005.

SWG meeting and Lawson's Congressional testimony powerfully shaped his understanding of the interconnected politics of cultural labor and IP.

The April meeting of dissident writers seeking to revive the SWG would likely never have happened in the absence of a series of dramatic events within the film industry in early 1933. Particularly galvanizing was the announcement by the heads of the major studios, at a mass meeting of film workers held on the 8th of March, that a general financial crisis had seized the film industry. The following day, an emergency committee speaking for the major studios told stunned workers that blanket wage cuts were to be imposed: a 50 percent wage cut for those earning $50 or more per week, and a 25 percent wage cut for those earning less than $50 per week.[32] Several decades later, Lawson recalled that the studio heads framed the cuts as a necessary consequence of Roosevelt's bank holiday, and that they painted themselves as fellow victims. The hypocrisy and cynicism inherent in this ploy, along with the pain of the salary cuts, made it plain to Lawson that "the time had come when it was possible to really organize a union, although writers were afraid of the word union, so we called it the Screen Writers Guild."[33]

In addition to the salary cut, the studios hoped in early 1933 to win approval for a "central artists' bureau," in which all stories, actors, and properties would be centralized in order to make cooperation between the studios more efficient. The writers saw this as the creation of a "hiring hall" under the domination of the employers, a proposal that would leave creative professionals in the same precarious position as stevedores waiting for the

[32] Schwartz, *The Hollywood Writers War*, 9-10.
[33] Interview with John Howard Lawson (from 1973 with Dave Davis and Neal Goldberg) from *Art/Politics/Cinema: The Cineaste Interviews* edited by Dan Georgakas and Lenny Rubenstein (London: Pluto Press, 1984), 192.

daily "shape-up."[34] In their attempt to mount a resistance to this "hiring hall" plan, screenwriters mustered, perhaps for the first time but certainly not for the last, a series of moral distinctions between white-collar and manual work.

Here was laid the basis for the contradictory politics of "value incommensurability" and "moral rights" in early New Deal-era Hollywood. While plans such as the studios' "hiring hall" scheme threatened writers' traditional rights to work in isolation, under conditions more or less of their own choosing, and to control the destiny of their creative output, the defense of these rights seemed to require the differentiation of skilled intellectual work from ostensibly demeaning grunt labor. Reliance on such rhetorical gestures would only serve to weaken, of course, the powerfully important cross-class solidarity (especially with the manual and craft workers in Hollywood) upon which all labor struggles necessarily rely.

The March 1933 offensive, in combination with continuing interference from the studios' company union the Academy of Motion Picture Arts and Sciences, spurred the development of an independent cultural workers' unionism in Hollywood. In the first meeting of the revived SWG, two IP-related topics dominated the screenwriters' strategy sessions. First, writers homed in on the problem of the diffuse sources of what we would today call "creative content." Lawson was especially committed to the notion that real power would only come with full control of the flow of literary property in and out of the Hollywood studios. If writers could effectively threaten executives with an embargo on

[34] Murray Ross, *Stars and Strikes: Unionization of Hollywood* (New York: Columbia University Press, 1941), 62.

screenplays, they would be able to negotiate for decent contracts and improved working conditions.[35]

Second, writers proposed the idea of royalties for screenwriters, now a familiar feature of Hollywood contracts, but at the time a radical challenge to the governing paradigm of employee-produced knowledge in the film industry. In the 1930s, studios tended to either purchase or lease film rights to literary properties or compensate screenwriters under "work-for-hire" arrangements. In both arrangements, writers relinquished all rights to future revenues by contract. The new SWG offensive against studio prerogatives drew on the premises of "moral rights" to argue that writers could not freely choose to alienate their own rights to profit from the fruit of their labor. If this was not radical enough, the SWG's challenge to studio sovereignty would require a much greater level of transparency vis-à-vis film production costs, executive compensation, and profits. If writers were to earn royalties, they would need good information about how much value writers contributed to motion pictures, and how much money each film actually earned. As in most industries in the 1930s, the studios were loath to "open the books," and regarded the writers' quest to achieve a proper picture of the political economy of the movie business as a grave affront to business rights.[36]

Additionally, such a plan would make necessary the correction of existing problems of authorship and attribution in Hollywood. To properly divvy up royalties, credits for writing films would have to become more accurate. The status quo system of assigning

[35] This vision of collective control of all screen content would be articulated into an ambitious policy drafted by James M. Cain and floated as a plan by the Screen Writers Guild in 1945-47. See Fine, *James M. Cain and the American Authors' Authority*.
[36] Horne, *The Last Victim*. On labor demands to "open the books," see Nelson Lichtenstein, *The Most Dangerous Man in Detroit*, 223, 238.

credits that prevailed in the early 1930s, with attribution entirely at the whim of the producer and studios, often resulted in gross inaccuracies.[37] Lawson later recalled that it was "not uncommon for 8 or 10 writers to work on one script with screen credit whimsically distributed among the producers' in-laws, golf partners, or bookies."[38] Lawson and the SWG's proposal to rationalize Hollywood's chaotic attribution system, while forceful and original, was not the first such initiative. Seeking relief from "intolerable conditions" screenwriters and the Association of Motion Picture Producers met regularly between 1928 and 1932 to work out a "code of practice," ratified by nine studios and over two hundred writers on May 1, 1932.[39] One-third of the code was devoted to issues of attribution and screen credit. In the words of Murray Ross, an early historian of Hollywood labor, the screen credit provision "gained the author public recognition along with the director and the producer as a co-partner in the creation of the photoplay." Screen credit, in Ross's words, was essential to the professional fortunes of screenwriters: "Even a recognized writer had difficulty in selling his services if his screen credits during the preceding year were poor or nonexistent. Producers could take this to mean that his work was not a box-office attraction or that he was not productive." Importantly, this victory was understood also as a means of differentiating writers as specialized mental laborers from mere "technicians," by granting writers a better position on the title card.[40]

Thus, when the National Industry Recovery Act was signed into law on June 16, 1933, authorizing the creation of the NRA, Hollywood writers could point to both years of negotiation with studios over authorship and attribution questions, and the new critiques

[37] Schwartz, *The Hollywood Writers' War*, 24.
[38] Horne, *The Last Victim*, 92.
[39] Ross, *Stars and Strikes*, 58-59.
[40] Ross, *Stars and Strikes*, 59-60.

proffered by the SWG, as evidence that IP issues would likely be on the table as the New Deal state attempted to rehabilitate the American economy.[41] The NRA's two most important legislative initiatives—the outlawing of the company union and provision of modest support for the development of independent collective bargaining agencies, and establishment of a code-making authority to create "codes of fair competition" for each industry—were greeted with considerable excitement by Hollywood writers.[42] When the NRA's Amusement Division, under the leadership of Sol Rosenblatt, began holding hearings to begin drafting a film industry code in summer of 1933, writers jumped at the opportunity to work in IP-related provisions. [43]

Screenwriters were buoyed by the relief that the NRA promised from Academy interference with the SWG (and its emergent partner, the SAG), and took advantage of the open-endedness of the code-drafting process to think creatively about what a film industry code might cover. Early hopes were quickly dashed, however: fears of regulatory capture arose almost immediately, with news of Hollywood executives eagerly collaborating with the NRA and dictating terms and conditions to Rosenblatt. Unlike many other industry leaders, the "big five" Hollywood movie studios (Fox, RKO, Warner's, Loew's, Paramount) and the three major producer-distributors (Columbia, United Artists, and Universal) welcomed the

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[41] Key works on the NRA include Arthur M. Schlesinger, Jr., *The Age of Roosevelt, Volume II: The Coming of the New Deal, 1933-1935* (Boston: Houghton Mifflin, 2003 [1958]); Ellis Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (New York: Fordham University Press, 1995[1966])' Robert Himmelberg, T*he Origins of the National Recovery Administration: Business, Government, and the Trade Association Issue, 1921-1933* (New York: Fordham University Press, 1976); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession in War* (New York: Vintage, 1985); and Colin Gordon, *New Deals: Business, Labor, and Politics in America, 1920-1935* (Cambridge: Cambridge University Press, 1994).

[42] The labor provisions (Sections 7a, b, and c) allowed workers "to organize and bargain collectively through representations of their own choosing," while the mandate to produce "codes of fair competition" (Title 1) aimed to rationalize industry without running afoul of antitrust law. Gordon, *New Deals*, 171.

[43] See Donald Gomery, "Hollywood, the National Recovery Administration, and the Question of Monopoly Power" in Gorham Kindem, ed., *The American Movie Industry: The Business of Motion Pictures* (Carbondale: Southern Illinois University Press, 1982); and "Rethinking U.S. Film History: The Depression Decade and Monopoly Control." *Film and History*, 10:2 (1980: May), 36.

code-drafting process, expecting that the NRA seal of approval might both legitimate their monopoly control of the film industry and lend a patina of patriotism to an industry that was still regarded by many Americans as a morally degraded and corrupting influence.[44]

The summer and autumn of 1933 was therefore a time of intense confusion and volatility within the Hollywood trade union movement. Lawson later reflected upon this time, emphasizing the rapid process of disillusionment in the potential of the NRA process to accommodate the writers' demands. "I spent most of the year 1933 and early 1934 in Washington trying to get recognition of the Screen Writers Guild under the National Industrial Recovery Act," he recalled. "Being in Washington," he continued, "totally frustrated in the effort to get recognition for the Screen Writers Guild, I learned a great deal about the Establishment and about Washington politics." This education in the "meaning of the social structure of capitalism in the United States" confirmed for Lawson the futility of making compromises with the Establishment. "I learned that it was simply a dream," he continued, "to suppose that the Roosevelt Administration was going to support the demands of writers against the demands of the rulers of the industry, when the Administration and the whole government depended on the industry to popularize its activities and to support it."[45]

A more or less corporate-authored NRA Motion Picture Code was signed into law at the end of 1933. By this point, many writers and actors had become convinced that the NRA code-drafting process represented a threat to creative autonomy and fair remuneration for creative work. What the studios could not achieve between 1928 and 1933 in their attempts to proletarianize professional writing in Hollywood might well be codified in cooperation

[44] Gomery, "Hollywood, the National Recovery Administration, and the Question of Monopoly Power," 205-06.
[45] "Interview with John Howard Lawson," in Georgakas and Rubenstein, eds., *Art/Politics/Cinema: The Cineaste Interviews*,195.

with the New Deal state. In October and November of 1933, the writers organized mass meetings and demonstrations, orchestrated a campaign of angry telegraphs in partnership with the Authors' League of America, and bombarded the press with warnings of the dangers posed by the studio's preferred version of the Motion Picture Code.

A letter from Eddie Cantor to President Roosevelt of October 8, 1933, captures the tenor of this campaign. "The contemplated code," Cantor complained, "would control salaries and consign actors, directors, writers, and all creative people in picture business to peonage." Cantor accused the studio heads of failing to understand their own business, characterizing them as "mainly interested in stock promotion" and avoiding contact "with the creative minds working for them."[46] Edward Childs Carpenter, head of the Dramatists Guild, suggested that propose regulations "would impose upon dramatic authors the most unfair practices that could possibly be devised." Carpenter insisted that writers "create the fundamental capital of the picture industry" and thus should not be classified as "employees" under the code.[47] Playwright Rachel Crothers begged Roosevelt to "separate the writers entirely from the code," fearing that its provision would be "wholly destructive to the writers' contribution to the theatre."[48]

Especially revelatory was a message from Lawson and Cantor to Roosevelt on October 15, 1933. Lawson and Cantor melded "moral rights" arguments and ethical claims rooted in "value incommensurability" in their appeal to the president. The code, Lawson and

[46] Telegraph from Eddie Cantor to President Roosevelt, October 8, 1933. "Motion Picture Code Authority—Committee Five & Five—Complaints" From Records of the National Recovery Administration, Consolidated Approved Code Industry File, Motion Pictures, -124-, Code Authorities Committees, 5 & 5, Box 3753, Entry 25. National Archives, College Park, MD.
[47] Edward Childs Carpenter to President Roosevelt, October 10, 1933. "Motion Picture Code Authority—Committee Five & Five—Complaints."
[48] Rachel Crothers to President Roosevelt, October 19, 1933. "Motion Picture Code Authority—Committee Five & Five—Complaints."

Cantor warned, might extend beyond cinema to all of the literary arts: "The novelist can be told on the same theory how much he must take for his novel, and the excess profits by limiting his compensation go not to the state but to the publishers." All white-collar workers ("Lawyers doctors artists poets and all the creative talents") might be harmed by the code. "The motion picture producers plan to limit what the artist may receive," Cantor and Lawson warned, and entirely for the purpose of aggrandizing studio profits. Marrying their plea for relief from the onerous sections of the proposed code to an economic counter-analysis of the origins of Hollywood's economic crisis, Cantor and Lawson insisted that it was not the outsized salaries of creative workers that bankrupted the studios, but the "purchase and leasing of theatres at exorbitant prices caused by the race for power of a few individuals desiring to get a stranglehold on the outlet of the industry, the box office."[49]

Cantor and Lawson protested the manner in which studio representatives presented "the creative workers whose ideas (and) talents are the foundation stone of screen entertainment" as "irresponsible racketeers whose salaries and professional conduct must be controlled by methods unprecedented in American law." Characterizing the code as an "attack on the creative element." Cantor and Lawson suggested that Hollywood studios were bedeviled by "waste, extravagance, and mismanagement." A full investigation would "show conclusively that the average screen writer or screen actor is not overpaid… We deplore the attempt to saddle the sins of these financial buccaneers on the creative talent of the business"[50] As this correspondence suggests, the question of fair compensation for creative labor dominated debates surrounding the creation of a Motion Picture Code. After some last-

[49] Telegraph from Eddie Cantor to President Roosevelt, October 8, 1933. "Motion Picture Code Authority—Committee Five & Five—Complaints."
[50] Cantor and Lawson letter in "Motion Picture Code Authority—Committee Five & Five—Complaints."

minute meetings with Cantor and Lawson, Roosevelt worked out a compromise in order to ensure the passage of a Motion Picture Code in late November 1933. The studio-friendly code remained intact, but the President suspended the most controversial provisions by executive order.[51]

The NRA code-drafting process then entered a new phase: that of the "Five-Five" committees. These actor-producer and writer-producer committees were meant to hammer out the details either not covered by the Motion Picture Code, or among the suspended provisions. The "Five-Five" period was marked by producer delays, procrastination, and other ruses to wait out meaningful cooperation while the courts considered the constitutionality of the NIRA.[52] While the studios tried to wait out the NRA, by July of 1934 the SWG began to articulate its demands: pushing for a "guild shop," protections against being traded from studio to studio without consent, the elimination of writing "on speculation," the formalization of hiring and firing procedures, standardization of the credit system, and an end to all blacklists, formal and informal.[53]

Driven to greater levels of IP-related activity by the SWG, the Academy re-emerged in the summer of 1934, with a new focus on securing writers' attribution rights. New contractual proposals put forward by the Academy specified that the writers who contributed to the creation of filmed screenplays had the right to participate in the determination of screen credits. Allocations were made for writers to have sufficient time to review films prior to the assignment of credits in order to fairly represent the division of creative labor. In order to remedy the tendency of studio producers to parcel out credit to various individuals (often

[51] Ross, *Stars and Strikes*, 105-06.
[52] Ross, *Stars and Strikes,* 106-07.
[53] Schwartz, *The Hollywood Writers' War*, 30.

only tangentially connected with the screenwriting process, if at all), the Academy suggested a standardization of the practice of choosing only one or two writers for the title card. Additionally, the Academy proposed the publication of a monthly bulletin that would fairly record and publicize the participation of all writers to all films.[54]

A second plan put forward by the Academy in October of 1935 took the form of a Revised Basic Agreement and Writer-Producer Code of Practice. This plan further reflected the influence of the SWG in the domain of IP politics. The October 1935 plan guaranteed written contracts for screenwriters. Additionally, writers were required to sign "plagiarism warranties" in which they promised that their work was original. Studios were required to notify writers if others were working on the same material, and to display a "Screen Play by" legend during the final credits.[55]

The Supreme Court declared the NRA unconstitutional in spring 1935, coinciding with a number of other challenges for the SWG: in particular, a renewed offensive against writers by the major studio and the emergence of rival right-wing unions. Ironically, it was during this moment of confusion that some of the SWG leaders' most lucid and far-sighted analysis was forged. By 1935 it was painfully apparent that a different kind of control would be necessary if the Guild wanted studios to take writers' unions seriously. A "closed shop" was not enough: writers needed to band together under one aegis, in order to effectively threaten an embargo on new scripts that would effectively bring studio production to a grinding halt.

In the summer of 1935, the SWG began to look seriously at the prospect of forming a new amalgamated authors' union. Lawson and other SWG leaders met with representatives

[54] Ross, *Stars and Strikes*, 114-16.
[55] Ross, *Stars and Strikes,* 176.

of the Authors League of America in Hollywood, hatching plans to bring all professional writers into a common organization. Once such an amalgamation had been achieved, the writers would demonstrate their collective power by cutting off the flow of creative properties to Hollywood in order to negotiate satisfactory contracts. 20th Century Fox head Daryl F. Zanuck was so enraged by this plan that, in the event of a strike, he threatened to "mount a machine gun on the roof and mow (the writers) down."[56]

A 1936 *Screen Guilds' Magazine* editorial declared: "Guild shop is yours for the asking. You can get it by helping create one mighty league of all American writers for the protection of their rights and your rights." The temper of the Hollywood writers' labor movement was indicated in another editorial. "The picture business belongs to those who make it—writers, actors, directors, and others who work in it," the editorial insisted, adding as an afterthought, "as well as the producers." It continued by asserting the cultural workers' "right to carve out of it by organization an equitable share of its profits and fair working conditions," and to reject the studios' "take it or leave it" offers.[57]

Much of the ballast for the attacks on screenwriters during the Hollywood Red Scare of the 1940s derived from the studios' anger at this turn towards quasi-syndicalist politics. Film director Jules Dassin, a famous victim of the blacklist, insisted that the growing power of writers from the mid-1930s onward stoked the anti-communist fervor that began to grow towards the end of the decade. "It was clear that the writer, basically, was the potential enemy," Dassin recalled. Writers had never been feared by studios for their potential to imbed politically radical themes in otherwise apolitical films. It was a "ridiculous idea," that was, in fact, "howlingly funny," Dassin insisted, that screenwriters were "writing Communist

[56] Schwartz, *The Hollywood Writers' War*, 60.
[57] Ross, *Stars and Strikes*,180.

propaganda or subversive stuff." Rather, it was the "organization of a guild demanding rights and better financial arrangements, with people asking for royalties, as in the theater" that management deemed impossible. "The demand of the writer to be considered the creator—and to earn a fair distribution of what a film earns," Dassin concluded: "this is really what brought the industry down upon them.[58]

With the SWG under an increasingly dense fog of suspicion, the Guild's right wing dissidents seized the moment and formed a new union, Screen Playwrights, which displaced the SWG in the years between 1936 and 1938. Somewhat surprisingly, Screen Playwrights emerged out of negotiations within the SWG to reach a compromise and salvage amalgamation; within a few weeks the amalgamation plan was dead, and the Screen Playwrights became the new Hollywood writers' union.[59] The SWG officially dissolved in 1936, but returned a few years later. It was able to build on its earlier history to win the screenwriters' first contract on June 18, 1941. In addition to minimum pay of $125 per week, minimum periods of employment, and control of layoffs, the SWG won control of screen credits and the abolition of writing on spec.[60] This contract laid the groundwork for the standardization of residuals payments in the entertainment industry, the source, as Andrew Ross notes, of both the strength and the relative health of "above-the-line" talent guilds even in the era of globalization.[61]

The Policy Context

[58] Patrick McGilligan and Paul Buhle, *Tender Comrades: A Backstory of the Hollywood Blacklist* (New York: St. Martin's Press, 1999), 211.
[59] Schwartz, *The Hollywood Writers' War*, 70-78.
[60] Ross, *Stars and Strikes,* 173.
[61] Andrew Ross, "Technology and Below-the-Line Labor in the Copyfight over Intellectual Property," *American Quarterly*, Volume 58, Number 3, September 2006, 755.

The passage of the National Industrial Recovery Act in May 1933, which brought the NRA into existence, encouraged workers across the American economy to ramp up unionizing efforts. Workers' long-simmering discontent and outrage at managerial attempts to slash salaries and cut jobs in 1932 and 1933 coalesced in organizing campaigns in many sectors of the economy, including the motion picture industry. The NRA forced recalcitrant employers to negotiate with writers in a federally mediated forum and provided a political language and conceptual framework that buttressed the writers' demands for intellectual property protections. At the NRA's core was an attempt to make peace with and harness the power of monopolies to restore economic order. As such, it was a boon for professional writers and other cultural workers, in three very specific ways.

First, it legitimized the oligopolistic big businesses for which many professional writers labored, like the Hollywood Big Five studios. This was not an inevitable outcome. There was enormous pressure on the New Deal administration to break up the large movie studios and to challenge the monopolies of the large newspaper publishers.[62] Many ordinary Americans wanted government control of the culture industries. Sol Rosenblatt, Administrator of the NRA's Amusement Division, noted in late 1934 that the "question of the motion picture" had been "an ever present one in the minds of millions of our people."[63] By refusing to wage war on Hollywood, New Deal administrators provided a tacit guarantee

[62] This was not merely the product of the powerful aversion to big-ness and centralization at the center of Progressive rhetoric, still influential in the New Deal era, but also to the plebeian energies of New Deal-era mass culture. In their enthusiasm for Roosevelt and the New Deal many conservatives, neo-Populists, and quasi-Fascists in the United States called on the federal machinery to take up the regulation of culture As the early New Deal "brain truster" Raymond Moley noted, "it was a wonder that the government did not become an official film censor." Raymond Moley, *The Hays Office* (New York: Bobbs-Merrill, 1945).

[63] Speech by Sol Rosenblatt before the Motion Picture Division, State Federation of Pennsylvania Women, October 16, 1934. Office Files of Sol Rosenblatt, 1933-35, A-B. Entry 174, Box No.1. Records of the National Recovery Administration, Record Group 9. National Archives, College Park, MD.

to the studios that their sovereignty would, at least for the immediate future remain unchallenged.[64]

Second, the strategic embrace of certain forms of monopoly by the NRA administration meant that many Depression-era corporations began to seek state sanction for the expansion of corporate IP rights. The connection between monopoly and IP rights may not be immediately obvious, but copyright and patents are, in fact, forms of monopoly, requiring the state apparatus to protect and enforce the exclusive rights of property owners. Legal scholar Steven Wilf notes that whereas the monopoly character of IP led jurists of the pre-New Deal period to frown upon the expansion of copyright and patent protection, the emergence of New Deal jurisprudence and the relaxation of hostility toward monopoly saw policymakers increasingly favoring the growth of IP.[65] From the perspective of cultural workers, this tendency represented both a threat and an opportunity. In terms of class struggle, the growth of IP was part of an employer offensive against employee ownership of certain elements of workplace property—in this case, knowledge created on the job— that remained vested in workers. The expansion of IP also, however, opened up a new terrain of contestation: if the government was disposed to increasingly privatize property rights in cultural works and scientific discoveries, there remained the possibility that workers, rather than employers, might be declared owners of that property, thereby greatly enhancing the economic power and bargaining position of cultural workers.

[64] Advocates for independent exhibitors, like Idaho Republican William E. Borah, attacked the NRA's film division for favoring the big studios and legitimating monopoly. "Film Code Aids Big Producers, Borah is Told; Protest, Charging N.R.A. Fails to Protect Independents, Put in Record" *New York Herald Tribune*, February 7, 1934.

[65] Steven Wilf, "The Making of the Post-War Paradigm in American Intellectual Property Law" *Columbia Journal of Law & the Arts*, 142-45.

Third, within the culture industry, the NRA moment witnessed an increased tendency to view the communications media as "clothed with a public interest." (We delve further into the history this term in the final chapter of this dissertation). The notion that certain businesses were "clothed with a public interest" stretches back to nineteenth century monopoly jurisprudence, standing at heart, for example, of the Supreme Court's upholding of the legality of municipal monopolies on slaughterhouses in the famous 1876 *Slaughterhouse Cases*. While the laissez-faire jurisprudence that came into vogue during the Progressive Era took issue with the notion that firms providing essential goods and services were "clothed with a public interest" and thus in need of government regulation, the term never disappeared, and began to reappear in policy discourse in the age of Wilson. Particularly after World War I, film, radio, and newspapers could not be viewed as purely private industries. In legal and political circles, it became commonplace to view them as both quasi-public entities, vital to democratic life and requiring careful regulation. Thus, from the perspective of cultural workers, the state could be expected to be interested in working conditions and the distribution of power to a degree incommensurate with the relatively small size of the film, radio, and print media industries.[66]

If the NRA policy window created the conditions for new struggles over the ownership of cultural property, the economic chaos of the early New Deal period also contributed to the creation of a fertile ground for policy experimentation. In the film industry, an aggressive campaign of industrial expansion, hinged upon an extended process of upgrading and refurbishing movie theaters to accommodate "talkies" between 1928 and 1933, led to the prospect of imminent bankruptcy of the five big and three small major

[66] See Zechariah Chafee, Jr., "Reflections on the Law of Copyright: I," *Columbia Law Review*, Vol. 45, No. 4 (Jul., 1945), pp. 503-529; and "Reflections on the Law of Copyright: II, III," *Columbia Law Review*, Vol. 45, No. 5 (Sep., 1945), pp. 719-738; and *Government and Mass Communications, Vols. I and II*, Chicago: University of Chicago Press, 1947.

Hollywood studios at the beginning of 1933.[67] Consequently, the Hollywood moguls who ran the studios were increasingly subject to the dictates of the Eastern bankers who had assumed a large measure of control in the first months of the Roosevelt administration. In 1936, Lawson described "the period from 1928 to the present day" as one during which "big motion-picture companies, facing the depression, have been forced necessarily to introduce large-scale business methods and more or less machine methods into the industry."[68] The age of the "talking picture" was thus "the period of the executive, the executive who is often thoroughly ignorant of creative values." While perhaps "necessary in the course of the reorganization and the business development of the motion-picture field," the next logical step, for Lawson, was for "the creator, the man who knows his job, who knows how to create material and produce entertainment for millions of our people" to "have the right to do that job according to the technique method that he has learned."[69]

The centralization of cultural production in Hollywood resulted in the concentration of creative talent in a relatively small geographic space during a period marked by intense confusion. The film industry, Gerald Horne writes, turned to the writer in desperation, as the old silent film directors seemed bewildered about how to oversee the transition from silent to sound cinema.[70] Out of this dialectical process arose the political militancy of the Hollywood screenwriter. Lawson's noted that "each successive attempt by the producer to lower the economic and artistic status of the screenwriter" was met with "stronger organization on the part of the screenwriter."[71] A more specific dimension of industrial change intensified the

[67] Schwartz, *The Hollywood Writers' War*, 5.
[68] Lawson testimony, 1936, 532.
[69] Lawson testimony, 1936, 532.
[70] Horne, *The Final Victim*, 51.
[71] Horne, *The Final Victim*, 52.

degree to which IP issues would become central to the labor politics of Hollywood screenwriters. The advent of the "talkie" represented a seismic shift in the nature of narrative filmed entertainment. Lawson later reflected on the transition from silent to sound from the perspective of the screenwriter: "There is very little that can be said for the screenwriter of the silent days. It was a crude, vigorous, bawdy, blatant sort of business that resembled a sideshow in a honky-tonk circus; in fact, most of the people who controlled its destinies had come up from these sideshows and still carried with them their philosophy that 'audiences were suckers and had to be taken.'"[72] In his 1936 testimony, Lawson noted that since the introduction of spoken dialogue "the importance of the author became more apparent, but the author did not benefit by this."[73]

The rise of sound film profoundly altered the business of writing for the movies. The studios' hunger for literary properties meant that considerations of the value of a literary work would necessarily be shaped by the price Hollywood would pay for the rights to produce a film adaptation. Even writers who resolutely stuck to the stage or printed page could not afford to ignore the economic influence of Hollywood. Playwrights needed guarantees that film adaptations of their works would not be released during the first theatrical run of new plays; otherwise, audiences might opt to skip the play and see the movie instead. Writers for the stage similarly hungered for IP protections to prevent close facsimiles of hit plays from being rushed to cinemas, which threatened to rob value from first-run theatrical rights.[74]

[72] Lawson, quoted in Horne, *The Final Victim*, 52.
[73] Lawson testimony, 1936, 532.
[74] Lawson testimony, 1936, 533.

Public enthusiasm for the sound films of the early 1930s led to a speculative frenzy as studios attempted both to lure talented writers of dialogue to California, and to minimize the costs of producing "derivate works": the films adapted from plays, stories, and novels that constituted the cast majority of Hollywood fare. At this early moment, as the language of filmic storytelling was in the process of development, writers wielded considerable power. Studios could not turn to alternative sources of labor, and management did not necessarily understand how to replicate past successes.[75] The early 1930s thus saw a unique distribution of power that favored cultural workers' militancy and fostered an acute critique of the role of property relations in the political economy of Hollywood.

Lawson and the SWG's articulation of an IP rights-oriented agenda was conditioned by the particular exigencies of the economic crisis of the Depression and the corporate reorganization of the Hollywood studios. As historians have increasingly come to insist, economic crises are often critical moments of policy experimentation and crucibles of new kinds of discourses. In times of widespread uncertainty regarding the legitimacy of governing institutions and the stability of social relations, workers often experience a new sense of possibility regarding the contestation of seemingly ironclad understandings of terms like "property," "rights," and "ownership." This was certainly the case with the screenwriters in the early years of the Depression. Contextualizing their emergence within the indeterminate policy context of the early New Deal helps to explain why a relatively novel vision of labor politics centered on IP rights could gain remarkable traction within a span of a few years.

[75] The power relation between writers and studio executives, therefore, as C.L.R. James observed, was one of "armed truce." See C.L.R. James, *American Civilization*, Anna Grimshaw and Keith Hart, eds. (Oxford: Blackwell, 1993).

Chapter Five: Heywood Broun and the American Newspaper Guild's First Decade

Heywood Broun's "It Seems to Me" column of August 7, 1933, which ran in the New York *World-Telegram* and several other Scripps-Howard dailies, launched the American Newspaper Guild (ANG).[1] A figure straight out of a newsroom screwball comedy of the 1930s, Broun weighed over 300 pounds, stood six foot four and was described by unlikely friend and future Red Scare archvillain Westbrook Pegler as an "unmade bed." In a review of Benjamin Stolberg's 1939 quickie history *The Story of the CIO*, the New York *Time*s' Rose C. Feld describes Broun as a "journalistic Broadway character, a sort of left-wing man about town who knows all the right people with the left touch," with the "skin-deep charm of the middle-aged *enfant terrible* who can make the upper classes take 'class struggle' as a canapé with their cocktails, and titillate the middle-class intelligentsia with a sense of proletarian boldness."[2] While Feld underestimated both the depth of Broun's convictions and his comfortability around ordinary folks, it was true that Broun attended Harvard in the same graduating class as Walter Lippmann, Stuart Chase, T.S. Eliot, and John Reed.[3] Broun's first gig as an opinion columnist was with the New York *Tribune*, starting in 1919. He left the *Tribune* for the Pulitzer's *World* in 1921, frequently getting into trouble with management for his left-leaning writing on hot-button topics like the trial of Sacco and Vanzetti.[4] In 1928, he was hired away by Scripps-Howard, and ran for Congress on a Socialist ticket in 1930.

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[1] Heywood Broun, "It Seems To Me," New York *World-Telegram*, August 7, 1933. See also Walter M. Brasch, *With Just Cause: Unionization of the American Journalist*. Lanham: University Press of America, 1991.
[2] Rose C. Feld, "The CIO's Growth," New York *Times*, Jan 15, 1939, BR7. Benjamin Stolberg was a militant Lovestonite who evidently loathed Broun. The Scripps-Howard newspaper chain ran his CIO book as a serial over the course of 1938. See Benjamin Stolberg, *The Story of the CIO* (New York: Viking Press, 1938) and Robert Cantwell, 'The Communists and the CIO" in *The New Republic*, February 23, 1938.
[3] Brasch, *With Just Cause,* 207.
[4] Brasch, *With Just Cause*, 209-211. Samantha Barbas, *The Rise and Fall of Morris Ernst, Free Speech Renegade* (Chicago: University of Chicago Press, 2021), 180.

Throughout the 1930s, Broun used his "It Seems to Me" column to rail against child labor, racial discrimination, the Klan, and Father Coughlin. Broun's commitment to egalitarian politics was memorialized by the ANG in its decision to dub Article II, Section I of its constitution, which forbids discrimination against any member "by reason of age, sex, race, national origin, religious, or political conviction or anything he writes for publication," as the "Heywood Broun clause."[5]

In many ways, Broun was an unlikely candidate for labor radical. "It is a little difficult for me," Broun offered, "in spite of my radical learning and training and yearnings, to accept wholeheartedly the conception of the boss and his wage slaves." In the mid-1930s, as newspapers slashed their workforces, Broun enjoyed safe and secure employment as one of the country's most successful newspaper writers.[6] "After some four or five years of holding down the easiest job in the world," Broun joked, that he hated to see other newspapermen "working too hard." Such a display was, after all, embarrassing in view of the "newspaper men who are not working at all," among whom numbered "some of the best."[7]

Broun's column of August 7, 1933, concerned attempts by newspaper publishers to work around the authority of the NRA. The scheme centered upon a plan to classify editorial staff as "professional men." Because NRA regulations excluded such white-collar workers, newspaper staffers would continue in many instances to work at least eight hours a day, six days per week.[8] Seeking to protect work schedule, Broun mocked the publishers' attempt too pat their "fathead employees" on their heads and flatter them as "professionals." He cautioned his fellow newspaper workers: "the men who make up the editorial staffs of the

[5] Brasch, *With Just Cause*, 212.
[6] Brasch, *With Just Cause*, 201.
[7] Broun, "It Seems To Me," August 7, 1933; Brasch, *With Just Cause*, 202.
[8] Brasch, *With Just Cause*, 201.

country are peculiarly susceptible to such soothing classification as 'professionals,' 'journalists,' 'members of fourth estate,' 'gentlemen of the press,' and other terms which have completely entranced them by falsely dignifying and glorifying them and their work." Broun reminded his journalists that they were, in fact, "hacks and white-collar slaves." Any attempt to unionize the "leg, rewrite, desk or makeup men" was doomed to be laughed to death in the newsroom: "Union? Why, that's all right for dopes like printers, not for smart guys like newspapermen!"[9]

Meanwhile, the blue-collar employees of the major New York newspapers had long enjoyed muscular union protection, under the banners of the International Typographical Union (ITU) and the five other labor bodies that together constituted the famous "Big Six," a bargaining behemoth unrivaled in power. Pointing to the victories of the printers' unions, Broun highlights the hidden costs of his fellow journalists' sense of superiority: "Yes, and those 'dopes' the printers, because of their union, are getting on an average some thirty percent better than the smart fourth estaters." Broun was not exaggerating. At an NRA hearing shortly thereafter, Frank Morrison, Secretary of the AFL, would complain that despite requirements for a higher degree of education and higher standards of living, writers and editors generally received weekly salaries "far below" wages paid to skilled workers employed in producing the same papers. Broun notes the irony: by refusing to be called by the "high-faluting names" that had seduced editorial employees, the printers would be guaranteed coverage under NRA codes of fair competition. The "Big Six" would win the re-employment of a large number of unemployed printers, while their "smart" counterparts in the editorial department would "continue to work forty-eight hours a week because they love

[9] Broun, "It Seems To Me," August 7, 1933; Brasch, *With Just Cause,* 202.

to hear themselves referred to as 'professionals' and because they consider unionization as lowering their dignity."[10]

On September 17, 1933, 350 newspaper editorial workers met at the City Club on 55 West 44th Street to vote to form an organization upon which the ANG would be built: the "Guild of New York Newspaper Men and Women." They voted to send a committee of five to represent white-collar journalists at an NRA hearing in Washington the next week, and urged the adoption of a newspaper code that would mandate a five-day week and a guarantee that notice of firings of experienced journalists be given with generous advance notice. Additionally, the new Guild sought minimum wage protections: $35 for editorial workers with one or more years of experience, $40 for those with two or more years of experience. Joseph Lilly, of the *World-Telegram*, presided.[11] In December of 1933, the Guild would formally establish itself as a national organization, seeking to "preserve the vocational interests" of newspaper editorial and reportorial workers, and to "improve the conditions under which they work by collective bargaining."[12]

Four months later, Broun became the first president of the American Newspaper Guild, working on both union duties and newspaper writing until his untimely death on December 18, 1939. The ANG held its founding convention on December 15, 1933, in Washington DC. Broun was elected President of the Guild; he won re-election six times by unanimous votes.[13] Broun used his perch as ANG President as a bully pulpit. "Until there is a good newspaper code," Broun thundered, "there will be no good codes because if you boil all the publishers of America down—a consummation devoutly to be wished—you will find that you have in

[10] Brasch, *With Just Cause*, 202.
[11] "News Writers Form Guild Under the NRA" New York *Times*, Sept 18, 1933, p. 4
[12] "Newspaper Guilds Unite Nationally" New York *Times*, Dec. 16, 1933
[13] Brash, *With Just Cause*, 213.

essence automobiles, textiles, steel munitions, utilities, and all the leading industries of the country."[14] Broun worked closely with lawyer Morris Ernst, a personal friend who became the Guild's attorney (and later, stung by criticism from ANG members about his cosy personal relationship with lawyers for the newspaper publishers, turned against the union, became a militant anti-communist and informant for the FBI).[15] According to Ernst, it was Broun who urged the ANG to join the organized labor movement and extend membership beyond the editorial department.[16]

Once in Washington, the team pored over the NRA code submitted by the American Newspaper Publishers Association. Broun and Anderson met with Hugh S. Johnson, NRA director.[17] In a long New York *Times* article ("News Men Demand 5-Day Week in Code") of September 23, 1933, the newspaper code-drafting process is described as mired in confusion and chaos.[18] The code encompassed everything from the journalistic freedoms of editorial workers to the conditions of newsboys. The ANPA "stood stoutly by" the code and attempted to deflect criticisms." Elisha Hanson, ANPA's lead counsel and ANG's primary antagonist in its early years, explained that the code provided a forty-hour work week except for "executives" and reporters who were paid $35 weekly or more, who were to be classified as "professionals." As predicted by Broun's "It Seems To Me" column, it was this classificatory move that would animate much of the early push by the ANG for a more employee-friendly NRA code.

[14] Brasch, *With Just Cause*, 213-14.
[15] Brasch, *With Just Cause*, 214.
[16] See Samantha Barbas, *The Rise and Fall of Morris Ernst Free Speech Renegade*. (Chicago: University of Chicago Press, 2021).
[17] "News Writers Ask Changes In Code" Wednesday, September 20, 1933 New York *Times*, p. 8.
[18] "News Men Demand 5-Day Week in Code" New York *Times*, Sat, Sep 23, 1933, p. 8.

Various Guild members voiced the Guild's resistance to the classification of editorial employees as "professionals." Doris Fleeson of the New York *Daily News* expressed annoyance on behalf of the Guild's members, describing the "professionals" clause as a ruse meant to deprive journalists of the benefits of the NRA. Edward Angly of the New York *Herald Tribune* castigated the proposed code for leaving news gatherers and editors "out in the snow." He too objected to the "professionals" label: "We would much prefer to be classified simply as craftsmen and taken up to the nest of the Blue Eagle rather than left down in the valley of rugged individualism."[19]

Foreshadowing arguments that the publishers would push all the way to the Supreme Court, the draft code included language protesting against any requirement that would interfere with the "constitutional guarantee of freedom of the press." For Hanson and for the publishers, these First Amendment concerns precluded "interference by a third party." In a manner typical of the time, they painted labor unions as uniquely threatening to independent-minded employees who did not wish to join a "particular organization." Singing further from the anti-labor hymnal, Hanson raised the specter of "racketeering" and denied any quarrel with collective bargaining rights but protested against any interpretation of the law by labor's "self-appointed—I might say self-anointed—spokesmen for employees." In response, Broun attempted to counter the publishers' strategic invocation of the First Amendment, declaring: "I suggest that the freedom of the press is a matter of importance to the men and women who write the stories which appear in the newspapers." A few months later, the Guild passed a resolution expressing its conviction that "freedom of the press is one of the essential foundations of human liberty" but insisting that "the newspaper industry which asserts its

[19] "News Men Demand 5-Day Week in Code," p. 8.

freedom from governmental interference with the news or free comment on the news" could not "rightfully evade its responsibility to assume, by organization under a code of fair practice, the same responsibilities for public welfare that other industries are being called upon to assume."[20]

A wide range of concerns were voiced at this first meeting of the representatives of journalists, the publisher, and the New Deal state. One speaker would highlight the differing situations faced by small regional papers as compared to metropolitan dailies. The next would demand gender parity in newspaper work. The question of child labor would be raised vis-à-vis newspaper deliver boys, to be followed by a publisher protest at the very idea of labor regulations in the news industry. This volatile mixture of issues caused labor bureaucrats endless headaches, but also illustrated the potential power of cultural workers' unionism. The unique blend of a semi-autonomous craft solidarity in the belly of a nationally integrated capitalist media complex allowed for the politicization of many issues—gender politics, workplace control, and the contradictory class position of the poorly paid but high-status skilled worker—that exceeded the narrow parameters of wages and hours.

The Guild's complex relationship with Franklin Roosevelt, which was to become increasingly vexed over the coming years, began with a pleasant meeting on December 11, 1933. Broun, Roosevelt, and NRA head Hugh S. Johnson sat down to work out the broad contours of the deal sought by the editorial employees: a five-day, forty-hour week, representation on the NRA code authority, and clarification of several sections of the code. Johnson told Broun that he could not urge them to organize, but that he and the NRA would protect them once they had formed a union: "if you choose to organize yourself in guilds or

[20] "Newspaper Guild Begins to Function" New York *Times*, Nov 16, 1933, p. 30.

in any other way for the purpose of collective bargaining, protecting your rights, or any other purpose, nobody in this administration can interfere." Broun promised that the Guild would not propose any "tricky or impossible things." [21]

The Guild's initially optimistic vision of the NRA code-drafting process soured with the appointment of Ralph Pulitzer, formerly of the New York *World*, as Deputy Administrator of the NRA in charge of the newspaper code in January of 1934. The Guild declared: "we see nothing in Ralph Pulitzer's record as a publisher of the one-time New York *World* to justify a belief that he will have the employees' interests fairly at heart," and issued a call for his resignation. Opposing the appointment of any publisher or person affiliated by business interest with publishers, the resolution complained that newspaper employees' organization had not been consulted in the appointment. [22] In June of 1934, Roosevelt sent Broun personal greetings and wishes for success to the Guild at its opening convention in St. Paul, Minnesota.[23] The message read: "So many of my friends are attending with you the national convention of the American Newspaper Guild that it affords me real and personal pleasure to send a word of greeting and best wishes." It affirmed that "newspaper men" rendered "real and valued service to the nation" and expressed gratitude for their acceptance of the "great responsibilities that go at all times with their work."

This cozy relationship between Roosevelt and the Guild was not to last. A year later, Broun would charge that Roosevelt had "surrendered" to the publishers: "We feel that it is impossible to dodge the fact that the newspaper publishers have cracked down on the President of the US, and that Franklin D. Roosevelt has cracked up." Roosevelt, Broun

[21] "Guild Men See President," New York *Times*, Dec 12, 1933, p. 2.
[22] "Guild Opposes Pulitzer," New York *Times*, Jan 24, 1934, p. 2.
[23] "Roosevelt Greets Newspaper Guild," New York *Times*, June 6, 1934, p. 5.

alleged, had "made no attempt to learn from the Guild its bill of complaints against the stupidities and the inequities of the Newspaper Industrial Board." Depicting the publishers' blustery *sturm und drang* offensive against the Guild as akin to a bank holdup, Broun joked that Roosevelt "surrendered at the point of a wooden gun." By March of 1935, Broun would be calling Roosevelt "labor's Public Enemy No. 1."[24]

In the calmer climate of 1934's ANG convention, Governor Floyd B. Olson of Minnesota welcomed the 150 delegates, who represented about 8,000 newspaper men in fifty cities, and warned them to resist the inducements of the "white-collar complex." At the outset of the four-day meeting, Broun reviewed the rapid growth of the Guild, noting that over the prior six months, the Guild had grown from nothing to the "largest organization of its kind in the world." He warned, however, that the Guild still lacked unity and cohesiveness, while rejecting, for the time being, affiliation with the AFL as a possible fix. As we will see, the question of AFL affiliation (and later of CIO affiliation) would become a major element in the story of the Guild's first decade.

The program of the Guild's national meeting further illustrated the expansive character of its political vision. While working out the details of the beat journalist's working week, the convention also saw the adoption a resolution urging the immediate release of Tom Mooney, and another pledging to use "every means of obtaining additional legislation to protect collective bargaining and outlaw company unions." Speakers rose to call for the protection of confidential sources, protection of unorganized reporters, "freedom of conscience" to tell the truth and not to "distort or suppress facts such as might lead to economic, industrial, or military wars," and for the ouster of NRA deputy administrator George Buckley on the

[24] "Labor Men Denounce NRA," New York *Times*, Mar 25, 1935, p. 10.

grounds that he was a "tool of the publishers." The convention also saw a lively debate over a provisional code of ethics, which would stress the provision of "accurate and unbiased news reports," the recognition of the "equality of all men before the law," the need for journalists to avoid being swayed by "political, economic, social, racial, or religious prejudices," and opposition to the "suppression of news by privileged persons or groups including advertisers, commercial powers, and friends of newspaper men."[25]

Broun had an outsized talent for attracting publicity to the Guild's organizing efforts. In July of 1934, for example, he received considerable attention for distributing copies of a special edition of the *Guild Reporter* to the picketers then protesting outside the Long Island *Daily Press* offices in Jamaica, New York.[26] The protests concerned the firing of workers as retaliation for Guild membership, as well as charges of non-compliance with the NRA. William F. Hoffman, publisher of the *Daily Press*, composed an open letter to Broun that ran on his newspaper's front page yesterday, charging that Mr. Broun had failed to present any demands or filed any statement of what he hoped to accomplish by picketing, and asserting that the *Daily Press* had "never disputed the right of collective bargaining." Police warned Broun that he risked arrest for "parading without a permit" and distributing "handbills," which led Broun to demand his prompt arrest, which in turn occasioned a march of hundreds of picketers to the police station with Broun leading the parade. Dismissed with a warning, Broun returned to the *Daily Press* offices and continued distributing copies of the *Reporter*, while the Guild drove sound trucks in support of the striking workers. This fracas attracted

[25] "Newspaper Guild Votes Ethics Code," New York *Times*, Jun 9, 1934, p. 20.
[26] "Newspaper Pickets in Jamaica Warned," New York *Times*, Jul 13, 1934, p. 10.

the attention of Mayor LaGuardia himself, who invited both sides to meet at City Hall to settle their differences.[27]

The Guild began picketing the offices of the Staten Island *Advance* in August of 1934, protesting the July 28 firing of its journalist Alexander L. Crosby as retaliation for joining the Guild.[28] On August 19, 1934, the Guild held an open-air mass meeting at Richmond and Harrison Avenues, in Staten Island, which saw Crosby addressing an audience of about 1,000 people.[29] The Guild again made good use of their sound truck, broadcasting the request that Staten Island residents not purchase the newspaper until the problem had been resolved. Broun was not averse to using his perch as a public intellectual to draw attention to the *Advance* protest. Later in August, Broun was among the many prominent writers asked to provide analysis of the general strike then roiling the West Coast. He took the opportunity to castigate the *Advance*'s publishers, asserting that the firings of Guild members amounted to the eradication of the free press in the US, and establishing a link between the press barons of Staten Island and San Francisco. "If the threat of Fascism seems to you remote in California," Broun suggested, "consider the role played by the newspapers in the general strike." Broun took the opportunity to further ridicule publisher paeans to "freedom of the press," which amounted only to the "freedom to use child labor," the "freedom of a newspaper owner to print what he pleases and throw away the rest."[30]

In early September 6 of 1934, Broun reached an agreement with L.H. Rouse, president of the New York Typographical Union 6 of the ITU, gaining Local 6's participation in the Guild's campaign against the Staten Island *Advance*. On November 5, 1934, Broun traveled

[27] "Mayor Offers Aid In News Guild Fight," New York *Times*, Jul 14, 1934, p. 11.
[28] "Newspaper Guild Faces Writ Today," New York *Times*, Aug 17, 1934, p. 17.
[29] "Guild Holds Rally," New York *Times*, Aug 19, 1934, p. 17.
[30] "Liberals Protest Curbs on Freedom," New York *Times*, Aug 22, 1934, p. 17.

to Hyde Park to further discuss the NRA newspaper code with Roosevelt.[31] Broun reported that Roosevelt was greatly interested in the problems affecting news reporters and writers" and expressing the hop that these problems would be worked out at hearings on revisions to the code to be held in Washington beginning in the first week in December. "The whole general picture was discussed involving the problem of news gathering on newspapers or press associations in a view of the hearings for a revised newspaper code," Broun summarized, and recalled discussions of problems related to "alleged interference upon the part of newspaper management with the right of newspaper employees to organize themselves." Now representing over 8,000 Guild members, according to the *Times*, Broun emphasized that the unemployment of newspaper workers had become an acute crisis, and committed the Guild to adjusting newspaper practices in a manner that would "provide for more work for reporters and absorb the unemployed."[32]

By mid-February, 1935, the action had moved to New Jersey. As an ANG strike at the Newark *Ledger* strike entered its thirteenth week, Broun sent Roosevelt a plea for executive intervention on behalf of the Guild's striking workers.[33] The ongoing strike, in the ANG's view, signified a breakdown in the NRA arbitration machinery, and prompted an appeal for "immediate executive action based on restoration of all Guild strikers and employees who have been discriminated against." Broun warned that unless machinery for settling the strike was established, the Guild would withdraw from the NRA's Newspaper Industrial Board, which was temporarily averted by Labor Secretary Frances Perkins' offer of federal mediator services to the *Ledger* and Guild on March 13, 1935.[34]

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[31] "Wider Press Code Put To Roosevelt," New York *Times*, Nov. 6. 1934, p. 23.
[32] "Printers Aid Guild Fight," New York *Times*, Sept 6, 1934, p. 2.
[33] "News Guild Sends Plea," New York *Times*, Feb 13, 1935,
[34] "President Enters News Guild Fight," New York *Times*, Mar 13, 1935, p. 27.

Meanwhile, Broun used the ongoing strike as an opportunity to test the real world limits of the First Amendment. An injunction had been issued by Vice Chancellor Maja L. Berry of Newark restraining the Guild's strike activities in that city. Broun took to the radio waves to criticize the injunction as "very unfair, unjust, and drastic." He opened his radio address by quoting part of the temporary injunction that restrained him from any "annoying language broadcast, spoken or disseminated by use of loud-speaking or other sound devices or radio." He joked: "I don't know whether I'm using annoying language or not," and added "but the language employed by Vice Chancellor Berry is certainly annoying to me." He asked how it could be that a judge could unilaterally "undertake to restrict the freedom of the press" and set himself up as a "one-man radio commission." Broun described the writ as "one of the most drastic ever handed down and therefore one of the most unfair," and declared: 'I am only speaking what I believe to be the whole and entire truth and I am not yet ready in a land of freedom to surrender that right to any judge, particularly to any judge whom I have never seen and a judge who has not the slightest idea about our side of the case."[35]

On March 20, 1935, a petition for removal to Federal court of the injunction case brought by the *Ledger* against the Guild and some of the striking *Ledger* workers was filed in Chancery Court by Abraham J. Isserman, Guild counsel.[36] The Guild's lawyers contended that because the Fourteenth Amendment was in play, the case should be removed to the Federal court. At play, here, was the possible weakening of the New Jersey Chancery Court's employer-friendly system of injunctions against labor activity. Merritt Lane, former vice chancellor of the Chancery Court issued a warning in late March of 1935 on behalf of the Newark Chamber of Commerce, the Employers Association of North Jersey, and the

[35] "Newark Strikers Seek Court Shift," New York *Times*, Mar 20, 1935, p. 11.
[36] "Newark Strikers Seek Court Shift," New York *Times*, Mar 20, 1935, p. 11.

Manufacturers Association of New Jersey, warning that union defenses of "peaceable picketing" served as a mask for labor's strong-arm tactics. Lane called attention to a letter from the AFL's William Green to Broun urging violation of injunctions in the *Ledger* case, and to articles in the *Guild Reporter* with similar messaging. In familiar anti-union language, Lane painted labor as "a minority group which claims special privileges before the law, and which claims and exercises the right to violate the process of the law," while secretly seeking to establish itself as a "preferred class." Lane warned of the dangers of a form of "fascism" more insidious than "communism or of any dictatorship of the proletariat," which the unions were inviting by issuing radical demands.[37]

On June 5, 1935, the Guild held its second national convention, centering around the dramatic approval of a resolution "favoring an industrial union for newspapers."[38] Broun spoke from the floor in favor of what newspapers described as an "industrial, or vertical, union," to be distinguished from craft unions "as exemplified in the American Federation of Labor." Here, we see an indication of significant cracks beginning to form in the Guild's tacit alliance with Green's AFL, which would devolve into full-scale warfare in the coming months and years. Some Guild members pushed back against the calls for "industrial unionism." A.J. Evans of Richmond, Va., for example, pointed out that, given the Guild's failure to completely organize completely editorial employees, any plan to organize the entire workforce bordered on "moonshine."[39]

On October 17, 1935, the Guild announced that a final tabulation of referendum votes had resulted in the defeat for the proposal to apply for affiliation with the AFL: roughly 65.4

[37] "Fascist Rise Seen To Subdue Labor," New York *Times*, March 22, 1935, p. 9.
[38] "Newspaper Guild for Vertical Union," New York *Times*, Jun 6, 1935, p. 19.
[39] "Newspaper Guild for Vertical Union," New York *Times*, Jun 6, 1935, p. 19.

percent of Guild members favored affiliation, just short of the required two-thirds majority. Broun commented that the Guild could not apply for AFL membership until the question has been brought up at another national convention, and acknowledged that a "large majority of the Guild has given a clear mandate for the conception of the Guild as a trade union organization and part of the labor movement," promising that we would labor "to bring about a favorable vote for affiliation at the next convention or in any form of referendum which it may decide to set up."[40]

Broun was again arrested, at his own insistence, during a strike demonstration in Milwaukee on March of 1936. He was charged with interfering with an officer and disorderly conduct, and spent two hours in a jail cell before being released on bail.[41] Broun was in Wisconsin protesting the arrest of Alfred Lauterbach, a young Milwaukee Guild member with the *Wisconsin News*, a Hearst publication, as part of a strike for higher wages and shorter hours started that had begun a month earlier. Broun commented that he had been arrested on two previous occasions, but that this was his first experience in a jail cell. "I was not particularly well accommodated, because I had to more or less hitch-hike a ride in the patrol wagon," Broun confessed. "I was not allowed my legal right of a phone call, although I kept hollering for it for a couple of hours and began to realize why people go nuts in jail." Several weeks later Broun was convicted by a Municipal Court jury of interfering with police officers, and was fined $10.[42]

By the third Guild convention in June of 1936, the focused shifted, temporarily, from the question of AFL affiliation to the threat posed to labor by the courts. Charging the Supreme

[40] "Guild Vote 35 Short On Tie With AF of L," New York *Times*, Oct 17, 1935, p. 12.
[41] "Heywood Broun Is Jailed In Strike," New York *Times*, March 22, 1936, p. 22.
[42] "Broun's Appeal Fails," New York *Times*, April 17, 1936, p. 15.

Court with a "greedy seizure of dictatorial powers over the State and Federal governments during the past year" the Guild warned of an "alarming threat to newspaper workers and to labor," and called for a constitutional amendment to protect the rights of labor. "The Supreme Court's interpretations have gone so far," a Guild report alleged, "that the way out that was possible a year ago, in the form of a legalistic and common sense approach that would bring our constitutional law up to date" had now been closed. The convention, at which Broun was re-elected Guild president, also formally condemned Mayor Frank Hague of Jersey City, National Democratic Committee member as an "enemy of labor." Such a description was, if anything, an understatement, and Broun and the ANG would soon tangle further with the autocratic Hague, sometimes called the "Hitler on the Hudson."[43]

Immediately following the convention, conflicts over AFL affiliation again began to boil over. Green presented a charter of affiliation to the Guild in early August. Broun, increasingly favoring affiliation with the upstart CIO, surprised Green with a rejection of the charter and the announcement of an unexpected gambit: announcement of his resignation as president of the Guild as a proxy test of whether the Guild should join John L. Lewis's new labor body. Broun's tactic failed to generate sufficient support for either AFL or CIO affiliation, accomplishing little besides placing him squarely in Green's crosshairs.[44]

Broun joined the CIO as an individual member in late 1936, and the Guild executive board adopted a recommendation to hold a vote on affiliation with the CIO at the June 1937 annual meeting. Jonathan Eddy, ANG secretary, told newspapers that the board had received guidance from CIO director John Brophy, who urged that the Guild welcome affiliation of employees in the advertising, business, and circulation offices of newspapers. As discussions

[43] "News Guild Seeks Labor Amendment," *New York Times*, Jun 2, 1936, p. 12.
[44] "Green Gives Charter To Newspaper Guild," *New York Times*, Aug 8, 1936, p. 2.

raged regarding CIO affiliation, it became clear that there was no united sentiment favoring it and considerable resistance, rooted in a widespread and growing anticommunist smear campaign against industrial unionism.

The Morris Watson Case

By far the most significant sub-narrative in the history of the Guild was that of Morris Watson. We can learn a great deal about the complex politics of cultural work in the New Deal Era from the story of Watson, a close collaborator with Broun who played a starring role in the linked stories of the founding of the ANG and the legal fight over the legitimacy of the Wagner Act. Watson was also a key player in the Federal Theatre Project (FTP), and later would continue his Zelig-like career by moving to the West Coast to work with Harry Bridges and the ILU during the McCarthy Era. Watson joined the Chicago bureau of the Associated Press (AP) in December of 1928. He later moved to the AP's main offices in New York, gaining a reputation as an ace reporter. The AP was then organized as a cooperative organization to which about 1,300 newspapers in the US belonged. As the Supreme Court would find in 1937, its business was primarily the collection of news from members and other sources, both national and international, and the compilation, formulation, and distribution thereof to its members. AP employees selected, edited, and rewrote the information they received, and provided news articles to member newspapers and foreign agencies via the telegraphic wires as well as messenger services and radio transmission. The unique structure of the AP, as compared to any single major newspaper would come to have an effect upon Watson's legal saga. Unlike other reporters, Watson did not pound the

pavement and work sources, but instead worked to determine the news value of items received and then to "speedily and accurately" rewrite the copy.[45]

Watson experienced a political radicalization in 1933, as wages were slashed and several New York newspapers folded. As the Depression worsened, Watson became an enthusiastic supporter of the nascent Guild, attending the September 17, 1933 meeting at which Broun launched the union. Watson immediately got to work organizing the AP Unit of the Guild in November of 1933. When he was fired by the AP, Watson's case was picked up by the Guild and its legal advisor Morris Ernst as a test case to win legal approval of the right of journalists to unionize. This case was among the five that were later rolled together and decided upon by the Supreme Court when it ruled the Wagner Act constitutional in 1937.[46]

According to materials gathered by the National Labor Review Board in relation to his case, Watson had clearly been fired for his Guild activities. Prior to September 1933, Watson's evaluations had contained phrases such as "star reporter" and "first class reporter." As the Guild's campaign gained momentum, however, these evaluations began to contain warnings that Watson was an "agitator" who would disturb the morale of his fellow workers. Tensions rose further as the Guild initiated attempts to negotiate with the AP in the summer of 1934. Like the large metropolitan newspaper owners, the AP vowed never to bargain with "outsiders," but made the concession of a five-day week in an attempt to appease its restive employees. Watson was immediately reassigned to a series of positions described by Charles E. Clark, Dean of Yale University's Law School and trial examiner for the NLRB, as a "punishment for Watson's Guild activities." In January of 1935, the AP put Watson in charge

[45] *Associated Press v. Labor Board*, 301 U.S. 103 (1937); "Morris Watson, Newsman, Dies; Won Key Labor Law Test Case," New York *Times*, Feb 14, 1972, p. 33.
[46] "Labor Relations Act Challenged by AP," New York *Times*, Dec 19, 1935, p. 2; "Texts of Majority and Minority Opinions in the Case of The Associated Press," New York *Times*, Apr 13, 1937, p. 19.

of covering the Lindbergh baby kidnapping trial, a job apparently so demanding and unrelenting that Watson suffered a minor breakdown. Recovering quickly, Watson was then assigned to the graveyard shift (midnight to 8 A.M.) as retaliation for his Guild affiliations.[47]

At the time of his firing on October 18, 1935, Watson was serving as Guild vice-president. On October 9, Watson had introduced before the Associated Press Unit a resolution asking the Newspaper Guild to begin collectively bargaining on its behalf, which was adopted by an "all but unanimous" referendum. On October 17, the ANG wrote to Cooper, referring to the resolution and asking for an opportunity to discuss "the subject of hours and conditions of employment, with the purpose in view of negotiating a collective agreement." For months, AP higher-ups had been hinting to Watson that he should desist from union activities. The AP had also dangled incentives, such as promotion to foreign service, if Watson would forswear the Guild. J.S. Elliott, assistant general manager at the AP, and Watson's boss, had registered with concern Watson's participation in the drafting of a model NRA press code. "Mr. Elliott indicated that he felt that unionization was very foolish," Watson would later tell a hearing. Elliott promised him "a very brilliant future with the AP" if he would refrain from Guild activities. J.M. Kendrick, executive day news editor at the AP's New York offices, warned Watson that he found Watson's guild activities "embarrassing."[48]

After his firing, Watson found work with the FTP, signing on as manager-producer of The Living Newspaper at the Biltmore Theatre at a salary of $200 per month on November 21, 1935. The FTP would be Watson's professional home as he waited for the case to wind its way through the NLRB and the courts. The conceit underlying The Living Newspaper

[47]"AP Loses Ruling in Labor Dispute," *New York Time*, Apr 25, 1936, p. 6.
[48]"AP Loses Ruling in Labor Dispute," p. 6.

was that live theatre could be provided with an equivalent to the popular "March of Time" serials that played on radio and screen. Its scripts were to be written by out-of-work playwrights and members of the Guild, which was a cooperating sponsor, with subject matter adapted from current events. The Biltmore quickly became a site of considerable controversy. The first Living Newspaper show was censured by the WPA authorities on the ostensible grounds that the sketch "Ethiopia" ran afoul of rules proscribing the depiction of heads of other nations (in this case, Haile Selassie and Benito Mussolini).[49]

On March 15, 1936, the Living Newspaper again encountered political troubles that thrust Watson into the spotlight with the opening of its show on the plight of the American farmer, "Triple A, Plowed Under."[50] Thirty police officers patrolled the theatre's doors, while inside the theatre, two "anti-communist" protestors attempted to disrupt the performance and were promptly ejected. The *Times* reported that the clash "had simmered all day," in part because of tensions within the cast regarding the inclusion of the character of Earl Browder, leader of the CPUSA, in the show's text. That afternoon, at Union Auditorium on 48th Street, right-wing members of the Federal Theatre Veterans League met to express concern about the inclusion of "Browder's" speech criticizing the Supreme Court's attack on the AAA. At the meeting, Willis Browne, the Living Newspaper's stage manager, called Watson a "Communist" and charged that Watson had distributed all of the show's tickets to his "Communist friends."

In the meantime, Watson's case against the AP slowly worked its way through the courts. The National Labor Relations Board filed a complaint charging that the AP had targeted Watson because of his union activities. The AP responded with a denial of the charge, and

[49] "Rice Quits in Row Over WPA Drama," New York *Times*, Jan 24, 1936, p. 15.
[50] "30 Police on Guard as WPA Show Opens," New York *Times*, March 15, 1936, p. 27.

with a challenge to the very legitimacy of the NLRB and the Wagner Act that had led to its creation. AP lawyers complained that the Act attempted to "regulate matters not within the powers conferred upon Congress by the Constitution," deprived the AP of property without due process of law, and abridged the freedom of the AP in "gathering, transmitting, and publishing news."[51] The fight moved to federal court in early January of 1936.[52] The AP filed suit for a declaratory judgment holding the NLRA unconstitutional and for an order restraining Elinore M. Herrick, regional director of the NLRB, from "interfering with its business."

On January 18, 1936, Federal Judge William Bondy reserved decision on the AP's application for a declaratory judgment holding the NLRA unconstitutional and preventing Herrick from holding hearings on Watson's termination.[53] Bondy's courtroom witnessed a two hour argument regarding the constitutionality of the NLRA. Some drama was injected into the proceedings when Broun insisted on addressing the court in defiance of Bondy's orders. Guild lawyer Ernst had earlier asked for five minutes of the court's time for Broun to speak on behalf of the "thousands of newspaper workers of the country who would be subjected to reprisals of their employers" if the AP's injunction was granted. Bondy responded by stating that nothing would be thereby accomplished save for giving Broun the opportunity "to make news for the papers" the next day. Broun then rose to ask if the judge would not grant him a mere two minutes to speak. The *Times* reported that Bondy shook his head in the negative and announcing that he knew the history of labor unions and "their efforts to get a better share for labor," and that we was "in sympathy with the labor cause,"

[51] "Labor Relations Act Challenged by AP," New York *Times*, Dec 19, 1935, p. 2.
[52] "AP Asks Injunction in Guild Dispute," New York *Times*, Jan 4, 1936, p. 13.
[53] "Court Hears Case of AP and Guild" New York *Times*, Jan 18, 1936, p. 16.

but concluded that the issue before him was a "narrow legal question." Broun persisted, producing a sheet of paper and asking if he could at least read a few passages, before proceeding to announce: "John W. Davis (general counsel for the AP) is asking you for permission for the AP to run a yellow-dog shop." At this, Davis jumped up and angrily demanded that Broun's remark be stricken from the record. Broun continued with his speech, interrupted by Bondy, who complained: "But you're arguing economics now." Broun asked: "Doesn't economics belong in a court of law?" To this, Bondy replied in the negative, adding that "it would be better for our government if it would desist from entering into economic problems in which there is so much diversity of opinion."[54]

By the spring of 1936, signs began to point towards the likelihood of Watson's eventual legal victory against the AP. On April 25, 1936, Charles E. Clark, serving as trial examiner for the NLRB, declined to dismiss the complaint filed by the Guild against the AP over Watson's dismissal. Clark heard testimony presented by Ernst and by David A. Moscovitz, the NLRB's regional director. The AP, for its part, denied that it engaged in interstate commerce and protested that it was not a profit-making institution and thus ineligible for coverage under the NLRA. Ernst and Moscovitz countered that because the "flow of news from State to State would be seriously interrupted if employees of the AP went on strike" the AP was, *ipso facto*, engaged in interstate commerce.[55]

Clark recommended that Watson be reinstated to his old position at the AP at his former salary of $295 per month, and compensated for lost wages. The news service, in turn, should be required to negotiate with the Guild as the representative of its editorial employees. Clark found that Watson had been fired because he had "joined and assisted a labor organization"

[54]"Court Hears Case of A.P. and Guild," New York *Times*, Jan 18, 1936, p. 16.
[55] "Decision Reserved in AP-Guild Case," New York *Times*, June 17, 1936, p. 12.

and "engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection." He further held that the AP had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the NLRA. In his ruling, Clark expressed concern that the AP's strongarm tactics had led to the reduction in Guild membership and inspired widespread fear among editorial employees of reprisals for union activities. [56]

Anticipating the majority ruling in the Supreme Court's *Associated Press v. Labor Board* decision, Clark firmly rejected the AP's denial that it was involved in interstate commerce, finding that its business was "facilitating and making possible the flow of news from place to place throughout this country and other countries." Because a cessation of the AP's services would lead to a breakdown in the national and foreign newspaper business, it was impossible to deny the interstate character of its operations. Clark also poured cold water on the AP's plea for exclusion from labor law because of the unique character of the news industry and the need to protect "freedom of the press." The Wagner Act was clearly applicable in this and the freedom of the press would be enhanced by the provision of freedom of organization to its highest skilled employees.[57]

Upon hearing Clark's decision, Watson commented: "Dean Clark's brilliant opinion in his intermediate report to the NLRB may well become an imperishable bill of rights for editorial workers. I can only hope that the courts—if they are resorted to—will find it so." Clyde Beals, editor of the *Guild Reporter*, cautioned that "newspaper men have learned not to throw their hats in the air over moral victories obtained at the hands of governmental bodies." Broun offered: "I am delighted to think that the Watson case turned out as it did,"

[56] "AP Loses Ruling in Labor Dispute," *New York Time*, Apr 25, 1936, p. 6.
[57] "AP Loses Ruling," p. 6.

and expressed hope that the AP would take the decision in a "sportsmanlike manner" and reinstate his fired colleague.[58]

On May 23, 1936, the NLRB followed Clark's recommendations and issued a ruling demanding Watson's reinstatement, and called upon the AP to reimburse Watson for loss of income caused by his discharge. The NLRB also directed the AP to "cease and desist from discouraging membership in the American Newspaper Guild or in any other labor organization of its employees, by discharging, threatening to discharge, or refusing to reinstate any of its employees for joining the Guild or any other labor organization of its employes," and from discriminating "in any other manner" with the exercise of its employees right of self-organization and collective bargaining. The AP was also ordered to post notices in its New York offices stating the cease and desist order, to remain posted for at least thirty consecutive days. Ernst notified the AP that Watson was "ready, able, and willing" to return to his employment as reporter and rewrite man. The reinstatement of Watson added weight to the expectation that the AP would appeal and seek a decision from the Supreme Court on the constitutionality of the NLRB as it applied to newspapers. [59]

On June 11, the *Times* reported that the WPA Arts Program was likely to be cut.[60] Aubrey Williams, Assistant WPA Administrator, declared that nine billion dollars would be required to annually carry out a work relief program "to take care of the unemployed on a decent scale." Williams warned representatives of WPA arts program workers, who were in Washington to demand a larger allocation for music, drama, arts, and writers' projects, that the programs might be curtailed rather than increased, pointing to the competing interests of

[58] "AP Loses Ruling," p. 6.
[59] "Board Orders AP to Comply on Guild," New York *Times*, May 23, 1936, p. 13.
[60] "WPA Arts Program Is Likely To Be Cut," New York *Times*, June 12, 1936, p. 25.

providing jobs for the unemployed and providing support for artistic elites: "We will probably contract the arts program to get the best artists, painters, musicians, &c… I agree with you in the number of unemployed in the field of the arts, but it is a question of money."[61]

Watson was at the time in Washington on behalf of the Guild. He worked as part of a coalition of representatives of twenty groups and unions, claiming a membership of 45,000, that had drawn up a five-point program for WPA approval: 1) larger allocation of funds for continuation and expansion of the four Federal Arts projects; 2) control of the projects by joint committees of organizations representing the professionals of the particular arts; 3) continuation of direct Federal jurisdiction over all projects; 4) no dismissals except for cause and only after hearings, as well as vacation and sick days; 5) freedom of expression in all creative work.[62]

A few weeks later, on July 5, the Guild was certified by the NLRB as "the exclusive representative" for collective bargaining of all the New York City editorial employees of the AP, setting the stage for an appeal.[63] On September 15, 1936, the AP took its challenge to the constitutionality of the Wagner Act to the Supreme Court.[64] The AP's attorneys contended that freedom of speech and freedom of the press had both been "seriously jeopardized" by the Wagner Act, which was further attacked as "arbitrary, unreasonable, and capricious" and

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[61] "WPA Arts Program Is Likely To Be Cut," p. 25.
[62] The organizations represented included: American Writers Union, Authors League of America, Dramatists Guild, American Federation of Musicians, Local 802, American Newspaper Guild, Artists Union Eastern District, Artists Union of New York, New York Writers Union, Newspaper Guild of New York, Cartoonists Guild of America, Federal Theatre Projects Supervisory Council, Federal Writers Supervisory Council, City Projects Council, Association of Music Project Employes, Dancers Association, Federal Arts Project Local 1, Federal Writers Project Local 1700; Federal Theatre Projects Locals, Philadelphia Writers Union, and the Stagehands Union.
[63] "NLRB Makes Guild Agent of AP Men," New York *Times*, July 6, 1936, p. 22.
[64] "Associated Press Tests Labor Act," New York *Times*, Sep 15, 1936, p. 13.

as an "attempt utterly to destroy the freedom of individual employers and employees to bargain with each other equally and individually in regard to their own private relations and private occupations." AP lawyers asserted that such a "wholesale restraint on freedom of contract" was without legal precedent and not permissible under the due process clause of the Fifth Amendment, claiming "the right to discharge any employee, whenever it feels that his viewpoint has become so colored that he is unable to write the unbiased type of news story it attempts to provide its members."[65]

On September 29, the government declared its support for a Supreme Court review of the Watson case.[66] Solicitor General Stanley Reed asserted that, contra the AP's claims, Watson had been discharged because of his Guild activities, and opined that the AP was not entitled to "invoke the constitutional guarantee of freedom of the press as a cloak for destroying the freedom of its employees thus to associate among themselves." Reed also denied that the Labor Relations Act abridged the freedom of the press, explaining that the Act imposed "no previous or subsequent restraint or censorship whatever." Reed continued by noting that the AP had not justified its firing of Watson on the basis of his bias in editing the news, but because of his "activity as a member of an organization of petitioner's employees devoted to ameliorating their conditions of work and as a destructive blow at their right to associate for purposes of collective bargaining and other mutual aid and protection."[67]

The Watson case was then folded into a cluster of New Deal test cases, involving the Bradley Lumber Company, the Jones & Laughlin steel interest, the Fruehauf Trailer Company, and the Friedman-Harry Marks clothing concern. All concerned the collective

[65] "Associated Press Tests Labor Act," p. 13.
[66] "Government Seeks Wagner Act Ruling," New York *Times*, Sep 30, 1936, p. 14.
[67] "Wagner Act Is Among Most Important Laws Facing Test in Coming Session," New York *Times*, Oct 4, 1936, p. 45.

bargaining rights of employees. Ahead of the Supreme Court's decision, government counsel filed a brief with the Court on behalf of the NLRB stating: "A newspaper publisher does not have a special immunity from the application of general legislation nor special privilege to destroy the recognized right and liberty of others."[68] It stressed that the Wagner Act required only that the petitioner "refrain from interfering with its employees in their self-organization for collective bargaining, and consequently that the petitioner refrain from discharging an employee for the reason that he belongs to a labor organization." It argued strongly against the AP's contention that the Wagner Act restricted the freedom of the press by preventing publishers to freely fire employees, characterizing the AP's First Amendment argument as boiling down to the premise that editorial employees who belonged to labor organizations "must be conclusively presumed to be biased in their work."[69]

Seizing the momentum, Ernst warned of an impending "industrial conflagration" and predicted a "second Civil War" if the Wagner Act was not upheld, "leaving in its wake lives lost and property devastated."[70] Ernst pushed back against the AP's claim that the unionization of editorial employees would introduce bias into the news industry. The question, Ernst maintained, was not "whether news shall be unprejudiced, but rather whose prejudices shall color the news." He continued by noting that the "rise of collective action on the part of labor, made necessary by the modern industrial system" had made it necessary for workers to be "encouraged to associate for the advancement of their mutual interests and to bargain collectively through freely chosen representatives and, on the other hand, that

[68] "Government Brief Holds AP Wrong," New York *Times*, Jan 31, 1937, p. 2.
[69] "High Court Rushes Wagner Act Tests," New York *Times*, Feb 11, 1937, p. 2.
[70] "AP Assailed by Guild in the Supreme Court," New York *Times*, Feb 6, 1937, p. 2.

employers be induced to refrain from interfering with the organization of labor and to accept and adopt the procedure of collective bargaining."[71]

On February 10, 1937, the Supreme Court rushed to hear arguments in the AP case as part of a speed-run towards a definitive ruling on the Wagner Act, famously motivated by a variety of factors, including Roosevelt's threatened court-packing scheme. The AP's lawyers again stressed the incompatibility of "freedom of the press" and union protections for newspaper editorial employees. As in the other test cases, the government attorneys pointed to the commerce clause as necessitating regulation that included the protection of labor rights. Charles Fahy, general counsel of the NLRB, stressed again that Watson had been discharged because of his Guild activities, and rejected the claim that the "right of self-organizing and collective bargaining" had anything to do with "freedom of the press." Fahy called that freedom a "great liberty" for which Watson and the Guild were also fighting. "But the government heartily challenges the right of the petitioner to raise the issue as a shield behind which to stand," he continued, "while it stifles the freedom of the individual employee to associate with his fellow-employees for mutual aid and protection." Mere membership in a labor union did not "disqualify a person from expressing the news in any manner" desired by the AP. The AP's lawyer John Davis replied: "My brother Fahy says Congress lives by the power to regulate interstate commerce, but when Congressional power to regulate commerce conflicts with the First Amendment, the Constitution abolishes that power."[72]

On April 12, 1937, Justice Roberts issued the Supreme Court's majority opinion on the constitutionality of the Wagner Act as applied to the AP, finding that the news syndicate had

[71] "AP Assailed by Guild," p. 2.
[72] "High Court Rushes Wagner Act Tests," p. 2.

discharged Watson because of his activities in connection with the Guild. Roberts dismissed the AP's claim that it did not exchange in interstate commerce, describing as obvious that face that "strikes or labor disturbances among the class of employees would have as direct an effect upon the activities of the petitioner as similar disturbances among those who operate the teletype machines or as a strike among the employees of telegraph lines over which petitioner's messages travel." Roberts further found that the Wagner Act did not abridge the freedom of speech of the press, ruling that the AP was "in substance the press itself," its membership consisting "solely of persons who own and operate newspapers." He called attention to the absurdity of the AP's contention that "it must have absolute and unrestricted freedom to employ and to discharge those who, like Watson, edit the news" and that its freedom to "furnish unbiased and impartial news reports" rested upon its freedom to "determine for itself the partiality or bias of editorial employees." This would render any labor legislation an "invalid invasion of the freedom of the press." Roberts concluded that the business of the AP was not immune from regulation simply because it was an agency of the press: "The publisher of a newspaper has no special immunity from the application of general laws."[73]

As the Supreme Court ruling was announced, the Ritz Theatre hosted an improvised celebration for Watson. Following the performance of the Living Newspaper production of "Power," well-wishers thronged Watson.[74] Broun served as master of ceremonies and introduced Watson as "one of the militant founders of the Guild, whose militancy caused his dismissal." Watson announced that he was returning to the AP, with Broun slyly hinting that

[73] "Texts of Majority and Minority Opinions in the Case of The Associated Press," New York *Times*, Apr 13, 1937, p. 19.
[74] "Watson Greeted At Play," New York *Times*, Apr 13, 1937, p. 20.

Watson might return to the theatre. [75] (Watson would quit the AP a few weeks in order to return to the FTP).[76]

In an article entitled "Labor Here Looks to 'Era of Peace,'" Watson and Broun offered comments on the Supreme Court's Wagner rulings, alongside statements from David Dubinsky, Louis Waldman, Sidney Hillman, and Frank P. Walsh. Under the subheading "Guild Victory Tempered," Broun sounds a cautionary note: "Even though a victory has been won in the Watson case, the Guild can hardly forget that eighteen months elapsed before a man who was unjustly dismissed was restored to his job. In its most immediate sense, the 5-4 decision of the court will stimulate the Guild in perfecting its organization for all wire services and bringing about contracts through collective bargaining." Watson offered: "I was always sure that the fundamental human right—the right of workers to join themselves together for economic betterment—would be upheld. The decision not only vindicates me personally of the aspersions case upon my abilities when I was discharged, but it nullifies the often used argument of the employers that workers cannot be faithful and loyal to their work while banding together for mutual aid and protection."[77]

The ANG and the Battle Over Industrial Unionism

As labor's civil war heated up, the Guild finally held a decisive vote on CIO affiliation in September of 1937, with members voting 3,013 for and 1,691 against.[78] As a reflection of both the spirit of the times and a measure of the radicalism of the Guild, the CIO vote was

[75] "Watson Resumes Job in AP Office Here," New York *Times*, Apr 14, 1937, p. 14.
[76] "Watson Quits AP, Returns To Theatre," New York *Times*, May 18, 1937, p. 6.
[77] "Labor Here Looks To 'Era of Peace,'" New York *Times*, Apr 13, 1937, p. 20.
[78] "Guild Vote Backs CIO Membership," New York *Times*, Sep 11, 1937, p. 4.

paired with a more or less even vote regarding censure of Spanish fascism. Broun hailed the Guild's membership for showing its "overwhelming belief that the CIO is the real labor movement of the country." With the vote for the CIO, the ANG had also given its stamp of approval to "real industrial unionism," "progressive trades union democracy," and the "right of the union to take a stand on public issues." On the Spain vote, Broun cautioned that the 50-50 vote did not indicate a "tolerance of fascism." Rather, it reflected a long-running sentiment, on the part of newspaper workers, that they should not "take sides" in any "burning international controversy."[79]

As the vote tallies were counted, Broun wrote an incendiary public letter to Green. Broun charged the AFL leader, whom he dubbed the "Benedict Arnold of American Labor," with ignoring the democratic wishes of millions of workers, colluding with employers, company unions, and mobsters to crush insurgent industrial unions. Green responded with a shrug, stating that the ANG had been "with the CIO in heart and spirit all the time." The two men would trade increasingly sharp barbs, with Broun declaring, in response to restive Guild members unhappy with the CIO vote: "I did not like William Green, I do not like him now, and I will never like William Green, and I'll be hanged if I'll go to William Green on my hands and beg to be taken back into AF of L." Green charged that Broun had sold newspaper workers "down the river" under the inspiration of "some very astute Moscow-trained revolutionaries."[80] Green decried the opening up of Guild membership to "everyone in the newspaper plants, from newsboys and charwomen to classified ad takers, forgetting that before the Guild existed there were unions of working newspaper men employed on labor publications and in the foreign language press, and there were affiliate unions in which

[79] "Guild Vote Backs CIO Membership," New York *Times*, Sep 11, 1937, p. 4
[80] "Green Calls Broun 'Communist Stooge,'" New York *Times*, Jul 19, 1937, p. 4.

newsboys, charwomen, office workers et al were perfectly free to join." Attempting to uphold the traditional understanding of editorial and production workers as separated by an impermeable divide, Green lambasted Broun for believing that the "great rank and file of the editorial rooms of the American press could hold common aims with telephone operators, ad takers, carrier boys, and what have you." Green lambasted Broun for tying the press as a tail to John Lewis's kite, and concluded with some old-fashioned redbaiting: "it might be a good idea for Mr. Broun, who is a stooge for the avowed Communists in the CIO, to resign his presidency of the Guild."[81]

At a CIO conference in Atlantic City in October of 1937, Broun presented a report on the Guild, estimating its membership at approximately 15,000. "The action of their employees in joining the progressive labor movement immediately aroused the organized publishers of America into an anti-Guild fury unequaled before in the history of the ANG," Broun told the conference, warning that the AFL was now serving as the agent of the publishers in their campaign to split and disorganize the ANG. [82] Broun described the publishers' attack on the Guild as having reached its height in Chicago, where, "by a united campaign of dismissals and pressure by all local papers, virtually the entire local leadership [of the Guild] was wiped out, threatening extinction to the young organization in the second largest city of the country." Broun also acknowledged that Guild strikes against the Seattle *Star* and the Brooklyn *Daily Eagle* had been steadily draining the Guild's resources. But he emphasized the Guild's victories in reducing working hours from an average of 54 to 45 hours a week,

[81] "Green Calls Broun 'Communist Stooge,'" p. 4.
[82] "CIO Peace Plan Offered to AFL; Green Rejects It," New York *Times*, Oct 13, 1937, p. 1.

and in lopping off "upward of 10 million unpaid-for-hours of work a year for American newspaper men."[83]

In June of 1938, Jersey City Mayor Frank Hague would be forced to testify in Federal Court regarding alleged abuses of anti-labor injunctions and ordinances that had authorized police repression of ANG protests in 1936. Spaulding Frazer, counsel for the CIO, examined Hague.[84] Frazer asked Hague about a Jersey City ordinance forbidding the circulation of circulars, which the Supreme Court had recently ruled unconstitutional in the *Griffin* case.[85] Frazer pressed Hague on his frequent warnings about the Communist invasion of Jersey City, to which Hague offered: "I have had a great number of years of experience with labor, and in over twenty-five years, I have never had any disputes with the American Federation of Labor… We have never had any invasion from the American Federation of Labor." Hague then invoked West Coast ILU leader Harry Bridges, "the noted Communist of the country," whom he claimed had "ordered 500 of his strong-arm men to invade Jersey City, to destroy the shipping industry of Jersey City." Continuing in this paranoid mood, Hague elaborated that Bridges had enlisted two "strong-armed men," "noted killers now confined in the State Prison of Trenton for fourteen years" to launch a "CIO invasion."[86]

Hague complained of a "hostile group of reporters" who had insulted him at a public hearing and "started to talk about the Guild." Asked if the reporters had said anything true about him, Hague answered: "Well, occasionally, not frequently." He paused to clarify: "I am talking of the Guild now. That doesn't go for the entire newspaper profession." Hague

[83] "CIO Peace Plan Offered to AFL," p. 1.
[84] "Text of Mayor Hague's Testimony at Injunction Hearing in Federal Court," New York *Times*, June 11, 1938, p. 6.
[85] *Lovell v. City of Griffin*, 303 U.S. 444 (1938)
[86] "Text of Mayor Hague's Testimony," p. 6.

singled out Charles Zerner, Jersey City correspondent for the New York *Times* as a "member of the radical group and it has been proven that he is a member of the radical group, both he and his wife." Asked about an unflattering newspaper report, Hague declared that the report was merely the Guild was performing a "cheap newspaper trick."[87]

Asked to define "Communism," Hague answered: "Well, my interpretation, Counselor, of a Communist is a man who is subject to Russia, a radical who is opposed to the American principles and American institutions, whose sole purpose is to overthrow our government, whose sole purpose is against all types of religion, all types of government, only the Soviet Government of Russia." Asked if mere membership in the CIO was enough to prove Communist affiliations, Hague declined to say yes, but noted that the heads of the CIO, outside of John Lewis, were "noted Communists" and that Guild lawyer Ernst was obviously a Communist given his role as treasurer of the Garland Fund, and his alleged contribution of $25,000 to the IWW.[88]

Hague was not the only official convinced that Broun was a card-carrying Red. In August of 1938, Broun was asked to testify before Martin Dies's Special House Committee to Investigate Un-American Activities in the United States. He was there on the same day that J.B. Matthews, who was to have a long career as a professional anti-Communist, testified to the growing infiltration of the ranks of cultural workers by CP loyalists.[89] Broun testified before the committee, denying that he was a Communist, but expressing support for "the CIO and the Spanish Loyalists, against Fascism and for peace and democracy."[90]

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[87] "Text of Mayor Hague's Testimony," p. 6.
[88] "Text of Mayor Hague's Testimony," p. 6.
[89] "Red Growth Swift, Matthews Asserts," New York *Times*, Aug 23, 1938, p. 2.
[90] "Red Growth Swift," p. 2.

Green's war on the CIO continued through early 1938. He revoked the charters of the United Mine Workers of America, the International Union of Mine, Mill and Smelter Workers and the Federation of Flat Glass Workers in February.[91] Broun continued to battle with the AFL, attacking Philip Pearl, AFL director of Public Relations as a good time Charlie, which prompted Pearl to retort that Broun was "not a newspaper man" but instead "chief propagandist for the CIO and ballyhoo artist for John L. Lewis." Broun and Pearl almost came to blows when the former attempted to attend an AFL meeting.

Broun died on December 19, 1939. His obituary read: "No journalistic personality in our time was more distinct. Heywood Broun disagreed with many people, but no one could ever have hated him… Himself one of the glittering successes of journalism, he organized the National Newspaper Guild in what publishers as well as newspaper men knew to be a sincere desire on his part to be of use to his more obscure fellow-workers."[92] Analyzing his short but eventful career as a union leader leads us to several conclusions. First, it is clear that the historical conjuncture during which he led the ANG played as large a role in propelling the union as any other factor. Labor history is as susceptible as any other field to Whig/"Great Man" historiographical tendencies, but we are almost always better served by attending to the ballast and reinforcement that moments of mass solidarity provide to organizing efforts. Second, Broun's example demonstrates that the complexity of white-collar workers' class status need not sabotage unionizing efforts among skilled employees, particularly in the cultural sector. Broun acknowledged his advantages, respected the struggles of his poorer colleagues, and took risks commensurate with his relative privilege, happily getting arrested

[91] Louis Stark, "Federation Expels Three CIO Unions, Including Miners," New York *Times*, Feb 8, 1938, p. 1.
[92] Heywood Broun," New York *Times*, Dec 19, 1939

and bailing himself out in order to generate publicity for strikes and using opportunities afforded to him as a leading public intellectual to turn media appearances to the ANG's advantage. Finally, Broun encouraged the ANG to link their struggles to those of others within the incipient Popular Front coalition, whether political prisoners in the US, Spanish antifascists, or fellow industrial unionists. As against some who maintain a commitment to "bread and butter" unionism, the example of the ANG suggests that labor struggles are almost always strengthened by the establishment of strong alliances rooted in solidaristic convictions and a mutualist ethos.

Chapter Six: *RCA v. Whiteman*: Musicians, IP Rights, and the National Association of Performing Artists

As screenwriters and editorial employees fought for culture industry labor rights that challenged managerial prerogatives, working musicians pursued similar struggles. In this chapter, we look at the attempt by famous bandleaders to win IP rights in their interpretations of musical compositions as reflected in phonograph recordings, which culminated in the precedent-setting 2nd Circuit Court case *RCA v. Whiteman*.

Prelude: The AFM and the Spectre of Featherbedding

Working musicians (and no small number of amateur and part-time ones) had been organized in the American Federation of Musicians (AFM) since the turn of the century. By the 1920s, AFM had gained a reputation as a sclerotic organization that consistently failed to anticipate new technological challenges to musicians' livelihoods. Vern Countryman notes, for example, that AFM head Joseph Weber issued a public statement in 1926 celebrating the phonograph record as having "advanced the development of the love of music among the people" resulting in an "increase of employment opportunities for musicians."[1] From the perspective of working professionals, this was entirely too Panglossian a point of view. Mechanical reproduction of sound had already begun to threaten livelihoods, and would continue to do so with great force as movie theatres were wired for sound and network radio increased its power and reach.

[1] Vern Countryman, "The Organized Musicians: II." *The University of Chicago Law Review*, Winter, 1949, Vol. 16, No. 2 (Winter, 1949), 244.

This attitude changed in the 1930s with the rise of James Caesar Petrillo as head of the Chicago Local of the AFM and with Petrillo's elevation to the role of national AFM head in 1939. The AFM under Petrillo was not afraid to impose strict rules upon radio stations and recording studios mandating the employment of union members to operate specialized equipment. The union frequently called for the employment of musicians even in situations where technological improvements had rendered them redundant, leading to the association of Petrillo in the public mind with the curse of "featherbedding." In 1940, Petrillo responded to the growing trend of radio stations playing phonograph records on air by imposing a ban on cooperative radio programs. He also initiated a boycott of the Boston Symphony Orchestra, which resulted in the speedy unionization of its members. At the AFM's 1941 national convention Petrillo notified the recording and transcription companies that their AFM licenses, which were set to expire on August 1, would not be renewed. On August 1, the AFM's infamous recording ban commenced.[2] As Vern Countryman observes, the nation soon became obsessed with Petrillo: "Editorial writers and columnists throughout the land," Countryman recalls, "labored their readers with impassioned dissertations on 'dictatorship,' 'labor czars,' and 'musical Hitlers.'"[3] The AFM was often portrayed as anti-technology, reactionary, or corrupt, charges that were often at least a little bit accurate. It was, however, also quite radical and militant. Because musicians were the largest group of cultural workers employed in the United States, other cultural workers watched their campaigns closely. The

[2] See Scott De Veaux, "Bebop and the Recording Industry: The 1942 AFM Recording Ban Reconsidered," *Journal of the American Musicological Society*, 41, no. 1 (Spring 1988), 126–165; Anders S. Lunde, "The American Federation of Musicians and the Recording Ban," *The Public Opinion Quarterly* 12, No. 1 (Spring 1948), 45–56; James P. Kraft, *Stage to Studio: Musicians and the Sound Revolution, 1890–1950* (Baltimore and London: Johns Hopkins University Press, 1996), 137–161; Tim Anderson, "Buried under the Fecundity of His Own Creations": Reconsidering the Recording Bans of the American Federation of Musicians, 1942-1944 and 1948," *American Music*, Vol. 22, No. 2 (Summer, 2004), pp. 231-269; Robert D. Leiter, *The Musicians and Petrillo*.

[3]

short-term successes achieved by the AFM emboldened other cultural workers' unions and set the tone for labor-management relations in the culture industry throughout the era.

The Office of War Information charged that the AFM recording ban would stymie the war effort by removing music from "canteens and soda parlors where members of the armed forces go for recreation, and for use in factories where war workers use juke boxes for organized relaxation." Thurman Arnold, then Assistant Attorney General, sought to challenge the ban on anti-trust grounds, alleging that the purpose of the recording ban was the desire to pressure radio stations to cease using records and transcriptions and to persuade hotels, restaurants, taverns, and cabarets to abandon the use of juke boxes.[4] The ban finally ended in 1944, through the combined effects of companies caving to certain AFM demands, and a somewhat Pyrrhic recording industry victory in a 1944 case against the AFM before the new War Labor Board. Wartime conditions had rendered it difficult for lawyers on either side to decisively prove that recording technologies had affected the employment opportunities of musicians, one way or another. As Countryman explains, the AFM's arguments regarding a certain number of "missing" jobs that would have existed in the absence of phonograph players were necessarily speculative, and could never be properly "proven." A royalty fund was set up by the AFM to offset lost jobs for its members, into which the recording companies paid a certain percentage of profits from phonograph sales.[5]

Victory in 1944 was not predictive of further wins. Petrillo attempted to replicate his earlier success in Chicago in guaranteeing that only AFM members would be hired to operate music-related machinery in radio stations. This was the so-called "platter-turners" provision, but the AFM encountered difficulties with other unions that covered radio employees, in

[4] Countryman, "The Organized Musicians: II," 268.
[5] Countryman, "The Organized Musicians: II," 272.

particular the National Association of Broadcast Employees and Technicians (NABET). Gearing up to take on the television industry, the AFM was dealt a harsh blow by the passage of the anti-featherbedding Lea Act and then the ratification of Taft-Hartley, which also forbade union policies aimed at output restriction.[6]

Whiteman and the NAPA

Amid the heated labor struggles of rank and file musicians, a group of white jazz bandleaders, including Paul Whiteman, attempted to win legal recognition of their work as arrangers and interpreters or songs written by others as akin to the labor of authorship, culminating in the precedent-setting case *RCA v. Whiteman* (1939-40).[7] In *RCA v. Whiteman*, Whiteman and his colleagues worked with the National Association of Performing Artists (NAPA), a new group aiming to "curb promiscuous broadcasting" of commercial recordings via test cases that would force the courts to clarify the law.[8]

RCA v. Whiteman was the culmination of a series of lawsuits beginning with the 1935 case *Waring v. WDAS*. Whiteman and his peers hoped to win legal recognition of expansive "moral" property rights in their recordings. Recognition of "moral rights" in recordings would secure their economic position by opening up a new stream of profits in the form of rents collected per-broadcast from radio stations and other users of phonographs. This campaign culminated in Whiteman's suit against radio station WNEW, which led to a suit

[6] See, Jerome S. Wohlmuth and Rhoda P. Krupka, "The Taft-Hartley Act and Collective Bargaining," 9 Md. L. Rev. 1 (1948) Available at: http://digitalcommons.law.umaryland.edu/mlr/vol9/iss1/2, and "Lea Act, Taft-Hartley and State Remedies for Featherbedding." *Columbia Law Review* 55, no. 5 (1955): 754–62.
[7] *RCA Mfg. Co. v. Whiteman et al,* No. 357, United States Court of Appeal for the Second Circuit, July 25, 1940.
[8] Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994), 130.

launched by RCA (Whiteman's record label) against Whiteman himself. Judge Learned Hand, of the Second Circuit Court of Appeals, heard the case in 1939. The Second Circuit covered New York City, where the majority of music, theater, and publishing industry copyright conflicts of the first half of the century emerged. Hand had therefore developed considerable expertise in intellectual property matters, and the Court therefore regularly deferred to his decisions.[9] In *RCA v. Whiteman*, Hand ruled for RCA, declaring that "moral rights" did not extend to bandleaders the ability to collect revenues from recordings. Because the Supreme Court declined to hear the case on appeal, Hand's decision was affirmed as the law of the land for the next several decades.

The road to *RCA v. Whiteman* began with the frustrations of Pennsylvania bandleader Fred Waring, who in 1936 filed a lawsuit against Philadelphia radio station WDAS, claiming that its policy of broadcasting his recordings was a violation of his property rights.[10] The case was the brainchild of Maurice Speiser, a Philadelphia attorney with connections in the artistic and literary worlds and a pioneering copyright advocate. After reading and translating French lawyer Robert Homburg's *Legal Rights of Performing Artists*, Speiser was drawn to the idea of launching test cases that would induce American courts to recognize "a legal interest for the performer in the recorded performance." Speiser formed the NAPA in 1935 with Waring and Whiteman (as well as dozens of other white popular musicians like Guy Lombardo, Rudy Vallee, and Connie Boswell) to limit the uses to which recordings could be

[9] See Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Knopf, 1994).
[10] "Musicians Rally to Aid Waring Suit: Testify that Value of his Recordings were Damaged by Record Broadcasting," New York *Times*, Dec. 13. 1935, 31.

put, articulating a new vision of recorded music as a distinct species of intellectual property.[11]

Speiser explained to *Los Angeles Times* writer Carol Nye that the NAPA's campaign was meant to combat the steadily increasing "evils" of radio competition with live music. The situation for bandleaders, Speiser asserted, had become "intolerable," forcing them to compete against themselves. The NAPA did not wish to eliminate commercial recordings, Speiser noted, but to regulate their use: "The purpose is to control the commercial use of records which were made for home consumption and not for commercial exploitation—thus creating an opportunity for further employment of musicians and relieving unemployment in that profession."[12]

In 1937, AFM president Weber was heard to lament that only 10 percent of the United States' 600 commercial stations employed live musicians, representing fewer than eight hundred full-time jobs.[13] In closed-door sessions at the 1937 AFM convention in Louisville, Weber and the AFM executive board developed a plan to threaten strikes against the radio networks and record companies in order to gain guarantees of additional jobs.[14] Independent stations were under enormous pressure as the entertainment industry experienced a wave of consolidations. Historian David Stowe writes that "consolidation was the order of the decade" as dozens of record labels were reduced to a handful, and a multiplicity of independent radio stations came under the domination of the two national networks, NBC and CBS. At the same time, most of the touring bands signed up with

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[11] Homburg's book was originally published in France in 1930 as *Le droit d'interpretation des acteurs et des artistes executants* (Paris: Recueil Sirey, 1930). Speiser's translation was published as *Legal Rights of Performing Artists* shortly before the NAPA campaign began (New York: Baker, Voorhis & company, 1934).
[12] Carol Nye, "Radio and Its Personalities: Artists Open Fight against Recordings," *Los Angeles Times*, Jul. 19, 1936, C10.
[13] Kraft, *Stage to Studio*, 107.
[14] Kraft, *Stage to Studio*, 107-110.

national booking offices: Music Corporation of America, General Amusement Corporation, and William Morris. Links between bands and corporate sponsors also became more common.[15]

Seeking to assert authorial rights in recordings within this rapidly changing landscape, Waring and the NAPA filed suit against Philadelphia radio station WDAS in 1936. They sought an injunction to prevent disc jockeys from broadcasting Waring's recordings, and also seeking damages to compensate for lost income caused by the 1934 broadcast of several recordings by Waring's orchestra, the Pennsylvanians, by WDAS disc jockeys.[16] The *Waring v. WDAS* trial was something of a zoo. The New York *Times* reported that theatrical producers, composers and publishers, song-writers, orchestra conductors, musicians, and restaurant managers flocked to the witness stand to give testimony. Waring called on corporate allies to testify on his behalf, including executives from Paramount Pictures, as well as representatives from songwriters and the musicians' unions. The *Times* emphasized that this testimony was mainly used to establish the great commercial value of Waring's orchestral renditions. Film producers, for example, testified that Waring's asking price for scoring a motion picture was a whopping $250,000. Waring's lawyers argued that this value was negatively affected by broadcasting from records, and that "the use of records by broadcasting stations interferes greatly with the obtaining of exclusive contracts by orchestra leaders."[17]

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[15] Stowe, *Swing Changes*, 99.
[16] "Musicians Rally to Aid Waring Suit: Testify that Value of his Recordings were Damaged by Record Broadcasting," New York *Times*, Dec. 13. 1935, 31. Russell Sanjek, *Pennies From Heaven: The American Popular Music Business in the Twentieth Century*, rev. ed., updated by David Sanjek, (Da Capo: New York, 1996 [1988]), 122.
[17] "Musicians Rally to Aid Waring Suit," p. 31.

Speiser explained to *Los Angeles Times* writer Carol Nye that the NAPA's campaign was meant to combat the steadily increasing "evils" of radio competition with live music. The situation for bandleaders had become intolerable, Speiser insisted, forcing them to compete against themselves. The NAPA did not wish to eliminate commercial recordings but rather to regulate their use: "The purpose is to control the commercial use of records which were made for home consumption and not for commercial exploitation—thus creating an opportunity for further employment of musicians and relieving unemployment in that profession."[18]

The NAPA seized upon the fact that beginning in January 1933, phonograph record manufacturers RCA-Victor, Columbia, and Brunswick had begun to print stickers bearing the label "Not Licensed for Radio Broadcast" and to affix these stickers on every phonograph disc they issued. It was unclear at the time whether these labels had any legal force. Conventional wisdom held that they did not: concerned broadcasters were assured by their trade group, the National Association of Broadcasters, that the warnings meant nothing, and that "property rights ended once a record was sold across the counter." The "Not Licensed for Radio Broadcast" stickers also served the long-term interests of the manufacturers. In the event that courts recognized that these labels carried sufficient legal force to bar radio broadcasters from playing records, these manufacturers would be in a position to argue that they had begun to print the labels in order to protect their own, rather than musicians', property rights in recordings. For Speiser, the significance of the stickers lay in their utility within a "moral rights" argument: he could therefore argue in court that radio stations who

[18] Carol Nye, "Radio and Its Personalities: Artists Open Fight against Recordings," Los Angeles *Times*, Jul. 19, 1936, C10.

broadcast these recordings were not violating an abstract right, but willfully ignoring a written statement.[19]

According to some accounts, the "Not Licensed for Radio Broadcast" stickers were first dreamed up as a concession aimed at persuading Waring to return to the recording studio.[20] Waring, who had been recording for the Victor label since 1924, acutely feared competition from new technologies, and he began in the early 1930s to negotiate for a new contract that would explicitly preclude radio broadcasts of his discs. Because he was convinced that unauthorized broadcasts had hurt his chances for winning a contract with a corporate sponsor for a regular radio program, Waring took the drastic measure of refusing to enter a recording studio until his property rights were affirmed by legal action.[21]

Waring was not alone. Generalized anxiety in the face of technological threats to musical labor was everywhere in the air in the 1930s. These threats were indeed new. Until the early-to-mid-1930s, the vast majority of music heard over the radio was performed live in a studio by professional musicians. The radio broadcast market was divided between major networks, which controlled 20 percent of the market, and independents, which accounted for the remaining 80 percent. While major networks made deals with the AFM and bandleaders to hire live musicians to supply all of its music needs, the approximately 600 independent radio stations sought alternatives to high-priced live music. Frequently they used local musicians, who played for free in exchange for exposure, or electrical transcription services, which cost between $40 and $150 a week, depending on the station's transmitting power. These services provided only eight fifteen-minute programs, however, which still left many

[19] Sanjek and Sanjek, *Pennies*, 121-22.
[20] Sanjek and Sanjek, *Pennies*, 122.
[21] Sanjek and Sanjek, *Pennies*, 122.

hours of airtime unfilled. Radio stations therefore began to buy records at local stores at list price, or solicit free copies in exchange for frequent mention, and to broadcast them to listeners who believed they were listening to live music.[22] This was the trend that had alarmed Petrillo and inspired him to preserve employment for live musicians by requiring radio stations to hire musicians even when they played discs over the air.[23]

While the network radio business grew, the phonograph industry was in the midst of a long crisis of profitability. Peaking in 1921 with revenues of $106 million, record sales fell steadily over the course of the 1920s. By 1925, sales were half what they had been four years earlier. In 1931, record companies only sold $16.9 million worth of records, a 60 percent decline from 1930. In June 16, 1931, RCA issued an official order eliminating multiple takes in their recording studios, cutting recording down to a single wax take per selection. As soon as contracts expired, record labels dropped their most expensive artists.[24] This decline in profitability also affected the New York song-writing behemoth known as "Tin Pan Alley." Prior to the crisis, music publishers had paid between thirty-five and seventy-five dollars to bandleaders for arrangements, working on the assumption that an attractive orchestration would boost sheet music sales and royalties. Because of sluggish sales, publishers received just enough royalties to pay for the arrangement of a hit song, an expense for which they increasingly refused to pay. Bandleaders were also denied royalty shares that had become customary when they recorded songs pitched to them by Tin Pan Alley firms.[25]

The NAPA was thus well positioned to take advantage of growing discontent among the top tier of musical entertainers to launch an aggressive legal campaign. The defense,

[22] Sanjek and Sanjek, *Pennies*, 121.
[23] Sanjek and Sanjek, *Pennies*, 128.
[24] Sanjek and Sanjek, *Pennies*, 117.
[25] Sanjek and Sanjek, *Pennies*, 122.

aided by the National Association of Broadcasters, focused on the fact that Waring was not a songwriter, but an orchestral arranger of compositions authored by others. WDAS lawyers argued that Waring's renditions could not "be recognized by the general public as being performed by distinctive groups or orchestras." They further argued that Waring made recordings for the Victor label under a tacit "work-for-hire" arrangement.[26]

The *Waring v. WDAS* decision is a fascinating read, with Justice Horace Stern attempting to balance new issues surrounding musical arrangement and interpretation in the age of recorded sound against the aesthetic standards of nineteenth century European art music. Stern noted that the law did not require "that the entire ultimate product should be the work of a single creator" in order to establish "property rights in intellectual or artistic productions" and that "such rights may be acquired by one who perfects the original work or substantially adds to it in some manner."[27] Stern ruled in Waring's favor, enjoining WDAS from broadcasting his recordings. This signaled to the NAPA that they could legitimately claim intellectual property rights in recordings, a notion that had the potential to drastically reshape the recording industry and radio business The *Waring* decision shook up the radio and recording industries. For many years, radio stations in Pennsylvania refrained from broadcasting any recorded music. In the rest of the nation, the practice continued to blossom. The NAPA therefore needed a test cast that would be appealed to the Supreme Court and become the law of the land. This was a dangerous process, however—although the *Waring* precedent bolstered bandleaders' expectations of legal recognition of authorship, each new

[26] *Waring v. WDAS Broadcasting Station, Inc., Appellant* No. 116 Supreme Court of Pennsylvania 327 Pa. 433 October 8, 1937.
[27] Leibell cites *Waring v. WDAS* in HN2, *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court. S.D. New York 28 F. Supp. 787, July 24, 1939. See also Justice Horace Stern decision, *Waring v. WDAS Broadcasting Station, Inc.*

lawsuit raised the prospect that a judge would reject wholesale the legitimacy of bandleaders-as-authors.

RCA and NBC lawyers and executives took the threat posed by the NAPA seriously, viewing it as part of an accelerating general crisis in the radio and recording industries. In January of 1938, RCA lawyers wrote NBC founder and RCA president David Sarnoff, the visionary radio inventor who created the field of commercial broadcasting in the early 1920s, to sketch out a strategy regarding NAPA litigation.[28] They described the NAPA, "an organization of the artists themselves whereby they, withholding their 'rights and property in and to their unique, original performances and interpretations' would expect to exploit commercial reproductions of records they made, much like ASCAP now exploits copyrighted music." RCA's policy regarding copyright was that the recording artist had no claim to copyright, because there was nothing "of his" to which a copyright notice could attach. RCA, however, also lacked official copyright in recordings, even if it did usually receive by written contract from its recording artists full rights to "commercial, home, and every other use of records it makes." Nevertheless, RCA had never recorded an artist "when the contract with him left in him any property rights in the records he made."

RCA worried that the NAPA would unleash a deluge of cases seeking to "establish rights in artists to control commercial exploitation of phonograph records they make" and to assert property rights in "unique and original performances and interpretations.'" But the NAPA's previous suits had been against "small and inconspicuous broadcasters and comparatively powerless owners of coin-operated phonograph machines." The result of such

[28] Colonel Manton David to David Sarnoff, January 28, 1937, re: ASRA and NAPA litigation. Box 55, Folder 52, NBC Collection, Wisconsin Historical Society, Madison, Wisconsin (hereafter NBC/WHS). Correspondence regarding the NAPA often refers also to the ASRA (the American Society of Recording Artists), a West Coast group with similar aims that merged with the NAPA in 1939.

cases against more or less helpless defendants was that by "default, consent or otherwise," there had been a number of judicial decisions holding that recording artists did have "reserved rights in their records." Through this litigation, the NAPA was building up an "apparent common law right" which previously had no existence. In most of these cases, no evidence was taken, no fight was made, the judgments were by consent and the record manufacturers were not parties. The accumulation of NAPA victories, in RCA's view, had the worrisome "tendency to establish in the minds of judges, lawyers, and others," the existence of "moral rights" in recordings.[29]

RCA believed very strongly that it had to fight to "establish its rights as against the asserted rights of recording artists." The ideal situation would be the initiation of a policy of making "clear, written contracts with artists" stating the extent and scope of RCA's right to use the records it issued. In addition to revising contracts, RCA lawyers proposed that the company intervene in NAPA court cases if they brought actions involving the Victor label (which it owned) to establish that the artists had "no property right in their interpretations," had conveyed all their rights in such recordings to RCA and had retained no right to "prevent or control their use" after sale.

In addition to the NAPA actions, RCA and NBC were closely monitoring the increasingly tense stand-off between the Chicago AFM Local 10 and the radio and the recording industry. NBC lawyers noted that Petrillo had ruled that it would not permit Local 10 members to make any records "except on conditions to be laid down by it." Although the much more important New York AFM Local 802 had given NBC assurances that they were not going to adopt the Chicago ruling, they also refused to interfere in Chicago. NBC

[29] Colonel Manton David to David Sarnoff, January 28, 1937.

lawyers connected the need to resolve the legal indeterminacy at the heart of the NAPA conflict with its general strategy regarding the musicians' union.[30]

The threatened recording ban by Local 10 came to fruition in January of 1939. Adopting a new posture, Gotham's musicians told record manufacturers that "because of the 'gross negligence' of the record companies in failing to stop the broadcasting of records," it was "heartily in sympathy with the action of the Chicago Local" and would use its best efforts at the National Convention of the AFM "to have a nation-wide ban placed against the making of recordings by union musicians." [31] NBC and RCA proceeded cautiously with its own plan to assert "moral rights" in recordings. In internal correspondence, RCA executives stressed the imperative of asserting such rights because otherwise the demands of recording artists and NAPA would become "a serious threat to the very existence of the phonograph record business."[32]

In response to the successes of the NAPA, executives began to float the idea of a test case of its own against a broadcaster "to enjoin the use of phonograph records over the air." They suggested that first RCA "should first formally notify all broadcasting stations of its contention that it has a property right in its records and that broadcasting of records violates this property right and also constitutes unfair competition."[33] This form letter, sent by Brunswick, Columbia, Decca, and RCA Victor to all broadcasting stations in the United States, attempted to clarify the position of the record labels with the respect to the use of their products for radio broadcast. Declaring confidence in their claim to a property right in all of

[30] Colonel Manton David to David Sarnoff, January 28, 1937
[31] Letter from David Mackay to Colonel Manton Davis, February 19, 1937, Box 55, Folder 52, NBC/WHS.
[32] David Mackay to Colonel Manton Davis, February 19, 1937.
[33] David Mackay to Colonel Manton Davis, February 19, 1937.

the discs that they manufactured, they claimed also the right to prohibit the use of these discs for radio broadcast purposes, without prior written consent. This, they claimed, was the reason for the inclusion of the statement "Not licensed for radio broadcast" on the discs. "We consider the use of phonograph records for radio broadcast purposes without our consent," they continued, "to be a violation of our aforesaid property right and also to constitute unfair competition." The letter ends with a "cease and desist" order, warning stations to immediately discontinue broadcasting recorded music.[34]

Despite this strong language, RCA and NBC ultimately balked at the prospect of a full-scale attack on radio broadcasting of records, fearing that such a move would cause a war between NBC and other broadcasters.[35] Lawyers prevailed in cautioning the record manufacturers against sending the memorandum to broadcasters.[36] RCA opted instead to focus on intervening in pending NAPA suits, such as *RCA v. Whiteman*.[37] There was serious corporate concern that if the NAPA remained unopposed, it would very shortly become a "second ASCAP, capable of dictating the manner in which both RCA and NBC conduct their business and exacting substantial fees from both." Intervening in the NAPA suits would also serve to challenge the radio stations who claimed to have the right to broadcast records "without permission of artists or record manufacturers." Many well-known recording artists, following Waring's example, had begun to refuse to make new phonograph records for RCA, and other artists were threatening to do so unless the abuse abated. As a result, RCA suffered

[34] Letter from recording companies to radio stations, Box 55, Folder 52, NBC/WHS.
[35] Letter from A.L. Ashby to David Sarnoff, February 24, 1937.
[36] Letter from Lenox Lohr to Frank E. Mason, Lloyd Egner, and Mark Woods, Box 55, Folder 52, NBC/WHS.
[37] Letter from David Mackay on Position of RCAM re: its Phonograph Records, January 20, 1937, Box 55, Folder 52, NBC/WHS.

decreasing sales of phonograph records, compounding the problem of an already depressed market in records. [38]

In April of 1937, RCA intervened in several California suits brought by recording artists Wayne King and Jan Garber against Warner Bros. Broadcasting Corporation to restrain the broadcasting of phonograph records.[39] The purpose of the intervention was to establish that artists did not have property rights in records, that if they ever had any such property rights they had been transferred to RCA, that RCA had a special property right of its own in its records, "sufficient to enjoin any unfair use thereof by others," and that the "use of phonograph records for broadcast purposes infringes this property right and constitutes unfair competition…and should be enjoined."[40] These cases were inconclusive and local. RCA therefore hurried to intervene in Whiteman's lawsuit against WNEW in 1939, a suit more or less tailor-made to its purposes.[41]

RCA's lawyers would likely have been more sanguine in 1937 and 1938 had they properly understood the weakness of the NAPA. The group's fortunes began to falter almost immediately after the initial victory of *Waring v. WDAS*. Two other court cases launched by the NAPA in its first year, involving Frank Crumit and Ray Noble, had failed. An ostensible victory by Waring in North Carolina, seeking to enjoin the broadcast of electrical transcriptions of the Ford Motor Company broadcast was stymied by lobbying on the part of broadcasters, who convinced the North Carolina legislature to adopt a statute cancelling the

[38] Letter from CL Egner to Lenox Lohr, re: Phonograph Record Broadcasting, February 24, 1937, NBC/WHS.
[39] Letter from A.L. Ashby to Mason, Egner, and Woods, re: NAPA, April 1, 1937, Box, 55, Folder 52, NBC/WHS.
[40] Memorandum from Frank Wozencraft to David Sarnoff, re: Control of Commercial Reproduction of Records, April 21, 1937, Box, 55, Folder 52, NBC/WHS.
[41] R.P. Myers to Mark Woods, December 2, 1938, re: Whiteman v. WNEW, Box 65, Folder 47, NBC/WHS.

decision in the Waring case. Broadcasters also succeeded in getting South Carolina and Florida lawmakers to issue similar statutes.[42]

Getting Paul Whiteman as lead plaintiff in a NAPA test case was thus a major coup for the group, and probably the best bet for a Supreme Court affirmation of the *Waring* precedent. Targeting WNEW made sense as a way to reap maximum strategic advantage: WNEW was the home of Martin Block's "Make Believe Ballroom," the NAPA's *bête noir*.[43] Paul Whiteman's life and career paralleled the development of the popular music business in the United States. Widely cited as the inspiration for every other successful white bandleader in the country, and still popular with the listening public two decades into his career, Whiteman was a logical choice for protagonist of the NAPA's final battle for "moral rights" in recordings.[44]

Whiteman was born in Denver, Colorado on March 28, 1890. His father, Wilberforce Whiteman, was a music teacher who trained Whiteman as a violist. In 1908, Whiteman left Denver for the West Coast, spending a decade playing in orchestras. During the war years, he began to study the "ragtime" music then popular in the dockside taverns of California. After a stint in the Navy, Whiteman returned to the Bay Area, and began to organize his own orchestras. In 1920, he recorded a hit single, "Whispering," for the Victor label, which sold over a million copies and propelled Whiteman into the ranks of "name" bandleaders.

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[42] R.P. Myers to Mark Woods, December 2, 1938.
[43] "Make Believe Ballroom," premiered on February 3, 1935: it created a fantasy space (an "imaginary, crystal-chandeliered dance palace") that sustained its illusory ambience by broadcasting records that Block had purchased from the nearby Liberty Music Store. Six months after Block launched his program, he had attracted four million listeners to his seven hours of daily programming. Sanjek and Sanjek, *Pennies*, 129.
[44] See the chapter on Whiteman in Elijah Wald, *How the Beatles Destroyed Rock and Roll* (Oxford: Oxford University Press, 2009).

Whiteman's contract with Victor gave him $50 per song, and his fellow musicians $25 per person, with no provision for royalties.[45]

RCA v. Whiteman began as a suit similar to Waring's, with Whiteman seeking an injunction against a New York radio station WNEW (and its corporate sponsors, W.B.O. Broadcasting Corporation and Ellin, Inc., a refrigerator manufacturer) for broadcasting nine of Whiteman's recordings made for the Victor and RCA labels.[46] This conflict was soon superseded by RCA's intervention in the case, in which it followed through on plans to challenge recording artists' claim that they owned the intellectual property embedded in recordings. As the record label that produced these recordings, RCA argued that if any rights were violated when WNEW disc jockeys broadcast Whiteman's music, *RCA* was the injured party, not Whiteman.[47]

RCA v. Whitman was first argued before Judge Vincent L. Leibell in the District Court for the Southern District of New York in 1939.[48] RCA's lawyers argued that the "use of [RCA's] records by others for profit" constituted a "wrongful exploitation of its property rights," reducing demand for its records, depriving it of "the services of artists who will not record unless they can be protected against injudicious and excessive repetitions over the radio of their recorded performances" and causing "a species of unfair competition" by destroying the saleability of records through "constant repetition." In the case of records like Whiteman's that bore labels proscribing radio broadcast, RCA alleged that radio station WNEW was guilty of "breach of contract resulting from violation of a restrictive covenant."

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[45] Sanjek and Sanjek, *Pennies*, 117.
[46] The songs at issue were: "San," "O So Blue," "Whiteman Stomp," "By the Sycamore Tree," "You Excite Me," "Cuban Love Song," "There's Nothing Else to Do," "Singing a Happy Song," and "A Waltz was Born in Vienna."
[47] R.P. Myers to Mark Woods, December 2, 1938.
[48] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York.

Directing its attention to Whiteman, RCA claimed that the bandleader's attempts to license records for broadcasting and public performances, along with "representations to the effect that [Whiteman] alone" was "entitled to grant such license" interfered with the company's "exclusive right to control the use of its records." This affront damaged its "reputation, goodwill and business" and constituted unfair competition in that Whiteman was attempting "to exploit, as his own, property rights belonging to [RCA]."[49]

Like Stern's decision in *Waring v. WDAS*, Judge Leibell's prose in *RCA v. Whiteman* rewards close analysis. Leibell notes: "until recent years the problem of a common law right in musical interpretations and renditions had never been adjudicated.[50]" He continues, by noting that prior to the advent of the phonograph, "a musical selection once rendered by an artist was lost forever, as far as that particular rendition was concerned." Because music "could not be captured and played back again by any mechanical contrivance," no property right of the artist pertaining to an "intangible musical interpretation" was in danger of being violated. That property right, however, did nevertheless exist, awaiting, as it were, the invention of the means of its violation. It was this right that Whiteman was asserting: the contribution of something in addition to that which was already the subject of a copyright, the musical composition itself.[51]

Leibell cites Stern's decision in *Waring v. WDAS* in order to establish that Whiteman indeed had a common law property right in his interpretations and recordings, and that he was therefore in a position to legally contract these rights away. Against the still pervasive view that intellectual property rights are held only be solitary authors who create original

[49] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York.
[50] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York.
[51] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York, HN1 and HN2.

works in isolation, Leibell underlines Stern's assertion that the law "has never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator" and that "such rights may be acquired by one who perfects the original work or substantially adds to it in some manner."[52]

Leibell then turns to the central question at the heart of the case: if creative workers were entitled to property rights in products with multiple creators, what about the property rights of the corporation that paid the money to bring the work into creation in the first place? The Copyright Act of 1909 declared these corporations the *de facto* authors in cases where creative laborers were employed on a "for-hire" basis. Leibell notes that there was some confusion surrounding the part played by RCA Victor Company in the "recording of Whiteman's interpretation and renditions" and whether this part was considerable enough to "vest in RCA a common law property right in what went on that record." In the final analysis, Leibell decided that it does not. He conceded that RCA's scientists had contributed the fruits of their research and experience in the production and manufacture of phonograph records, that their musical directors had advised on the placement of the musicians during the recording and on the volume of the various musical instruments, that their acoustic experts had arranged their appliances to produce a clear and well balanced renditions, and that their engineers and technicians operated the mechanical devices in the actual recording on the matrix. While all of these actions were "important and necessary in producing a perfect recording of the performance," they did not constitute authorial labor: "the performance was Whiteman's." RCA had played no role in "perfecting Whiteman's artistic interpretation of

[52]*RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York, HN2 and HN3.

the musical composition," but had only helped to capture that "unique interpretation" for the matrix or master record.[53]

Leibell suggests that even without the "Not Licensed for Broadcast" label on the record, its purchaser would not have the right to broadcast it on the air, because it would still constitute unfair competition with the Whiteman Orchestra. For Leibell it is self-evident that the use for which the record was made was "to reproduce its contents through the use of a phonograph" which did not extend to "the right to broadcast the contents of the record over the radio." If radio stations wished to "give their public Whiteman's orchestra" they were able to do so "by hiring the orchestra at a proper price, as some of them do." Leibell warns that if radio stations were allowed unfettered access to recordings for broadcast, "the principal beneficiaries of this judicial bounty" would be "those who in broadcasting such record seek to 'harvest the fruits of another's labor' at practically no cost to themselves."[54]

The Leibell decision affirmed that radio broadcast of recording constituted unfair competition with recording artists, and enjoined radio stations from playing Whiteman's recordings over the radio. It was unclear, however, whether this was primarily an intellectual property victory or an unfair competition one: both rationales were central to Leibell's recognition of Whiteman's rights. Leibell was most emphatic about the fact that radio stations and jazz orchestras were "competitors in the business of public entertainment," and that musicians were therefore in need of legal relief from unfair competition. The "moral rights" of musicians remained murky.

[53] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York.
[54] *RCA Mfg. Co., Inc., v. Whiteman et al.* District Court, S.D. New York.

RCA v. Whiteman was then appealed to the United States Court of Appeals for the Second Circuit, coming to trial in June of 1940 with Judge Learned Hand presiding.[55] In the appeal, the focus shifted from a conflict between radio broadcasters and the recording industry to an attack by RCA on recording artists' claims to property rights in their recordings. Learned Hand began his *RCA v. Whiteman* decision by reminding the court that intellectual property rights had recently been extended from literary efforts "to all productions demanding 'intellectual' effort" and conceding that for the purposes of the case he would assume that it also "covers the performances of an orchestra conductor." By privileging the literary text and foregrounding "intellectual effort," Hand created the impression that Whiteman's work represented the furthest limit of activities that could be plausibly understood as belonging to the realm of artistic works. Hand also stresses the significance of technological innovation in creating the specific circumstances of the *RCA v. Whiteman* case, noting that it was only in "comparatively recent times" that a "virtuoso, conductor, actor, lecturer, or preacher could have any interest in the reproduction of his performance." By restricting the musicians represented in this list to the "virtuoso" and the "conductor," Hand excludes all of the musicians in engaged in the non-elite demotic musical styles from which bandleaders like Whiteman borrowed.[56]

Like Leibel, Hand observed that, "until the phonographic record made possible the preservation and reproduction of sound, all audible renditions were of necessity fugitive and transitory; once uttered they died; the nearest approach to their reproduction was mimicry." Hand stressed that the "power to reproduce the exact quality and sequence of sounds had

[55] *RCA Mfg. Co. v. Whiteman et al,* No. 357, United States Court of Appeal for the Second Circuit, July 25, 1940.
[56] *RCA v. Whiteman*, 1937, Judge Learned Hand opinion, 6.

become possible, and the right to do so, exceedingly valuable; people easily distinguish, or think they distinguish, the rendition of the same score or the same text by their favorites, and they will pay large sums to hear them."[57] Here Hand links the ontology of works with the discernment of audiences and the capacity to generate profits—a pragmatic adaptation of the musical "work" to the age of mass reproduction that privileged cultural brokers like Whiteman (whose sonic "trademarks" entitled them to profits, rather than having expended the labor to create the intellectual property in question) without creating a basis for claims by arrangers, instrumentalists, and other rank-and-file musical workers.

At the heart of Hand's decision are questions regarding the legal notion of "abandonment." When is a work of art or innovation "abandoned" to the public, after which the creator can no longer try to regain a monopoly over its use or reproduction? Legal precedent suggested that the performance of a play or delivery of lecture did not constitute "abandonment" or "dedication to the public." Similarly, Hand reasoned, the work of a conductor directing a musical performance that is broadcast over the radio was not an "abandonment." In Hand's view, "it would be unlawful without his consent to record it as it was received from a receiving set and to use the record." This distinction appears to have been aimed at bootlegging (recording a broadcast off the radio and selling this homemade copy) and illicit radio transcriptions; in the case of recordings aimed for sale to the public, in contrast, Hand ruled that the "common-law property" in these performances "ended with the sale of the records." The NAPA's written proscriptions against unauthorized use did not "save" this "common-law property" and that even if they did, the records themselves could not be clogged with "a servitude." Hand stressed that since copyright is at root an artificial

[57] *RCA v. Whiteman*, 1937, Judge Learned Hand opinion, 6.

means of creating a monopoly, it consists only in the power to prevent others from reproducing the copyrighted work. In this light, Hand felt that W.B.O. Broadcasting Corporation had never "invaded any such right of Whiteman" because they had not "copied his performances at all; they have merely used those copies which he and the RCA Manufacturing Company, Inc., made and distributed."[58]

Following this logic, Hand took a conceptual turn, ruling that while Whiteman did at one point possess property rights in his recordings, those rights were abandoned upon publication: that is, at the point of sale. The "Not Licensed for Radio Broadcast" sticker was a form of what Hand's colleague and friend Chaffee called an "unequitable servitude on chattels"—a restriction that could not be imposed on a commodity for sale on the market. [59] Whiteman's property rights in his recordings protected only against unauthorized *republication* of the Whiteman Orchestra's music, not against its broadcast.[60]

Hand concluded with a disquisition on the nature of recorded music as intellectual property. Particularly in light of contemporary debates, it is rewarding to read this text carefully. "Property," Hand muses, "is a historical concept." Many forms of "labor and ingenuity" could not be owned. The law, Hand continues, protects only the expression of ideas, and it was up to the law to determine how far that protection shall go. This was a question of "more or less" rather than "natural rights." Hand refuses to evaluate the NAPA's claim that the "talents of conductors of orchestras" had been denied the compensation "necessary to evoke their efforts because they get too little for phonographic records" and

[58] *RCA v. Whiteman*, 1937, 6.
[59] *RCA v. Whiteman*, 8-9.
[60] *RCA v. Whiteman*, 7.

rejects as "idle" the invocation of the *deus ex machina* of "progress" which was "probably spurious" and not for the court to recognize if it were indeed genuine.[61]

Hand here rejected the tacit assumption that innovation and artistic creativity would grind to a halt without robust intellectual property protections. Whatever the complexities of Hand's decision, RCA was very pleased with the ruling. The company regarded Hand's verdict as a "complete victory for the broadcasting industry as opposed to the recording companies and NAPA." Because Hand denied Whiteman and other recording artists any common law property rights in performances or recordings, the upshot of the ruling was that Whiteman and the NAPA had lost the basis for arguing that the radio broadcast of phonograph recordings violated their rights.[62] Had the Court recognized the right of bandleaders to control the use of their recordings after sale, as Whiteman and Waring had hoped, the NAPA intended to extract licensing fees from radio stations similar to those collected by songwriters through their organization, ASCAP.[63] After *RCA v. Whiteman*, this was no longer a possibility. Furthermore, most bandleaders predicted that economic logic would compel the substitution of recordings for live performances on radio, sooner rather than later. As an indication of the pessimism that took root after the *RCA v. Whiteman* decision was issued, Whiteman disbanded his orchestra. Several months later, Whiteman began courting offers from network radio heads to assume an executive position within their corporations, overseeing popular music programming and hosting a weekly program. Whiteman accepted such an offer from the American Broadcasting Corporation, spun off

[61] *RCA v. Whiteman*, 13-14.
[62] A.L. Ashby to Niles Trammell, July 29, 1940, re: RCAM v. Whiteman, Box 81, Folder 25, Correspondence: Paul Whiteman, 1940, NBC/WHS.
[63] Countryman, "The Organized Musicians II," 256.

from NBC's Blue network in 1941, making a more or less seamless transition from bandleader to corporate executive and media personality.[64]

By the end of World War II, bandleaders like Whiteman had become members of an endangered species. Their popularity waned as that of the jazz musicians of the first bebop generation waxed. The slow integration of the bands of younger, "hipper," and more politically committed Jewish bandleaders Benny Goodman and Artie Shaw made these groups much more appealing to young music fans. Whiteman's re-emergence as a popular radio host ensured that he would remain a public figure—although without the fame and financial success of his early years—until his death in 1967.[65]

Conclusion

The legal opinions generated by *RCA v. Whiteman* are central texts in the literature of 20th century US IP jurisprudence. They are rarely read as documents relevant to any sort of labor history, and for plenty of good reasons. The "labor-side" protagonists in the case were not "workers," exactly. They were, in fact, much closer to "managers" in most important respects. But the legal battles of the NAPA for authorial rights in recordings were steeped in

[64] Don Rayno, *Paul Whiteman: Pioneer in American Music, Volume 2: 1930-1967* (Lanham: Scarecrow Press, 2009).

[65] Another important factor contributing to the decline of the age of the white jazz orchestra was the complicated showdown between rival song publishing groups ASCAP and BMI. ASCAP "struck" the radio industry in 1941 and 1942, keeping the music of Whiteman and every other popular bandleader off the airwaves. The radio stations began BMI as a way to keep broadcasting music during the embargo, favoring songs in genres sneered at by ASCAP's New York-based and elitist board of directors: country and western, African American styles like blues and rhythm and blues, and Latin American and Caribbean music styles. These genres surged in popularity in the early 1940s. The AFM recording ban from 1942 to 1944 also reshaped the music business, contributing to the increased obsolescence of orchestral jazz. See Don Cusic, "The Emergence of the Country Music Business: 1945-1955," *Studies in Popular Culture*, Vol. 17, No. 2 (April 1995); John Ryan, theIn 1940, following the resolution of *RCA v. Whiteman*, Whiteman retired from the band business, retreating to his farm in New Jersey. Paul Whiteman and Leslie Lieber, *How to be a Band Leader* (New York: Robert McBride & Co., 1941).

the language of labor, and reveal the pivotal role played by the theory of "labor deserts" in the evolution of copyright law in its encounters with new technologies. That the technology in question was also at the center of a much more famous dispute regarding technological unemployment makes it all the more compelling to regard *RCA v. Whiteman* as legal case in which labor historians might take an interest. In the postscript that follows, we examine the racial politics of Whiteman's quest for authorial rights in interpretations of music written by others.

Postscript: *RCA v. Whiteman* and the Racial Politics of Cultural Work in the Popular Music Industry

We would be committing a palpable violation of historiographical practice if we were to conclude our discussion of *RCA v. Whiteman* without contemplating the racial politics of the case. Paul Whiteman was not a neutral figure. Consider Langston Hughes's poem, "White Man," published in the *New Masses* on December 16, 1936 (that is, at about the same time that the NAPA was preparing the lawsuits that would culminate in *RCA v. Whiteman*:

White Man! White Man!
Let Louis Armstrong play it—
And you copyright it
And make the money.
You're the smart guy, White Man!
You got everything!
But now,
I hear your name ain't really White Man.
I hear it's something
Marx wrote down
Fifty years ago—
That rich people don't like to read.
Is that true, White Man
Is your name in a book
Called the Communist Manifesto?
Is your name spelled
C-A-P-I-T-A-L-I-S-T?[1]

Hughes here continues the tradition established in the African American press in the 1890s, upon which we touched in this dissertation's Introduction and Chapter Two, and continued

[1] Excerpted from Langston Hughes, "White Man," reprinted in Faith Berry, ed. *Good Morning Revolution: Uncollected Writings of Langston Hughes* (New York: Citadel Press, 1993, 1972), 4-5.

by Harlem's cultural workers in the first decades of the twentieth century. This was a tradition to which James Weldon Johnson contributed both as a practitioner (in *Autobiography of an Ex-Colored Man*) and as a historian (in *Black Manhattan* and in many essays). In the 1920s and 1930s, African American cultural workers were keenly attuned to the ways in which white cultural prospectors like Paul Whiteman drew upon the ingenuity of blues and jazz artists and used copyright law to arrogate profits therefrom for themselves. Hughes would continue to work within this literary genre into the 1950s, crafting a biting critique of white rock and roll entitled "Highway Robbery Across The Color Line in Rhythm and Blues" for the Chicago *Defender* in 1956. There he wrote: "It is nothing new for American whites to take American Negro songs, words, and styles, and appropriate them for their own," and noted that "(a)lmost as fast as the Negro originates something new in the world of music, the whites take it and go, sometimes even claiming as their own creation," pointing to Paul Whiteman taking upon himself the title of "The King of Jazz," while some of the "poor guys who created jazz" were barely surviving.[2]

In what is perhaps the most intriguing line of "White Man," Hughes accuses Whiteman of being a "C-A-P-I-T-A-L-I-S-T" and reminds his readers to read this as an insult, in the manner of the *Communist Manifesto*. Hughes here suggests that Whiteman's role as "capitalist" and "thief" are intimately interconnected, and indeed that capitalism and thievery are linked terms. In "White Man" it is *copyright* that serves as the connective tissue linking the two terms, with white attempts to propertize Louis Armstrong's improvisations highlighting the significance of IP as a technology of white appropriation of African

[2] Langston Hughes, "Highway Robbery Across the Color Line in Rhythm and Blues," *The Chicago Defender*, July 2, 1955, 9.

American cultural resources.[3] The subject was at the time urgent because copyright enclosures in the field of popular culture seemed to be accelerating with the rise of new mnemotechnologies.

As we explored in Chapter One's discussion of Oliver Wendell Holmes, Jr., from the turn of the century onward, American judges struggled to understand popular music through the framework of proprietary authorship based on the notion of the "musical work." Beginning around the turn of the century, piano-rolls and phonographs began to challenge sheet music as the preferred commodity-form of popular music. These commodity forms did not just represent a musical work, or embody it: they reproduced it by mechanical means. The 1909 Copyright Act revision and several key decisions by Holmes gave some shape to the law governing musical recordings and other forms of mass reproduction, but in a scattershot and confusing manner. In this indeterminate environment, and within the context of a legal culture that steadily rolled back the rights of African Americans, prospecting by whites of African American resources flourished.[4]

Attempts by white musicians to increase their authorial rights went hand in glove with this prospecting activity. Under other circumstances, NAPA lawsuits for "moral rights"

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[3] See Cheryl Harris, "Whiteness as Property," *Harvard Law Review*, June 1993, 106 Harv. L. Rev. 1707, 1-75. George Lipsitz, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics* (Philadelphia: Temple University Press, 2006). David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso, 1998 [1991]).

[4] See Olufunmilayo B. Arewa, "From Bach to Hip Hop: Musical Borrowing, Copyright, and Cultural Context," 84 N.C.L. Rev. 547, January, 2006; Stephen R. Wilson, "Rewarding Creativity: Transformative Use in the Jazz Idiom," PGH. J. Tech. L. & Pol'y 4, Fall, 2003; K.J. Greene, "Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists," 49 Pepp. L. Rev. 615, 2022; "Copynorms," Black Cultural Production and the Debate Over African-American Reparations," 25 Cardozo Arts & Entertainment Law Journal 1179 (2008); "Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues," 16 American University Journal of Gender, Social Policy & the Law 365 (2008); "Stealing the Blues: The Fleecing of Black Artists: Does Intellectual Property Appropriation Belong in the Debate Over Reparations?" *http://ssrn.com/abstract_id=655424*; "Trademark Law and Racial Subordination: From Marketing of Stereotypes to Norms of Authorship." 58 Syracuse Law Review 431 (2008).

in interpretation and recordings might have empowered and provided economic security to the African American jazz musicians whose most brilliant and innovative work was often built on the formal compositions of others.[5] The NAPA, however, was a whites-only advocacy group, and promised to extend intellectual property rights mostly to white performers. Because African American musicians were frequently barred from playing live in radio studios or in radio orchestras, a NAPA victory in its legal quest for a "curb on promiscuous broadcasting of commercial recordings" in cases like *RCA v. Whiteman* would likely have wreaked untold damage on working class and African American musical communities.[6]

While copyright lawyers and legal scholars find a lot of things interesting about *RCA v. Whiteman*, they rarely note its most bizarre aspect, the one to which readers of Hughes's "White Man" would have been most attuned: Whiteman sued to have courts recognize *his* moral rights as the author of compositions like "Whiteman Stomp," written by African American musicians Fats Waller and Don Redman. This fact was never raised by any party in the many iterations of *RCA v. Whiteman*. Within the historical conjuncture that provided a context for Langston Hughes's "White Man," with its direct correlation of capitalism, copyright, and racism, however, it had become increasingly likely that the broader push for cultural workers' rights might include a push for the more equitable distribution of profits and prestige in the world of jazz music, and might even allow for concerns about the racial politics of the music industry to be voiced. These possibilities must have been felt by artists

[5] See Mark Osteen, "Rhythm Changes: Contrafacts, Copyright, and Jazz Modernism," in Paul K. Saint-Amour, ed., *Modernism and Copyright* (New York: Oxford, 2011).
[6] See K.J. Greene, "'Copynorms,' Black Cultural Production, and the Debate Over African-American Reparations." 25 *Cardozo Arts & Entertainment Law Journal* 1179 (2008)

like Whiteman as deeply threatening, and we might seek an understanding of cases like *RCA v. Whiteman* as motivated by a kind of property anxiety.

In the late 1920s, Whiteman famously told the African American bandleader Fletcher Henderson, whose music he admired greatly (and who was sometimes mockingly called the "Paul Whiteman of the Race" by jazz enthusiasts): "if you were white, you would make a million dollars."[7] A million dollars, coincidentally, is the sum that white college students told social scientist Andrew Hacker that they would demand in compensation if they were to wake up one day to discover that they were African Americans. This anecdote, in turn, lies at the heart of Cheryl Harris's groundbreaking article "Whiteness as Property." Harris points to this imaginary million-dollar price tag to makes a powerful case for "whiteness as property" in relation to property's function as a "right to exclude," looking at the evolution of "whiteness" as a precious, selectively distributed resource, from *Plessy* to *Bakke*.[8]

What is perhaps most intriguing about Whiteman's cultural prospecting, this mysterious labor that ostensibly added a million dollars of value to his promiscuous borrowings, is that he made no effort to obscure it. Whiteman's remark to Fletcher Henderson was meant as an expression of jocularity, not cruelty. Whiteman tried to present his prospecting as a reflection of interracial friendship: an ostensibly "progressive" act, as in the case, for example, of his regular visits to see the Duke Ellington band play in Harlem in the 1920s and 1930s.[9] It was well known that Whiteman was often motivated to journey uptown by the desire to pilfer musical materials.[10] Whiteman even used to urge his composer

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[7] Thomas A. De Long, *Pops: Paul Whiteman, King of Jazz* (New York: New Century Publishers, 1983), 101. The "__ of the race" was a common phrase used in advertising in African American newspapers, as in the case of Sissieretta Jones, who was called the "Patti of the race" as well as "Black Patti," after the popular singer Adelina Patti.
[8] Cheryl I. Harris, "Whiteness as Property."
[9] Stanley Dance, *The World of Duke Ellington*, 65.
[10] Sonny Greer interview in Stanley Dance, *The World of Duke Ellington*, 65.

collaborator Ferde Grofé to make notes of what Ellington's outfit was playing, but Grofé had little or no success at capturing its distinctive sound and syncopation. When Ellington moved to the Cotton Club in 1927, Whiteman and Grofé were regular patrons, also intending to borrow what they could, but they admitted that due to the limitations of their ears, they couldn't steal "even two bars of the music."[11]

Whiteman's colleague and friend George Gershwin harbored a similar perspective vis-à-vis his travels to the southeastern states to collect musical materials from African Americans. When preparing for writing the music for *Porgy and Bess* Gershwin made numerous trips to South Carolina. Gershwin treated these trips as an "inexhaustible source of folk material." Gershwin lore has it that he "responded to the stimulus of his surroundings with an exuberant, creative outflow." The musical ideas he absorbed during his travels "poured forth quickly and steadily at the piano as if from a limitless subterranean well," many of which were incorporated into the *Porgy and Bess* score.[12]

In this light, it is interesting to read the Chicago *Defender*'s coverage of Paul Whiteman in the 1920s and 1930s. For example, an opinion piece by Dave Peyton from 1929 celebrates Whiteman even as it launches a complaint against the segregation and ghettoization of African American music by record labels. Peyton argues that African American musicians had been forced by record companies to play "discordant noises," as opposed to the "legitimate instrumentation" and "wholesome music" of white jazz musicians like Paul Whiteman. This complaint was familiar among New Orleans musicians who had moved to New York, many of whom chose not to feature the exotic sound effects (particularly those of brass instruments played with plunger mutes) in which they had

[11] Thomas A. De Long, *Pops: Paul Whiteman, King of Jazz* (New York: New Century Publishers, 1983), 101.
[12] McLeod, *Copyright Criminals*, 61.

specialized during the Dixieland era. The consensus held that "discordant noises" appealed to racist white listeners and that committing to a purer timbre was an important political act.[13]

In this light Whiteman's "refinements" might represent not a whitewashing of jazz, but a purification of African American music traditions. The problem was that white-owned record labels would not allow African American bands to emulate Whiteman, encouraging instead musical "bad habits." In December 1936, the *Defender* ran a story by the white journalist Harry Martin illustrating the reach of "whiteness as intellectual property" as an organizing ideology.[14] Martin celebrated Whiteman's participation in a tribute to African American blues pioneer W.C. Handy at Memphis, Tennessee's "Cotton Carnival," a "floral ball for the white folk." It was at this event, according to Martin, that "Handy's star attained its highest ascendancy." Handy's attendance as a guest at a white dance in a Southern city was "unheard-of," but Memphis elites felt that making an exception for Handy would be a "fitting gesture toward a man who had brought honor upon the city," and with "considerable nervousness" had issued an invitation. Martin paints the scene of Handy's entry on stage as thick with racial tension, diffused in the nick of time by the appearance of Paul Whiteman. "Few persons at that vast ball realized what was going on when this elderly Negro, perfectly groomed, slightly stooped, his bald head gleaming with the footlight reflection, shuffled slowly from the wings of the stage on which the Whiteman orchestra was playing," Marin opined. "Timidly, half apologetically, Handy moved toward the center of the stage," while the crowd fell silent, wondering: "Who was this interloper from another race? What was he doing on the stage?" As the crowd grew restive, Paul Whiteman appeared on stage, taking

[13] See Danny Barker and Alyn Shipton, *A Life in Jazz* (London: Macmillan, 1986).
[14] Harry Martin, "Weekly Forum: Views and Reviews: Grandaddy of the Blues," Chicago *Defender*, Dec 5, 1936, p. 16.

Handy by the arm and leading him to the microphone, inspiring deafening cheers and applause. “From 5,000 white throats went up a roar as 10,000 white hands beat together in recognition of a talented Negro,” Martin observed, declaring this moment as “Handy’s greatest monument.” While the event lasted only a few minutes, Martin concludes that “in that short interval had occurred one of the most remarkable phenomena in the history of relations between two races.”[15]

The reader is startled by the intensity of white fantasies of frictionless racial reconciliation that power this account, and is forced to wonder how the Chicago *Defender* readership might have received it. On the one hand, African American papers of the time tended to report on any newsworthy event involving popular entertainers, and also to celebrate any report of southern whites playing against type. On the other hand, the role of Whiteman here as cultural broker is so clearly arrogant and patronizing that the story may have been an inspiration for Hughes’s “White Man,” published the same month as this story in the same newspaper.

Against these celebrations of the healing powers of “whiteness as intellectual property,” African American artists and intellectuals developed a critical and resistant alternative throughout the twentieth century. Film critic Chappy Gardner articulated an early version of this critique in a 1933 editorial in the *Defender*: “Writer Says They Ape Our Musicians, Dancers, Actors, and Then Steal Our Songs; Hollywood Creates Nothing, but Copies all Harlem Offers.” Gardner begins with a jab at Whiteman: “Whites are claiming originality in Negro jazz, song, and music… If we don’t watch our step someone might actually believe these bedtime stories.” Gardner continues with the tale of a “certain white

[15] Martin, “Grandaddy of the Blues,” p. 16.

boy" who claimed he wrote "Stormy Weather." Outraged, Gardner tracked down the real writer, "Lukie" Johnson, and agitated successfully to collect royalties for the "song stolen by the white boy." "Negroes lead the world in entertainment," Gardner concludes. "The kind of music so popular today was created by us. One can trace jazz from the mourner's bench crowd standing about you clapping hands and keeping syncopated time with their feet." Whiteman, for Gardner, is the worst of all offenders: "Whiteman says he is king of jazz. Maybe he means he plays or imitates our real jazz masters quite well. But until he writes a 'St. Louis Blues' like Handy we are laughing at him."

The Aeolian Hall Concert of 1924

Whiteman's 1924 historic "jazz" concert, entitled "An Experiment in Modern Music," held at Aeolian Hall in New York seems to have represented a turning point in the epistemological maturation of "whiteness as intellectual property."[16] This concert both provided "proof" that jazz could be presented within the framework of serious concert music and allowed Whiteman to curate an "evolutionary" history of African American "progressing" from primitivism to sophistication, with his own music situated as the apex of this musical development, a narrativization that was highly paternalistic, insulting, and self-serving. By conscious design, Whiteman arranged the program around distinctions of "smooth" and "rough" and "civilized" and "wild." Famous for premiering Gershwin's "Rhapsody in Blue," the Aeolian Hall concert was a self-conscious attempt to "whiten" African American music, or (in language suggesting that passing from black to white is a

[16] De Long, *Pops*, 4, 64.

thoroughly gendered business), an effort to "make a lady out of jazz." After the Aeolian Hall concert Whiteman's earning power ballooned; Whiteman seldom earned less than $400,000 a year after 1924.[17]

Whiteman's orchestra began with a performance of "Livery Stable Blues," adapted from a 1917 recording by the Original Dixieland Jazz Band. The ODJB was a white group led by Chicago clarinetist Nick LaRocca, who would later insist that he had single-handedly invented jazz. In his 1924 memoir *Jazz*, Whiteman borrowed a page from LaRocca's playbook, coming close to claiming paternity over all of jazz music.[18] Whiteman's Aeolian Hall performance of "Livery Stable Blues" featured a variety of raucous imitations of barnyard sounds, mimicking the ODJB's performance on vinyl. Whiteman consciously chose "Livery Stable Blues" as the concert opener in order to display, over the course of the rest of the performance, subsequent "improvements" in jazz scoring. Later, Whiteman performed the popular song, "Whispering" in two versions, which he called "legitimate scoring vs. jazzing," in order to display a "melodic, harmonious, modern theme jazzed into a hideous nightmare." The evening was structured to validate white claims to having "improved" jazz, and thus to assert legal ownership of the music. Jazz writer Leslie Leiber wrote in 1941 that after the Aeolian Hall concert, "jazz was proclaimed respectable. It was fit to eat by…"[19] Whiteman was "the first conductor to make jazz a commodity saleable to hotels." By "subduing" the louder trumpets and saxophones, Whiteman was able to convince hotel

[17] In 1925 Whiteman's best year, he played dates in over 300 cities and towns and earned over $800,000 in expenses. De Long, *Pops*, 64, 84.
[18] Paul Whiteman and Mary Margaret McBride, *Jazz* (New York: Arno Press, 1974 [1926]).
[19] Whiteman, *Jazz*, 15.

managers that jazz did not interfere with "conversation and digestion," creating a new market for orchestra leaders in these spaces.[20]

Beyond simple avarice, would-be musical "improvers" like Whiteman were motivated by changing historical conditions in the decades after World War I. As we explored in this dissertation's Introduction and Chapter Two, beginning with the nineteenth century minstrel show and vaudeville's array of racialized buffoonery, American entertainment culture has long been defined by a central tension between original and forgery, repetition and difference. At the heart of this regime of racial representation lurked a central fantasy: that of the victim enjoying and/or authorizing his or her victimization, thereby provides a brief for those who would deny them political agency and capacity.

What this regime of racial representation could not tolerate was the free expression of the complex and fully human personhood of African Americans. As the gramophone, radio, and automobile led to increased opportunities for African American cultural workers to present their own aesthetic projects across the country, without the intermediating brokerage of white "translators," a crisis loomed for those who, like Whiteman, saw themselves as genuinely committed to aesthetic appropriation as evidence of interracial friendship, however curious such commitments were in the face of Whiteman's tendency to feature blackface minstrelsy sequences in his concerts throughout the 1920s and 1930s. Musicians like Whiteman, then, were fighting for the preservation of "whiteness as intellectual property" on two fronts: seeking to preserve their roles as folkloric or anthropological mediators, and also to preserve their roles as commercial "authors" of materials borrowed from others.

[20] Whiteman, *Jazz*, 15.

Whiteman was perhaps the most vigorous speculator in this area. Beginning with a chance encounter with jazz music in the Bay Area during the World War I era, Whiteman crafted a self-identity as an "interpretive musician," by which he meant a shaper and molder of "raw materials" through the commercial-aesthetic process of "sweetening." The cash value of such sweetening on the final commodity, as we recall from Whiteman's quip to Henderson, was often staggeringly high. We can better understand the multiple dimensions of this "sweetening" process by returning again to Harris's "Whiteness as Property," and exploring the subcategory of whiteness as intellectual property. The example of Whiteman seems to demonstrate that whiteness has served as a kind of license wielded by white artists enabling them to claim privileges of authorship and ownership of material derived from African American cultural practices. The critical and satirical writings of Langston Hughes and Chappy Gardner on Whiteman (echoed by Harold Cruse in *Crisis of the Negro Intellectual*) reminds us that intellectual property has served as an organizing epistemological paradigm extends outside the courtroom. In light of Chapter One's discussion of ideologies of copyright as deeply embedded in capitalist and nationalist metanarratives of progress and modernity, and in light of Chapter Two's exploration of copyright and race in the works of James Weldon Johnson, this should not come as a surprise.

Nevertheless, it cannot be overstated how powerfully the exclusion of African American musicians from intellectual property ownership served to deepen racial wealth inequalities. Nowhere is this more evident than in the case of the extremely limited degree to which African American musicians could make money through ASCAP, an organization that made many white musicians very wealthy. Beginning in the late nineteen teens, ASCAP began a long reign as the most important cog in the machine collecting licensing fees and

distributing money to musicians in the United States. ASCAP used a ranking system that ostensibly rewarded the most popular musicians with the most money, and the least popular with the least. The precise nature of this ranking system, however, was not disclosed to members. Along with the lack of transparency regarding the process by which non-members gained membership in the organization, the haziness surrounding the ranking system served to keep ASCAP's elitist and racist practices out of the public eye. Firms needed to prove they had been in the publishing business for at least a year, while composers needed to demonstrate that they "regularly practiced the profession of writing music," had published at least five works of music, had a track record of producing music that was "in vogue," and had gained the sponsorship of at least two members of the board and the approval of the business-dominated 24-member advisory committee. Acting in concert, however, these practices maintained ASCAP as the preserve of music publishing firms, many of which were owned by the same New York-based corporations and banks that controlled the Hollywood studios, and white composers. They also systematically kept African American and white working-class musicians from the southern states out of the organization. Ryan provides ample evidence of the discriminatory character of ASCAP in the 1920s and 1930s. Of the 170 composers and 22 publishers who were charter members, only one musician and one lyric writer was African American. During the next twelve years, only eight other African American composers became members. Prominent African American musicians were excluded for appallingly long stretches of time. Louis Armstrong, star of Hughes's "White Man," did not become a member until 1939. Fletcher Henderson—who might have been worth an additional million dollars had he been white, per Whiteman's joke—was not

allowed to join until 1948, even though by 1939 Henderson was a staff arranger for Benny Goodman.[21]

Whiteman's efforts were also aided by the importation of the language of *corporate authorship* into the governing logic of intellectual property law. While in the nineteenth century, corporations fought for legal recognition that they should be included, alongside individual creators, under the tent of authorship, in the twentieth century, individual authors increasingly had to convince courts that they were *akin to corporations* to gain recognition as authors.[22] Whiteman's book *How to be a Band Leader* provides ample illustration of this phenomenon. Whiteman wrote that the bandleader "stands at the head of a corporation—a corporation critically audited every day by untold numbers of listeners." The music market, Whiteman insists, resembles the stock market: young fans purchase shares in the popular jazz orchestras, and vote them "up or down on the market." The leader, meanwhile, "makes more money per year than the President of the United States" while sponsors "pay $8,500 to the young maestro for a half-hour of distinctive music." As a result of the "tremendous publicity value of these nation-wide broadcasts," the leader can earn as much as "$2,000 for one-night engagements during the rest of the week."[23]

In this new legal environment, white bandleaders (who by and large thought of themselves as corporate executives running complex organizations) had many advantages, and African American musicians had at least as many disadvantages. The fact of the

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[21] John Ryan, *The Production of Culture in the Music Industry: The ASCAP-BMI Controversy* (Lanham, MD: University Press of America, 1985), 54-65.
[22] Catherine Fisk, "Credit Where it's Due: The Law and Norms of Attribution," 13-14; "Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920" *Hastings Law Journal*, 52, L.J. 441, January 2001, 500; "Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor, 1830-1930," *The University of Chicago Law Review*, Vol. 65, No. 4. (Autumn, 1998).
[23] Paul Whiteman and Leslie Leiber, *How to be a Band Leader* (New York: Robert M. McBride & Company, 1941), 22-23.

bandleaders' whiteness, the use of that whiteness to situate themselves as "improvers" of "natural resources," and the articulation of that whiteness through the form of corporate entrepreneurialism all contributed to the very real formulation of whiteness as a kind of intellectual property.

Harold Cruse urges this understanding of the racial politics of IP upon readers of *Crisis of the Negro Intellectual*. Cruse traces the freezing of the "rather fluid, contending cultural trends among blacks and whites" in the early 1920s by the achievement of white discursive and institutional control in the later years of the decade. He reminds his readers of Gilbert Seldes's assertion of African American musical inferiority, and of Seldes's promulgation of the view that "Negroes were anti-intellectual, uninhibited, unsophisticated, intuitive children of jazz music who functioned with aesthetic 'emotions' rather than with the disciplined 'mind' of white jazzmen." Cruse reviews the sleight of hand that thereafter rendered "the real artists of Negro folk expression" as the "George Gershwins, the Paul Whitemans, and the Cole Porters." While white ideologues like Seldes insisted upon African American inferiority in the realm of the arts, they were haunted by the knowledge that the "white Protestant Anglo-Saxon in America has nothing in his native American tradition that is aesthetically and culturally original, except that which derives from the Negro presence." This bad faith and insecurity explains, for Cruse, the persistence of white American cultural imperialism, the continuing treatment of Afro-American folk music as the aesthetic ingredient, the cultural material, the wealth exploited by white capital. Cruse points to the unusual move by the Pulitzer Prize committee to withdraw the award it had briefly offered

Duke Ellington, while at the same time cultural authorities revered Gershwins and others for music that they "literally stole outright from Harlem nightclubs."[24]

Welcome to the Jungle? *Terra Nullius* and Whiteness as Intellectual Property

One clue to the deeper structure of Whiteman's cultural politics can be found in the film *King of Jazz*, a forgettable feature length revue starring Whiteman and his band, made in 1930.[25] The film is bad, but also quite illuminating when viewed against the historical grain. It is useful, especially, to watch the animated cartoon near the film's beginning, in which Whiteman gambols around the African jungle, goofing with primitives and anthropomorphized animals, and embodying the very spirit of the Victorian hunter/adventurer. The segment ends with the African menagerie crowning Whiteman the "King of Jazz." The inclusion of this bit of imperial kitsch points to the significance of "the jungle" in white intellectual property rationalizations of cultural prospecting: "the jungle" is a place where whites are free to propertize natural resources—including cultural expression and its artifacts—so long as they "improve" them. In the Western musical imaginary, "improvement" is implicit in almost all of the things a white musician might think to do with "primitive" materials: standardization, notation, adaptation to orchestral instruments, regularization of rhythms, smoothing out of timbre, and incorporation into narrative long forms.[26]

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[24] Harold Cruse, *Crisis of the Negro Intellectual*, 96.
[25] John Murray Anderson, dir., *King of Jazz*, 1930.
[26] On the ideology of improvement, see Ellen Meiksins Wood, *Democracy Against Capitalism* (Cambridge: Cambridge University Press, 2009) and Neal Wood, *John Locke and Agrarian Capitalism* (Berkeley: University of California Press, 1984).

The Whiteman cartoon is one variant of analysis of a central chronotope of the white engagement with jazz: travel to the "jungle" (literal or metaphorical) that leads to an epiphany of discovery, a sublime encounter with the music of the Other.[27] The Whiteman cartoon points to the extraordinarily long reach of a spatial politics that, as David W. Noble has argued, formed the basis of both Enlightenment nationalism (predicated, of course, on imperialism and colonialism) and its peculiar American variant, "exceptionalism."[28] This spatial politics, in its most crude forms, distinguishes civilization from wilderness as a way of justifying exploitation, colonialism, forced conversion, slavery, and genocide. At different historical moments, various ways of imagining these spaces have been dominant, and these spatial fantasies or imaginary landscapes can tell us a great deal about reigning social values and ideology.

Carole Pateman's discussion of the legal doctrine of terra *nullius* and the "settler contract" in her coauthored book with Charles Mills, *Contract and Domination*, helps to deepen our understanding of "jungle" fantasies"[29] Bookended by a discussion of the landmark 1992 Australian court case of *Mabo v. the State of Queensland*, Pateman provides a rich engagement with the doctrine of *terra nullius*. This legal conceit centers on the principle that if a newly encountered land could be described as "empty," it could rightfully be occupied by a European power.[30] Roman law had earlier established that an "empty thing" (*res nullius*) was common to all until it was put to use; the person who put the thing to use

[27] This scene is frequently used as a narrative device in films about songwriters: in *Night and Day* (1946), a Cole Porter biopic, Cary Grant's Porter first hears the melody of "Begin the Beguine" while in the trenches of World War I, and later gets out of a creative rut by visiting the jungle of New York's plebeian streets, "hearing" a melody that revives his career. In *Your Cheatin' Heart* (1964), a Hank Williams biopic, George Hamilton IV's Williams experiences similar epiphanies in an African American bar.
[28] David W. Noble, *Death of a Nation: American Culture and the End of Exceptionalism* (Minneapolis: University of Minnesota Press, 2002).
[29] Carole Pateman and Charles W. Mills, *The Contract and Domination* (Malden, MA: Polity, 2007).
[30] Pateman and Mills, *The Contract and Domination*, 35.

became the owner.[31] Because of the semantic spillover of the term *nullius*, from "empty," to "virgin," to "wilderness," to "jungle," the legal logic of property law worked to create circular justifications: that which was empty could be occupied, and thus that which was to be occupied must necessarily have been empty prior to contact.

Pateman notes that defenders of colonization in North America, from Grotius and Locke and Hobbes to most modern mainstream political theorists, have tended to invoke two senses of *terra nullius*. First, they claim that the land declared *terra nullius* was "uncultivated wilderness," and therefore open to appropriation by virtue of the "right of husbandry." This right, in turn, has been rooted in various iterations of the idea that Europeans were entitled to seize land if natives had not been using it properly: from "failing" to partition it into private property to "failing" to have developed a division of labor to "failing" to have developed currency and money. Second, they claim that the land declared *terra nullius* had no recognizable form of sovereign government, and thus belonging to the "state of nature" prior to the establishment of the social contract. Pateman points out that this social contract frequently took the form of a "settler contract," a specific form of what Charles Mills calls the "expropriation contract." What distinguishes the settler contract is that settlers alone can be said to conclude the original pact. Native peoples are excluded from the process of creating the settler contract, but they are automatically subject to it.[32] *Terra nullius* and the "settler contract" can be seen as a kind of problem solving, enabling the fiction of freely consenting parties to the social contract by writing into the contract the automatic consent of the colonized. Just as Pateman has elsewhere drawn attention to the demagogic implications of Locke's theorization of automatic consent, as well as the exclusion of women from

[31] Pateman and Mills, *The Contract and Domination*, 36.
[32] Pateman and Mills, *The Contract and Domination*, 38.

Locke's social contract, here we see how the oppression of Native people is rationalized not as a "necessary evil" but as the outcome of a freely chosen contractual transaction.[33] For our purposes, however, the most important insight of Pateman's discussion of *terra nullius* is the way it exposes the property logic at the heart of colonialism, providing the specific coordinates of the liberal mapping of the "jungle" as a space that more or less demanded to be occupied and improved.

Over the course of several centuries, and through a variety of encounters with the music of African, Asian and diasporic performers, Europeans and European-Americans have sought to travel to the figurative jungle for musical pleasures inaccessible in the equal-tempered, metronomic, and through-notated art music traditions of the West. Whiteman was firmly grounded in this tradition. We can better understand Whiteman's work as a cultural courier and the alchemy he performed in concerts like the Aeolian Hall performance if we think seriously about the metaphorical meanings of the uncultivated "jungle" and the civilized "city." David W. Noble notes that the jungle is often imagined as a "timeless space."[34] Neil Smith similarly writes of the "new urban frontier" that emerged as a central trope of 20th century US politics. "During the latter part of the twentieth century," Smith observes, "the imagery of wilderness and frontier has been applied less to the plains, mountains, and forests of the West—now handsomely civilized—and more to US cities back East." As suburbanization took hold, the city came to be seen as an "urban wilderness," a place of "disease and disorder, crime and corruption, drugs and danger." In the writings of urban theorists obsessed with pathology, blight, and decline, and in the larger popular culture, the

[33] See Carole Pateman, *The Sexual Contract* (Palo Alto: Stanford University Press, 1988).
[34] Noble, *Death of a Nation*, 1, 13, 44-47.

city was increasingly rendered as a "jungle."[35] This process had roots deep in the earlier decades of the century (and, in some instances, in the late nineteenth century). Chad Heap's *Slumming*, a study of urban tourism in the Progressive Era, reveals that this spatial imaginary was fully in place by the time Paul Whiteman picked up his baton.

As *King of Jazz* seeks to illustrate, to take a cultural artifact from jungle to civilization, as is not only to bring it across geographic boundaries, but to bring it out of timelessness into historical time. This labor is central to the claims of ownership and authorship (as well as authority and stewardship) that cultural prospectors like Whiteman claimed. At a time when Duke Ellington was performing "jungle" music for wealthy whites at Harlem venues where African Americans could not be seated as patrons, Whiteman's choreographed act of cultural transportation would have been clearly understood by audiences in terms of imperial logics of improvement and ownership.[36] Whiteman recreated the "jungle/bourgeois metropolis" distinction many times throughout his career, separating the jungle of Harlem from the city of the uptown concert hall, the jungle of the jazz jam session from the city of the jazz orchestral performance, the jungle of spontaneous black expressivity from the city of European-American self-mastery and authorial genius.

[35] Neil Smith, *The New Urban Frontier: Gentrification and the revanchist city* (London: Routledge, 1996).
[36] See, especially, footage of "jungle music" performances in Terry Carter, dir. *A Duke Named Ellington* (1992).

Chapter Seven: Zechariah Chafee, Jr. and Debates Over Cultural Work in the Postwar Era

As we saw in earlier chapters, the 1930s witnessed an extraordinary consolidation around the aesthetic authority of the figure of the "cultural worker" within the machinery of mass entertainment. In this chapter, we look at the evolution of the figure of the cultural worker within postwar liberalism, framing our analysis around the 1940s-era writings of Zechariah Chafee, Jr: the long 1945 *Columbia Law Review* essay "Reflections on the Law of Copyright" and a volume of the report of the Hutchins Commission on the Freedom of the Press, entitled *Government and Mass Communications*, published in 1947.[37] These writings return again and again to the dilemma of the cultural worker vis-à-vis the regulation of popular culture and the news media, and point to the arrival of the "cultural worker" as the representative white-collar professional in the mid-century discourse on skilled labor. Chafee's writings on cultural workers reflected a wider tendency among the intellectuals of the 1940s and 1950s to voice new concerns regarding the control of the mass media.[38]

For our purposes, the chief interest in this writing is simply the fact that in 1945, Chafee, then fifty-six years old, a longtime member of the Harvard Law School faculty, and the nation's preeminent expert on First Amendment jurisprudence, chose to delve deeply into a detailed inquiry into the history and future of American intellectual property law.[39] Chafee's choice to engage as deeply as he did with the history of intellectual property

[37] Zechariah Chafee, Jr., "Reflections on the Law of Copyright: I," *Columbia Law Review*, Vol. 45, No. 4 (Jul., 1945), pp. 503-529; and "Reflections on the Law of Copyright: II, III," *Columbia Law* Review, Vol. 45, No. 5 (Sep., 1945), pp. 719-738; and *Government and Mass Communications*, Vols. I and II, Chicago: University of Chicago Press, 1947.
[38] Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1976).
[39] Zechariah Chafee, Jr., "Reflections on the Law of Copyright."

jurisprudence suggests that the topic had, in the World War II years, become newly urgent. Chafee was not alone, among progressive legal thinkers, in devoting attention and energy to the almost forensic dissection of culture and law. Legal realist Vern Countryman wrote a detailed history of the American Federation of Musicians for the *University of Chicago Law Review* in the late 1940s. Thurman Arnold, who traveled in legal realist circles, continued to meditate, in print, on the problems of monopoly and output restriction in the newspaper, film, and music industries, while shifting between helming anti-trust prosecution of the AFM in the early 1940s to work as an attorney for the Screen Writers Guild after World War II. Morris Ernst and Walter Gellhorn, also immersed in the legal realist milieu, also wrote about new problems of law and culture in the 1940s.[40]

This sharpening of interest among the nation's most influential lawyers in the problem of the cultural worker reflected new concerns, worries, and challenges stemming from the fact that by 1940, the vast majority of producers of culture were now salaried, and in many cases unionized, employees. The transition from an older artisanal model of cultural production to a corporate capitalist one seemed to observers like Chafee to have taken place overnight. Its implications remained, in the early 1940s, troublingly unclear. Chafee's writings from the 1940s suggest that the proper consideration of the politics of cultural work (and the imperatives for governmental regulation thereof), which he highlights in "Reflections on the Law of Copyright" as the "economic protection of authors, musicians, and painters" necessarily required an interweaving of these three strains of jurisprudence.

[40] Vern Countryman, "The Organized Musicians: I" *The University of Chicago Law Review*, Vol. 16, No. 1 (Autumn, 1948); "The Organized Musicians: II," The University of Chicago Law Review, Vol. 16: No. 2 (Winter, 1949); on Thurman Arnold and the SWG, see "SWG Takes Court Action Charging Blacklist Conspiracy" in *The Screen Writer*, Vol. 4, No. 1, 1; On Ernst, see Samantha, *The Rise and Fall of Morris Ernst, Free Speech Renegade* (Chicago: University of Chicago Press, 2021); On Gellhorn, see Jack Greenberg, "Walter Gellhorn," *Columbia Law Review*, Vol. 75, No. 4 (May, 1975), pp. 710-712.

That Chafee seeks consistently to think in this way about cultural work is itself quite a remarkable indication of the arrival of a new discursive conjuncture.

The central conceptual problem, for Chafee, is that popular culture's endless stream of "new inventions and new economic set-ups" had either to be "jammed into inappropriate statutory language" or suffer the pecuniary and reputational damages attending exclusion from IP law. In a moment marked by the emergence of "new kinds of creativeness" (and thus the parallel rise of "new infringing devices"), nothing could be more important than adjusting the existing IP law infrastructure. Chafee's essay further illuminates the epistemological unsettlement effected by the crossing of the wires of intellectual property, First Amendment, and labor law. What protections might the law afford to the cultural workers organized in the new talent guilds? And what unintended consequences might overzealous affirmation of cultural workers' rights to these protections have for American culture?[41]

Biography

Chafee was born into a family of wealthy industrialists in Providence, Rhode Island that traced its lineage back to Roger Williams on December 7, 1885.[42] His early work was in commercial law, connected with his family's business interests. When Chafee joined the Harvard law school faculty in 1916, it was to teach commercial law, handling courses entitled "Equity," "Insurance," and "Bills and Notes." American entry into World War I spurred Chafee to begin researching First Amendment jurisprudence, a topic that was at the

[41] Chafee, "Reflections on the Law of Copyright: I," 516.
[42] Donald L. Smith *Zechariah Chafee, Jr. Defender of Liberty and Law* (Cambridge: Harvard University Press, 1986).

time he regarded as woefully understudied. Nearly as poorly organized as were the rights to free speech and assembly themselves, under an array of state and local-level sedition and censorship statutes. Destined to gain renown as a civil libertarian, Chafee was never, in fact, a radical firebrand. He once joked that he had become a civil libertarian only reluctantly, because "his people had money."[43]

John Wertheimer captures the broad strokes of Chafee's reputation (which Chafee himself had a hand in scripting and which was in large measure factual): "the monied conservative whose unbending adherence to principle impelled him to break ranks with his social class in order to defend the rights of groups he personally despised." Chafee would answer red-baiting critics: "I believe in property and I believe in making money."[44] Chafee was, in the main, averse to trade unionism and incurious about the causes and effects of inequality. As his biographer Donald Smith observes, Chafee held fast to the "negative liberty" or noninterventionist view of government common among classical liberals. Like his laissez-faire forbears, he maintained a fear of "big government," and identified as a "Cleveland Democrat." Speaking of jailed members of the Industrial Workers of the World, Chafee remarked: "I see no reason why I should be out mountain climbing and enjoying life, while some other chap who started life with less money and gets a little angrier and a little more extreme should be shut up in a prison for five to ten years…"[45]

Looking back at his early enthusiasm for First Amendment civil libertarianism from the vantage point of 1950, Chafee emphasized the significance of his youthful immersion in a certain culture of pragmatism. The spirit of the Wilson years, Chafee reflected, was one in

[43] Smith, *Zechariah Chafee*, 2.
[44] John Wertheimer, "Review: Freedom of Speech: Zechariah Chafee and Free-Speech History" *Reviews in American History*, Vol. 22, No. 2 (Jun., 1994)
[45] Smith, *Zechariah Chafee*, 2.

which "forward-looking men and women were still engaged in rethinking our traditional, political, economic, and social conceptions and considering how they could be best altered to meet the new needs of an industrial and highly developed country." At the same time, Chafee was known to quip: "I want to be a pragmatist, but I don't want to work very hard."[46] Nevertheless, Chafee often quoted pragmatists in his writings, for example in his note: "Sometimes copyright law seems like William James' description of the way a world appears to a newborn babe—'a big buzzing booming confusion.'" Chafee also venerates Oliver Wendell Holmes's pragmatic distinction between property in land and property in copyright: "By calling a business [or copyright] 'property' you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed." Differing varieties of property should be distinguished from its landed from and be protected in accordance with its nature and the "appropriate benefits and burdens caused by private ownership." Chafee draws upon Holmes's pragmatist jurisprudence also in insisting in his essay on copyright that a "word or a phrase does not keep an unchanging scope regardless of the place where it is used." He quotes Holmes: "A word is not crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[47]

Free speech issues did arise, from time to time, in the ordinary course of teaching commercial law: for example, in the common law doctrines of libel and slander.[48] The Equity

[46] Smith, *Zechariah Chafee*, 103.
[47] See Zechariah Chafee, Jr., "Reflections on the Law of Copyright: I," 519.
[48] In the late Progressive Era, libel and slander had recently become important vehicles through which the new commercial entities brought into being by the corporate revolution in American capitalism defended intangible values like brand "reputation." See Morton Horwitz's *Transformation of American Law*, 44.

law casebook that Chafee assembled in order to teach his classes at Harvard included, necessarily, some coverage of the legality of after-the-fact injunctions against libelous texts, as opposed to "prior restraint" on publication, a topic upon which Blackstone and other giants of Anglo-American law wrote passages with which competent lawyers were expected to be fluent. Significantly, these questions overlapped in many respects with bread-and-butter IP issues.[49]

The immediate impetus for Chafee's engagement with free speech matters was the repression of dissident speech and writing under the federal Espionage Act of 1917 and the Sedition Act of 1918. His first article on free speech appeared in the *New Republic* of November 16, 1918. The culmination of this research work was 1920's *Freedom of Speech*, which sought to contextualize the novel abuses of the Espionage and Sedition Acts, the Palmer Raids, and the imprisonment and deportation of leftists within the contradictory history of First Amendment case law. In *Freedom of Speech*, Chafee pioneered an influential "public service" theory of the press. For the next twenty years, into and beyond the World War II Era, Chafee sought to make sense of the repressive turn of 1919 amid worries that the next war might further imperil free speech.[50]

Chafee's engagement with First Amendment questions brought him into close proximity with the history of state regulation of writing, a history that included a significant swath of modern intellectual property law's lineal ancestry.[51] In the years between the publication of *Freedom of Speech* and World War II, Chafee often went for long stretches

[49] Smith, *Zechariah Chafee*, 103.
[50] Smith, *Zechariah Chafee*, 44-49.
[51] See Susan Stewart, *Crimes of Writing Problems in the Containment of Representation* (New York: Oxford University Press, 1991).

without attending at all to First Amendment questions or the politics of cultural regulation. This is not to say that he was ever aloof from the broader issues at the heart of First Amendment jurisprudence. As was common in the heyday of Hooverian associationalism, Chafee spent considerable time serving on para-governmental bodies. Perhaps most influential upon Chafee's later work on IP and free speech was his service, from 1929 to 1931, on the National Commission on Law Enforcement and Observance (the Wickersham Commission), under the leadership of Chafee's mentor and dean, Roscoe Pound. Herbert Hoover convened the Wickersham Commission to investigate Prohibition-era crime. The task that most affected Chafee's development was the work of one subcommittee that investigated "lawless enforcement of the law," including, in particular, the use by police officers of the "third degree." The widespread defense of police torture and intimidation galled Chafee and strengthened his commitments to what would come to be called "human rights."[52]

Work on the Wickersham Commission brought Chafee into contact with Carl S. Stern and Walter H. Pollak, Jewish civil libertarians deeply involved with the ACLU. In the case of *Gitlow* (1925), Pollak had argued successfully before the Supreme Court that First Amendment speech and press guarantees protect against infringements by state and local governments (effecting, in other words, the final ratification of the Bill of Rights, in the arena of free speech). Intellectual intimacy with Stern and Pollak made Chafee acutely aware of the extreme character of restrictions of speech that remained in force, even after *Gitlow*: state-level statutes that called, for example, for suppression of all "malicious, scandalous, and defamatory" publications. Questions of definition and evaluation remained open. The "clear

[52] Smith, *Zechariah Chafee*, 10.

and present danger" test that Oliver Wendell Holmes, Jr. had devised for 1919's *Schenck* case tended to shed less light on these questions than was often assumed: how to measure the "tendency to incite" was left unaddressed by the Supreme Court. Intellectual property law was, similarly, increasingly concerned with the nature of expressive action, what John Dewey, in *Art and Experience* (1935), attempted to define as the "creative act." Did a propertizable work of art require the trace of a certain kind of aesthetic effort, different in kind from ordinary labor? It was in response to these dilemmas that Chafee turned to Holmes's theoretical solution, which held that the term "writings" protected by the Copyright Act encompasses any "new collocation" of semiotic materials solidified in some "permanent fixation."[53]

As Chafee began to write about the new capitalist culture and IP, his field of specialization was undergoing a profound transformation. By 1940-41, the Harvard Law School "Equity" course series was replaced by a single class; to be replaced by "Equitable Remedies and Unfair Competition." "Bills and Notes" was soon to be collapsed, along with "Sales," into a single "Commercial Law" class. Ultimately, Chafee's pedagogical specializations would disappear into the now familiar "Civil Procedure," "Contracts," and "Constitutional Law" classes. Harvard, Chafee lamented, had "thrown Equity to the wolves."[54] In the late 1940s, he began to work with the newly established United Nations (UN), serving as delegate to the 1948 UN Conference on Freedom of Information and the Press, and as a representative on the UN Subcommission on Freedom of Information and the Press from 1947 through 1951. In 1950, Harvard appointed Chafee University

[53] See Zechariah Chafee, Jr., "Reflections on the Law of Copyright: I" and "Reflections on the Law of Copyright: II, III."
[54] Smith, *Zechariah Chafee*, 171-72.

Professor, in part to offset his unhappiness at the loss of the "Equity" class, and Chafee began teaching Comparative Literature 181 (Legal Protection of Literature, Art, and Music), a course of his own design that reflects his continuing interest in the laws governing the culture industries.[55]

The Hutchins Commission

We recall from the Introduction to this dissertation that Chafee was a key member of the Hutchins Commission, a WW II-era study group on the mass media. Reading through Chafee's writings for the Hutchins Commission sometimes calls to mind an unlikely companion text: C. Wright Mills's essay on the "cultural apparatus." Like Chafee and the Hutchins Commission, Mills is concerned with the mediating role played by experts in the "management of symbols." The central problem of the "cultural apparatus," for Mills, was the problem of public access to reality, and the barriers presented by the capitalist communications industry. Like Chafee and the Hutchins Commission, Mills believes that the problem of the "cultural apparatus" hinged upon the fallibility of cultural workers: "our standards of credibility, our definitions of reality, our modes of sensibility—as well as our immediate opinions and images—are determined much less by any pristine experience than by our exposure to the output of the cultural apparatus." It should not be entirely surprising that there should be elective affinities linking Mills and the Hutchins Commission: at Columbia University in 1945, Mills worked as a researcher on several studies of the media initiated by Paul Lazarsfeld, and he was also affiliated with several projects on public

[55] Smith, *Zechariah Chafee*, 243.

opinion formation, including the landmark "Decatur study" on political influence and opinion leaders.[56]

In some ways, Mills even shares analytic concerns with Learned Hand's 2nd Circuit ruling in the *AP* case, cited by Chafee in *Free and Responsible Press*. There, Hand observes that the production of news is not entirely comparable to the "production of fungible goods, like steel, machinery, clothes, or the like." Instead, the news industry serves one of the most vital of all general interests: the "dissemination of news from as many different sources, and with as many different facets and colors as is possible."[57] Reading Chafee and Mills together allows us to highlight what was unique and novel about Mills' writings on the "cultural apparatus." This was not to be found in Mills's mapping of the new terrain of the postwar popular culture industry, nor in its perception of the political potential of cultural workers who were unionized, self-confident, expert in techniques of mass persuasion, and potentially available as allies in an international left. Chafee's worries about the implications of the Morris Watson case amply demonstrate the degree to which this perception was widely shared in the immediate postwar period.

Returning to *Associated Press v. NLRB (*the "Morris Watson Case")

In Chapter Five, we looked at the 1937 case of *Associated Press v. NLRB,* often referred to as the "Morris Watson case," as part of our discussion of the American Newspaper Guild (ANG), and we will return to it, briefly, here. Chafee recognized that this

[56] Kim Sawchuck, "The Cultural Apparatus: C. Wright Mills' Unfinished Work," *The American Sociologist*, Vol. 32, No. 1 (Spring, 2001), 31.
[57] Chafee, *GMC*, Vol. II, 555-56.

case crystallized a number of new issues for labor and First Amendment law that exceeded its more famous role as a piece of the Supreme Court decision that upheld the legality of the Wagner Act. To review the key details: Morris Watson was a journalist who worked for the Associated Press, and was fired on October 13, 1935, officially for poor performance, but most likely as retaliation for his participation in the early efforts of the ANG. Subsequently, the ANG filed a complaint with the National Labor Relations Board. In response, the NLRB held a series of hearings (which the Associated Press tried to forestall by means of injunction). In May of 1936, after the Associated Press refused to comply with NLRB orders to reinstate Watson, a petition for enforcement was filed in the Second Circuit Court of Appeals. In July, the Second Circuit ruled in Watson's favor. The Associated Press appealed, and the Supreme Court issued its ruling (as part of a series of five cases deciding the constitutionality of the Wagner Act) in April of 1937, upholding the Second Circuit ruling, siding with Watson and the ANG against the Associated Press.[58]

Associated Press v. NLRB was a product of fresh political developments, including the formation of the ANG, the passage of the Wagner Act in 1935, and the rise of the CIO. It was to such novelties that the pragmatist legal imagination was particularly attuned. For Chafee, the upshot of the Morris Watson case *Associated Press v. NLRB* was that the First Amendment did not prevent the Wagner Act from applying to the AP's wire service. A newspaper, in other words, has "no special immunity from general laws." This meant that "a newspaper must not discriminate against an employee because of union activities, and that it must bargain collectively with the Newspaper Guild."[59] Noting that while typographical workers had long been organized without raising First Amendment issues, Chafee describes

[58] Daniel J. Leab, *A Union of Individuals*, 277.
[59] Chafee, *GMC*, Vol. II, 509.

the "unionization of the men who write and edit the paper" as "quite a different matter."[60]

Mainstream legal thinkers worried that the Watson case gave editorial workers too much control of newspaper contents. "Hitherto, the control of the editorial and reportorial staff over what the newspaper says has been the subject, potentially at least, to the outside influence of the owners and sometimes of the advertisers," Chafee summarizes. Now, however, a "new outside influence" had entered the scene, in the form of the ANG, behind which lurked the CIO. "Both are strong," Chafee submits, "and may well grow stronger." Chafee accepts, in part, the view of the publishers that the ideological slant of the CIO represented a real threat to editorial independence and to the work culture of professional journalism. He contemplates whether the unionization of the editorial employees might serve to create salutary countervailing pressures, but worries that instead, "the staff may find themselves struggling in more cross-currents of opinion than ever."[61] Chafee worries about "the preservation of editorial and reportorial independence, uncontrolled by CIO influence," but concludes that it is too soon to attempt to solve this problem. A proper solution could only be achieved by the newspaper owners and Guild leaders working together with the NLRB, and there was little for courts to decide.

Like the publishers, Chafee exaggerates the extent to which collective bargaining was complicated by vertical organizing, lamenting the difficulties that followed when some employers were directly engaged in "communications, as reporters, editorial writers, etc.," while others were "occupied in manual labor from presswork to cleaning without contributing to what the newspaper says." He worried about the possibility that the editorial

[60] Chafee, *GMC*, Vol. II, 511.
[61] Chafee, *GMC*, Vol. II, 511.

employees' CIO locals would overwhelm the AFL typographical union shops.[62] Elsewhere, he expressed anxiety about the influence of the "policies of a single dominant union" affiliated with the "gigantic CIO."[63] He cited an interview with a managing editor of a newspaper who expressed sympathy with the ANG "as an economic organization" but opposed the transformation of the union into a "political weapon." While the editor did not object to the closed shop in other departments of the paper, he stressed that politics were "not irrelevant in writing news."[64] To substantiate this claim, he charged the ANG with consistently following the "Communist Party line," and cited the ANG's opposition to lend-lease, compulsory military service, and US entry into World War II, adding: "It would be just as wrong if they had taken the contrary position." The danger resided in control of every reporter, copy reader, and editor by a controlling organization. The editor suggested that fair coverage of an AFL convention by CIO-affiliated journalists might become impossible. Chafee notes that while such worries were commonly shared, no concrete examples of this "slanting of the news" were ever produced.[65]

Chafee balances such testimony with that provided by ANG-affiliated journalists, who reminded him that the routine "slanting" from newspaper owners seeking to protect their own financial interests or looking to spread their own political messages was far worse than any engendered by the ANG and CIO. "The significance of owner control doesn't lie in the number of times the owner interferes," Chafee summarized, but rather in those cases when the issue is "really vital to the owner." He mentions a 1924 purge by the Cleveland *Press* in which 85 out of 103 journalists were fired for supporting La Follette. Outright pressure might

[62]Chafee, *GMC*, Vol. II, 511-12.
[63]Chafee, *GMC*, Vol. II, 517.
[64] Chafee, *GMC*, Vol. II, 518.
[65] Chafee, *GMC*, Vol. II, 519.

not be needed in a highly competitive and cutthroat industry, with some journalists seeking to curry favor by anticipating the slant that the owners might prefer: the "menace of the sycophant."[66] In general, Chafee maintained an admirable openness to the cultural workerist discourse that saw the organization of newspaper professionals into trade unions as enhancing the delivery of the news. He cited one reporter who testified that reporting on labor news had improved as a result of journalists learning the ins and outs of organizing within the contest of the ANG: "I know that an individual who knows what he is talking about writes a better story than one who is sent out without any background for it."[67]

Chafee and IP Politics

At the same time, as we have also considered in an earlier chapter, cases involving popular bandleaders Paul Whiteman and Fred Waring were wending their ways through district courts. These legal contests would ultimately arrive at the Second Circuit Court docket of Chafee's friend Learned Hand, and form the basis for Hand's landmark decision in the 1939 case of *RCA v. Whiteman*. In his *RCA v. Whiteman* decision, Hand drew heavily on Chafee's article 1928 article "Equitable Servitude on Chattels."[68] The technical question at the center of *RCA v. Whiteman* concerned a sticker placed upon sound recordings that announced: "Not Licensed for Radio Broadcast." This sticker was a near-perfect example of what Chafee meant by "servitude on chattels": a restriction upon the rights of a property owner that was announced by the property itself (for example, in the warnings placed on

[66] Chafee, *GMC*, Vol. II, 520.
[67] Chafee, *GMC*, Vol. II, 523.
[68] Chafee, "Equitable Servitudes on Chattels" *Harvard Law Review*, Jun., 1928, Vol. 41, No. 8 (Jun., 1928).

electronic appliances restricting repairs to licensed specialists). Revisiting the case years later, Chafee commends Hand's refusal to ratify the lower court judge's ruling that the "Not Licensed for Radio Broadcast" stickers prevented radio stations from playing records over the airwaves.[69]

Chafee paid close attention to cases involving cultural workers and IP, and worked up many of his analyses in the two-part essay "Reflections on the Law of Copyright." In these essays, Chafee surveyed the thirty-five year stretch between the passage of the 1909 Copyright Act revisions and the end of World War II.[70] Chafee considered the "wide variations in the creative and industrial processes with which copyright law is concerned." There is a "vast difference between all the things which the statutory 'author' creates," ranging from Beethoven's *Kreutzer Sonata* to Tolstoy's *Kreutzer Sonata*. The means of infringement are similarly diverse: "printing, offsetting, stage performances, concerts, broadcasting, record-making."[71]

Chafee wrote of *RCA v. Whiteman* and *Waring v. WDAS* as proving that compulsory licensing—rather than restrictive stickers affixed to musical commodities—provided adequate protection against unfair competition. He commended the 1909 Copyright Act's innovation of requiring payment of an automatic two-cent "mechanical royalty" with every sale of a phonograph record, appreciating especially that this flat "mechanical royalty" is content-neutral, "the same for a 10-inch record as for a 12-inch, for an unaccompanied jazz-song as for a symphony with full orchestra."[72] Writing in a Holmesian key, Chafee

[69] Zechariah Chafee, Jr., "The Music Goes Round and Round: Equitable Servitudes and Chattels," *Harvard Law Review*, May, 1956, Vol. 69, No. 7
[70] Chafee, "Reflections on the Law of Copyright: I" and "Reflections on the Law of Copyright: II, III."
[71] Chafee, "Reflections on the Law of Copyright: I," 518.
[72] Chafee, "Reflections on the Law of Copyright: I," 515.

commended the law for recognizing that Toscanini and Benny Goodman alike possess "enough artistic skill to another's music to deserve recognition more than a commercial catalogue of lighting fixtures." Chafee celebrated the law's provision of some measure of legal protection to orchestral conductors, musical artists, and recording companies "in return for their notable contributions to our enjoyment of music," and declared as a fait accompli the increasing use of recordings by radio stations "because of the progress of electronics and the growing demand for good broadcast music."[73]

Chafee worried about overzealous prosecution of musical plagiarism, expressing particular concern about the fetters it might place on innovation: "Do we want Benny Goodman to say that another jazz orchestra is copying his new tricks with the clarinet?"[74] Chafee insisted that the encouragement of one author's "creativeness" must also facilitate the "creativeness of others."[75] In the field of music, the 1909 Act provides protection to "authorized arrangements of already copyrighted music," but requires a certain standard of independent effort, barring, for example, the copyrighting of new fingerings of music. Chafee invoked Judge Nelson's standard: a man who merely makes "additions and variations, which a writer of music with experience and skill might readily make" ought not be granted a monopoly. "There is an analogy to the rule which refuses to patent an improvement on an existing invention, if any good mechanic could think up the improvement."[76]

Chafee cautioned, however, that these "most pressing problems of artistic property" should not be left in "neglected confusion."[77] Such issues, Chafee proposed, ought to be

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[73] Chafee, "Reflections on the Law of Copyright: II, III," 737.
[74] This question might be profitably contemplated in tandem with Sianne Ngai's work on the "gimmick" and capitalist aesthetics. See Ngai, *Theory of the Gimmick: Aesthetic Judgment and Capitalist Form* (Cambridge: Harvard University Press, 2020).
[75] Chafee, "Reflections on the Law of Copyright: II, III," 736.
[76] Chafee, "Reflections on the Law of Copyright: I," 512.
[77] Chafee, "Reflections on the Law of Copyright: II, III," 737.

settled by a revision of the 1909 Copyright Act, a task that would not be completed until 1976. Chafee suggested that such a revision should be guided by the "essential principle" of "the author's right to control all the channels through which his work or any fragments of his work reach the market."[78] Here we see a consecration of the "corporate authorship" that had become dominant under the legal principle of "work-for-hire." If the authorship right is singular and indivisible, it cannot be shared between co-creators.

Chafee seemed to be deliberately skirting the question of contested authorship in collectively created works. What of the case of the author of the song upon which Benny Goodman improvises his new clarinet tricks? What of the instrumentalist hired by Goodman to pioneer their own techniques on a recording by Goodman's big band?[79] In any event, Chafee concluded, the contemporary situation had become hopelessly complicated. "In music," he observed, "the sheet-music publishers and the record companies are with the composers and performers; the broadcasters are with the public." Efforts to benefit readers and other consumers by limiting the monopoly enjoyed by authors or publishers might instead result in gains for juke box companies and pirating publishers and broadcasting companies. This situation had given rise to "unprecedented bloodthirstiness" in recent years as the conflicting interests had become "highly organized." "In short," he summarized, "everybody is organized except the readers and consumers, who have more at stake than anybody else."[80]

Chafee ended with a qualified defense of corporate authorship, reasoning that just as patent law presumes "an immense expenditure of money" to bring a product to market,

[78] Chafee, "Reflections on the Law of Copyright: I," 505.
[79] Chafee, "Reflections on the Law of Copyright: II, III," 734.
[80] Chafee, "Reflections on the Law of Copyright: I," 517.

copyright law gives "an indirect benefit to authors by enabling them to get royalties or to sell the manuscript outright for a higher price." Additionally, because "publishing is close to gambling," it is only equitable that publishers should obtain a return on their investments. It is only the "occasional killing" that "makes it possible for us to read a number of less popular but perhaps more valuable books."[81]

Chafee notes that there had recently been "considerable agitation for statutory recognition of these moral rights." Moral rights gave the author the power to preserve the integrity of his creation by preventing its appearance in garbled form. Such rights had becoming increasingly germane given the "inclination of Hollywood producers to take extensive liberties with the books and plays they have purchased has caused several indignant authors to long for this moral right." The key question was whether moral rights were deemed to be assignable and transferable: if the answer is in the affirmative, then the "Hollywood producer would always be sure to put a clause allowing unlimited adaptation into his contract, and we should be just where we are now."[82]

Chafee worried that disaster might be looming, if the rapid expansion of IP rights eventually brings the engine of American cultural innovation to a halt. New campaigns by cultural workers for European-style "moral rights" (or *droits d'auteur*) seemed to point to the revision of IP law in the direction of the eradication of all temporal limits on copyright, with IP rights imagined as lasting in perpetuity from the moment of creation until the end of time. Artistic progress would be stifled, Chafee warned, unless "some use of the contents" of existing texts was granted "in connection with the independent creation of other authors." Chafee is alarmed, in particular, by the "posthumous veto power" that the 1909 Copyright

[81] Chafee, "Reflections on the Law of Copyright: II, III," 721.
[82] Chafee, "Reflections on the Law of Copyright: II, III," 728.

Act had given to the surviving relatives of authors. The unpublished letters of James McNeill Whistler had been lost to the world "because his crabbed niece would not allow his chosen biographers to print them." Chafed invokes a hypothetical case: the discovery of a new Edgar Allen Poe manuscript, never seen by the American public because of the exercise of IP rights by Poe's descendants. Multiplied, such a scenario spelled disaster for national culture.[83]

In a second section of the essay, Chafee lamented that copyright's diversity of subject-matter produces difficulties that are not seen in patent law, which similarly encompasses a vast range of activities. "Music seems no more remote from a novel than the Bessemer process from the cotton-gin," Chafee mused. Why, then, did patent law encounter fewer philosophical difficulties than copyright law? Acknowledging that this is a "very puzzling question," Chafee offers as an explanation that patents cover inventions that are easier to describe in plain language than the works of art covered by copyright: "a radio station broadcasting a song does not look in the least like the composer putting notes on a sheet of music, and a phonograph record is different from both."[84]

This problem would become more urgent as technological innovations ushered in new forms of artistic creation over the coming decades. Would these new forms be amenable to the "pushing and squeezing" that allowed motion pictures to be analogized to photographs prior to revisions of the Copyright Act in 1912? At the time of the essay's writing, the Shotwell Bill had proposed the inclusion of architectural works under the umbrella of copyright, "insofar as they embody artistic character and are not processes or methods of construction," and to allow for the protection of dance, so long as the arrangements were fixed in writing. While this was a promising start, Chafee regretted that "phonograph records

[83] Chafee, "Reflections on the Law of Copyright: II, III," 726.
[84] Chafee, "Reflections on the Law of Copyright: I," 519.

of a great orchestra" remained outside of the penumbra of coverage, to say nothing of "new forms of artistic creation which we do not yet envisage," and worried that it would become impossible "for the law to keep pace with the resources of scientific invention and artistic imagination." New legislation would in time add "communication by wired or wireless-radio broadcasting, rebroadcasting, facsimile reproduction, telephony, television, or any other means of transmitting or communicating lines, words, points, images, or sounds."[85]

Chafee, Cultural Workers, and the McCarthy Era

As Chafee was working through the implications of the "vast increase in the pecuniary value of literary and artistic property" in the post-World War II Era, he was also deeply involved in the effort to mitigate the effects of the new Red Scare. Civil libertarians reflexively reached out to Chafee when drafting strategies to combat McCarthyism, given Chafee's experience defending the speech of radicals during the World War I and 1919. Chafee was also drawn to take a strong stand against McCarthyism because of personal connections to some of its most prominent victims. Alger Hiss was a former student of whom Chafee was particularly fond, as was Dean Acheson. Despite Chafee's concerns regarding the CIO influence in the ANG, he firmly resisted the entreaties of Cold Warriors like Arthur Schlesinger, Jr., and Morris Ernst, who had made a quick journey from Broun's legal consigliere to militant anti-communist and FBI informant, to join the Americans for Democratic Action. Chafee did legal work for the SWG as the ordeal of the Hollywood Ten was initiated, and he argued firmly that HUAC would "render the treatment of significant

[85] Chafee, "Reflections on the Law of Copyright: I," 522.

social and economic problems even rare and more timid than it is now." Additionally, he was among the signers of an unsuccessful 1950 amicus brief seeking Supreme Court review of two contempt citations of two screenwriters who had availed themselves of the Fifth Amendment during HUAC hearings. For such efforts, McCarthy added Chafee's name to one of his infamous lists, in this case a 1952 list of seven persons "dangerous to America."[86]

Chafee's refusal to adopt his peers' vulgar anti-communism did not automatically win him the respect of the left. Herbert Aptheker, writing a review of several new books on McCarthyism by liberal intellectuals for *Masses & Mainstream* in the early 1950s, ridiculed Chafee's forward to *The Loyalty of Free Men*, written by *Washington Post* editorial writer Alan Barth. Aptheker notes that Chafee is alone among the writers to mention "fascism," but points out that Chafee invokes it only to reassure the reader that it should not cause much worry. Chafee's resistance to anti-communism stems mostly from his pragmatic analysis of the limited power of domestic Communism, and not disagreement with authors like Barth, who sought to profit from sensationalizing the "Communist threat to freedom." Aptheker wrote that while none of the authors state clearly exactly who is attacking civil liberties, "all assume that the responsibility for the attack rests with the Communists who have, so far, been particularly attacked!"[87] In the absence of incisive critique, Chafee blamed World War II for afflicting the populace with the "mental pestilence of hatred and fear" and warned that the biggest danger to the United States was posed by "stuffed shirts" in positions of authority "who seek to fill every government office and every teaching position" with other "stuffed shirts." Chafee even proposed that in peacetime, rank-and-file Communists, after having been properly identified by the FBI, might be ordered to undergo psychiatric treatment to

[86] Smith, *Zechariah Chafee*, 262.
[87] Herbert Aptheker, "Civil Rights and the Liberals," *Masses & Mainstream*, 1952, 13.

free them from their red commitments. Chafee justified this by calling Communists "American problem children" who must be brought into "renewed communication with fellowmen." In wartime, however, Chafee affirmed the solutions favored by Nevada Senator Pat McCarran: imprisonment in camps until the end of the emergency. "It is a measure of the corrosive power of anti-Communism," Aptheker lamented, that, "once embraced, it leads a Professor Chafee, historian of the struggle for freedom of speech in the United States, to go along with the essential program of an arch enemy of free speech like McCarran."

Conclusion

Legal scholars are for the most part in agreement that it is impossible to say with any degree of certainty what the framers of the Constitution intended when they drafted the following phrase (now usually referred to as the Intellectual Property Clause) in 1787: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[88] As one early study of US copyright history observes, the Intellectual Property Clause is so general that it is impossible to infer any one theory of copyright alone from its language.[89] Whatever the motivations behind the decision to insert the modifier "useful" in front of the noun "Arts," the result was the consecration of a formula that would mock all attempts at synthesis.[90] It is useful to think with the tensions inherent in the phrase "useful arts" as we review the historical work we have attempted to carry out in the pages of this dissertation.

Writing in the 1910s, Ernst Bloch described the historical separation of the "useful" from the "Arts" in the seventeenth and eighteenth centuries as the birth moment of modern aesthetics. "The psycho-socially embedded difference between applied and pure, high art," Bloch observed, was "immediately defined by a changed angle of vision." Everything that was to be *used,* "everything that remains floor and armchair, that is occupied by an individual presently experiencing himself," would thereafter fall into the category of "craft." In contrast,

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[88] Oren Bracha, "Commentary on the Intellectual Property Constitutional Clause 1789", in *Primary Sources on Copyright (1450-1900),* eds L. Bently & M. Kretschmer, www.copyrighthistory.org (2008).
[89] See Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) supra note 45, at 192-94, 195
[90] The best historical guide to the somewhat mysterious process by which the Constitution's Intellectual Property Clause was drafted and ratified is Edward C. Walterscheid, "To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution" *J. Intell. Prop.* L. 1, Fall 1994, 2.

creations that directed the gaze skyward, that facilitated the "individual experiencing himself *symbolically*" would hence belong to the realm of "high art."[91] One thread that we have traced in this dissertation is the collapse of this distinction, particularly after 1900, when (per Bloch's friend Walter Benjamin): "technical reproduction had reached a standard that not only permitted it to reproduce all transmitted works of art and thus to cause the most profound change in their impact upon the public; it had also captured a place of its own among the artistic processes."[92]

Both parts of the phrase "the useful Arts" have been in considerable flux from the moment of the constitution's ratification to the present day. By tying the "useful Arts" to "artists and proprietors," the Founders anticipated a later-developing division of labor: between white-collar mental workers (those who qualify as "authors") and blue-collar manual laborers (those who do not). Alfred Marshall would later describe the split as one between the "hard-handed" and "soft-handed" industries.[93] For Victorian-era critics of capitalism, like William Morris, the more apt distinction was that between "brain-sick brain workers" and "heart-sick hand workers."[94] The only answer to this crisis seemed to be a return to an older mode of social organization and aesthetic consciousness. In the nineteenth and early twentieth centuries, many American intellectuals agreed.

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[91] Ernst Bloch, *The Spirit of Utopia*, tr. Anthony Nassar (Stanford: Stanford University Press, 2000), 16.
[92] Walter Benjamin, "The Work of Art in the Age of Mechanical Reproduction" in Clive Cazeaux, ed., *The Continental Aesthetics Reader* (London: Routledge, 2000), 324.
[93] Parenthetically, it is interesting to note that Marshall recommended the division of labor suggested by Giddings (*Political Science Quarterly*, Vol. II, pp. 69-71): "(i) automatic manual labour, including common labourers and machine tenders; (ii) responsible manual labour, including those who can be entrusted with some responsibility and labour of self-direction; (iii) automatic brain workers, such as book keepers, and (iv) responsible brain workers, including the superintendents and directors."
[94] William Morris, "How I Became a Socialist" (http://www.marxists.org/archive/morris/works/1894/hibs/hibs.htm)/ See also E.P. Thompson, *William Morris: Romantic to Revolutionary* (Oakland: PM Press, 2011); Eileen Boris, *Art and Labor: Ruskin, Morris, and the Craftsman Ideal in America* (Philadelphia: Temple University Press, 1988).

Few of the future technological developments that would come to characterize American cultural capitalism—the ever-changing complex of entertainments and diversions that generate profits for entrepreneurs via the organization of skilled aesthetic labor—could have been dreamed of when the Copyright Act of 1790 was drafted and signed. For a brief moment, the division of made things into products of the "mechanical" as opposed to the "useful" arts more or less tracked the organization of production. But by the turn of the nineteenth century, Romanticism would soon ratify a very different organizational matrix. "Art" emerged as an autonomous category of the object world. The rest of the more or less useful things that derived from the mixture of nature and labor now belonged to a different ontological order.

This tension—between "useful" and "arts," between "cultural" and "worker"—has been a central theme of this dissertation. As Douglas Wixson summarizes, the view of artistic creativity as a "specialized form of production" emerged at around the time of the Industrial Revolution, as "literature became a commodity created by professionals in a market arrangement between writer and public." Within the Romantic imagination, the artist was as a special kind of person, imbued with genius, while art itself was considered to be a "superior reality."[95] The emergence of the cultural worker, as we have seen, represented both a challenge to and an elaboration of this ideological certitude. To make sense of this history, we have sought for context the changing meaning of the "worker" over the course of the late nineteenth and twentieth centuries. The key category of "skilled worker" (into which most cultural workers have tended to fall) has been particularly volatile.[96] We have seen the

[95] Wixson, *Worker-Writer in America*, 356.
[96] Robert Zieger captures the situation: "The very meaning of the term skill fell into contention. Critics of census and union definitions argued that what was defined as skill had less to do with the inherent character of

importance, in different cases, of the fact that cultural workers have possessed a claim, however attenuated, to property rights in the products of their labor, and have thus functioned as exceptions to the rule within the capitalist mode of production. Marxist historians, in whose camp the author finds himself, typically chart a general process whereby workers in capitalism are denuded of all property, and are forced to sell to the capitalist their capacity to perform labor.[97] Within this pattern, skilled workers have often served as exceptions to the rule, able to maintain a variety of property rights past the point at which we must expect them to be lost. These have included the right to control over the work process, the right to own tools, and the right to organize hiring and professional stratification. We should read the history of the struggles of cultural workers for IP rights as continuous with this history of skilled workers' battles to preserve these limited forms of workplace sovereignty.[98]

In this dissertation we have also attempted to attend to the role played by commercial revolutions in music, film, and print in generating new categories of productive work.[99] The maturation of urban working class culture and advent of technologies of mass reproduction, in conjunction with the emergence of a variety of popular culture practices, produced armies of skilled workers whose economic function was to create or recreate cultural texts. Capitalist

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work than with who was doing it: when women or immigrants took over tasks earlier performed by men, taxonomists began to classify the work as un- or semiskilled. Was secretarial work, involving meticulous labor with state-of-the-art typewriters, calculating machines, and accounting and filing systems, less skilled than typography? And what of the skills of interpersonal discourse, human management, and personal appearance, increasingly at a premium in a society moving rapidly toward white collar employment? Even in the industrial sphere, it was unclear that the stereotypical picture of the sturdily republican craftsman was any closer to reality than the national myth of the yeoman farmer." Robert Zieger, *The CIO: 1933-1955* (Chapel Hill: The University of North Carolina Press, 1966), 8.

[97] Lebowitz, *Beyond Capital*, 5.

[98] Andrew Ross "Technology and Below-the-Line Labor in the Copyfight over Intellectual Property," *American Quarterly*, 58.3 (2006), 745.

[99] See Catherine Fisk "Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920" *Hastings Law Journal*, 52 L.J. 441, January 2001, "Credit Where It's Due: The Law and Norms of Attribution," and "Authors at Work: The Origins of the Work-for-Hire Doctrine," *Yale Journal of Law & the Humanities*, Winter 2003, 15 Yale J.L & Human. 1.

entrepreneurs seized upon the seemingly infinite number of "market opportunities for the commodification of both high and vernacular cultural works into mass reproduced products."[100] A host of new technologies created demand for what we would today call "content": scripts for radio and film, music for phonographs and radio broadcasts, performances for vaudeville shows and nightclubs, and copy for the growing field of advertising. These fields all built upon the legal foundations of the intellectual revolution that accompanied the rise of corporate capitalism in the late 19th century: the "corporate personhood" inscribed in post-*Santa Clara* 14th Amendment jurisprudence, the Gilded Age-era propertization of intangibles like corporate reputation, the growth of a futures market around the Chicago Stock Exchange, and the marginalist creation of the notion of "mental labor" to describe the value inputted by managers, engineers, and owners to the production process.

As the popular culture industries expanded their reach, cultural work began to figure centrally in mass fantasies about escape from the routine and spatial and temporal restrictions of the working day. The early comedies and melodramas of Hollywood's "dream factories" were often built around the travails of characters trying to break into, or employed by, the culture industries. In post-World War II popular culture, the worlds of acting, music, and professional sports have often been pictured as spaces of fantasy, with the new celebrities associated with these fields positioned as idols who are admired as much for their freedom from a 9-to-5 grind as for their glamour and personal fortunes. Such fantasy constellations serve obvious ideological purposes, and also obscure the reality of cultural work, which has tended to be as grueling and precarious as any other forms of skilled labor. At the same time,

[100] Michael Denning, *The Cultural Front*, 42.

the culture of celebrity worship also speaks to widespread worker dissatisfaction and proletarian dreams for more free time and the resources with which to live a creative life.

The Mute Piano

In the *Grundrisse*, Marx finds himself evaluating the claims to productivity of cultural workers. The piano maker, he concedes, might be a productive worker, but the piano player was not, even though the piano would be "absurd" in the latter's absence. The pianist's labor might produce something, Marx concedes, but not enough to make it productive in the economic sense: "no more than the labor of the madman who produces delusions is productive."[101] Raymond Williams discusses this passage in his classic essay, "Base and Superstructure in Marxist Cultural Theory."[102] He points that Marx's tendency to associate productive labor with heavy industry reflected certain dimensions of the capitalist mode of production as it existed during his lifetime, and describes this passage from the *Grundrisse* as an analytical "dead end," especially as applied to the economics of modern cultural activity.[103]

In many ways, this dissertation has been an exercise in thinking through the implications of Williams's critique of Marx regarding the productivity of piano makers and piano players. As Williams observes, Marx is here thinking about the political economy in a relatively conventional way, and in fact in a way much less dialectical than is typical in his

[101] Karl Marx, *Grundrisse*, 305.
[102] Raymond Williams, "Base and Superstructure in Marxist Theory," *New Left Review* I/82, November-December 1973. The passage from Marx is in Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (New York: Vintage Books, 1973), 305.
[103] Raymond Williams, "Base and Superstructure in Marxist Theory," 6.

writings. An interesting counter-argument drafted by John Bates Clark in 1887, which might have been written as a response to Marx (had the *Grundrisse* been available to read by an American economist in the 1880s), suggests a different way to resolve the dilemma of the cultural worker's productivity. We looked at this passage in Chapter One, and it is useful to return to it here. Recall that Clark complains of the narrowness of his fellow economists' "conception of wealth." Insisting upon "the pernicious classification of labor as productive and unproductive," economists frequently excluded from the ranks of "productive labor" such persons as "the actor, the musical performer, the public declaimer or reciter, and the showman."[104] Playing music, Clark observes, is a service, and every service consists of an "effort" and a "gratification." The "artisan's effort" gives pleasure to the viewer or listener "only through the medium of the commodity which he produces." In and of itself, effort is "irksome to the laborer," and we would not want to witness effort, "without outward results." The piano player pounding on a mute instrument would indeed be an "unproductive laborer." But because piano players do not play on mute instruments, their palpable affective displeasure is "counterbalanced" by the "objective effect": the musical sound.

Underlining this conclusion, Clark proposes: "Let an accomplished pianist advertise a concert on one of Mr. Petersilea's mute piano-fortes, and promise to display a large amount of effort; how many tickets, at a dollar each, would he probably sell?" Clark here refers to the American piano prodigy, educator, and New England Conservatory of Music co-founder Professor Carlyle Petersilea (1844-1902), who experimented for many years with the

[104] John Bates Clark, *The Philosophy of Wealth*, Boston: Ginn and Company, 1903 [1887], 2-3. The prime target here is John Stuart Mill. Clark writes further: "The prevalent theory of value started with a misconception of utility, and of the part which it plays in exchanges. Economic science, in general, *found no adequate place for the intellectual activities of men*, and made no important use of the fact that society is an organism, to be treated as a unit in the discussion of many processes affecting wealth…"

development of various models of muted pianos for practice. [105] Continuing with another thought experiment, Clark imagines a "voiceless speaker" attempting to entertain an audience. In both cases, nothing would be missing but sound: that "tenuous outward product." Clark describes as a "mark of progressing civilization" the passage from physical to immaterial labor, and hails as a mark of "intellectual sovereignty" the impression made by the thought of man on vibrating air or carried by electricity to remote regions.

We have explored many of the uglier dimensions of the progressive frameworks upon which a thinker like Clark relied, but we should not therefore dismiss his proposal that the "more ethereal products of human effort" are the characteristic forms of wealth of a "highly organized society."[106] What we are suggesting, in other words, is that Clark might well have been a prophetic observer of shifts within capitalism itself. The United States in the late 1880s was not, after all, England in the 1850s (or the 1830s, which was when Nassau Senior, Marx's sparring partner in that passage from the *Grundrisse*, was writing). The economic order underwent rapid alterations at the level of its fundamental operating system in the 1870s and 1880s, with the rise of the corporation, multiple revolutions in transportation and the technology of electrification, the reorganization of factory work, the emergence of consumer culture in the rich countries of the West, and the intensification of imperialist hyper-exploitation in the Global South.

What Clark is here trying to identify and isolate, by highlighting the negative sonic space or difference that distinguishes the player of the mute piano and the unmuted one, is the newfangled value of fleeting and durational sound produced by the cultural worker who tickles the ivories. We have seen each of the thinkers whose writings we have discussed in

[105] See "Prof. Carlyle Petersilea Dead," New York *Times*, Jun 14, 1903, 8.
[106] John Bates Clark, *The Philosophy of Wealth*, 9.

this dissertation pose the same question, from the contemplation of the productivity of new forms of aesthetic labor contemplated by Eaton Drone, George Haven Putnam, and Oliver Wendell Holmes, Jr., to James Weldon Johnson's narrator in the *Autobiography of an Ex-Colored Man*; from the theorists of proletarian culture and its veneration of novel "technique" studied by Joseph Freeman and John Howard Lawson, to the new cultural workers' labor unions like the SWG and ANG that would structure their campaigns around an insistence upon the "value incommensurability" of creative labor as a justification for the inclusion of authorship and attribution rights in the contracts for which they bargained; and from the Hutchins Commission to C. Wright Mills to Harold Cruse, we have seen how the mysterious values generated by aesthetic production could fuel both paranoid fantasies of mass media as an apparatus of propaganda and malign influence to new emancipatory visions of cultural workers' control of the mediatic apparatus.

Throughout, our goal has been to attend to this history by dramatizing conflicts over terminology and definition rather than accepting as given the binary oppositions of "art" and "craft," "intellectual" activity and mass culture, "commitment" vs. "autonomy," the "aesthetic" realm versus the vulgarity of the shop floor. Within the broad sweep of radical thought in the modern US, the norm has been vigorous debate regarding the tensions these oppositions attempt to capture. That this has often been obscured may be chalked up to a certain well-established anti-intellectual strain in the liberal historiography of the US left. At the same time, a certain overinvestment in the recovery of lost strains of leftism (and a focus on reclaiming victories in the name of a "useable past") has sometimes led to the suppression, within the historiographical record, of the vigorous disagreements and frequent disappointments of those who struggled to create a new world in the shell of the old. Many of

the left participants in the debates about cultural work really did disagree with—and sometimes hated—one another. If we are to come to terms sensibly with our relationship to their contribution to the tradition of the left in the US, we should proceed by taking seriously their orientation towards intellectual battle as constitutive praxis. I have tried to dwell on some moments in which intellectuals have envisioned cultural work as a component of an emancipatory project aimed at averting the multiple disasters of modernity. That many of the people studied here achieved much less than that reflects above all the ferocity and tenacity of the forces that worked to usher in the arrival of those disasters.

But historical hindsight also does help us to appreciate that the temporary worlds created by committed cultural workers really did provide practitioners and audiences opportunities for collective enjoyment, for the formation of community, for mutual education and study, for artistic innovation, for the provision of pleasure, for the maintenance of meaningful traditions of resistance, for relief from the degradation and cruelty of the world, and for the calling into creation of new publics. Above all, they insisted, and continue to insist, that one cannot live on bread alone. "Brains, Incorporated," the title of this dissertation, contains a dialectical double-meaning. C. Wright Mills coined it as part of his fusillade against the bureaucratic monoculture of the Eisenhower era, but came to see the "cultural apparatus" ("Brains, Incorporated" by another name) as a possible nucleus upon which a New Left might emerge to combat the nation's addictions to "crackpot realism": its supercharged militarism, cultish authoritarianism, and crass materialism. Mills's wager strikes us, still, as one worth taking.

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