Response

Heuristic Interventions in the Study of Intellectual Property

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Professor Dan Burk offers many challenges to the study of patents and patent law in his Article *On the Sociology of Patenting*.[1] Burk's Article is itself a response to Professor Mark Lemley's Article *Faith-Based Intellectual Property*. Lemley's Article critiques as irrational (e.g., based on a leap of faith) continued adherence to intellectual property law as necessary to incentivize production and dissemination of innovative or creative work given substantial evidence to the contrary.[2] Lemley's second critique—that deontological justifications for intellectual property are insufficient to plug the hole created by empirical evidence that weakens the utilitarian incentive justification—similarly derides non-utilitarian justifications as "faith-based" because they too are inconsistent with evidence-based law and policy.[3] In *On the Sociology of Patenting*, Burk, a long-time colleague, collaborator, and friend of Lemley, explains how faith-based explanations for the durability and productivity of innovative organizations are well understood in sociology and are not irrational but instead explain long-standing social and political systems.[4] To make his argument, Burk draws from the "new institutional" sociology. His elaboration of new institutionalism in light of patent law and practice exemplifies the value of interdisciplinary scholarship. His analysis turns inside-out a well-understood area of intellectual property law (pa-

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    1.   Dan Burk, *On the Sociology of Patenting*, 101 MINN. L. REV. 421 (2016).
    2.   Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1334–36 (2015).
    3.   *Id.* at 1336–37.
    4.   Burk, *supra* note 1, at 428–29.

tent doctrine) and demonstrates how this approach's applica-
tion and instantiation in organizations (such as universities
and firms) can be understood as a matter of institutional prag-
matic functioning and resilience, rather than a matter of asset
accumulation and opportunities for licensing revenue.[5] What
Lemley derides as "faith-based" through a framework of the
economic analysis of law, Burk demonstrates as cogent and
substantiated across diverse organizational models through a
new institutionalist sociology framework.

In this Essay, I elaborate three of Burk's challenges to
Lemley's critique—what I am calling "heuristic interven-
tions"—to underscore and explain their importance for study-
ing law generally and intellectual property law specifically. I
note at the outset that my contribution below is unoriginal as it
derives from the social sciences of sociology and anthropology,
and to some extent also from critical literary theory. But my
proffered heuristic interventions remain largely original to the
study of law within law schools and traditional legal scholar-
ship (as opposed to the study of law from within the social sci-
ences and humanities). That is part of what makes Burk's Arti-
cle so important: he joins a small but growing group of legal
scholars (many of which he refers to in the Article) reaching
beyond legal doctrinal analysis and the economic analysis of
law to explain intellectual property law as a *social practice*. In
this way, his Article demonstrates an understanding of law (not
only intellectual property or patent law) as a social practice
both reflecting and forming social structures, the understand-
ing of which requires more than the analysis of statutes, cases,
administrative filings, and economic models. To be sure, under-
standing intellectual property law (or law itself) as a set of so-
cial practices and not as a set of rules with straightforward ap-
plications and predictable outcomes complicates the ways in
which lawyers and legal scholars can be helpful explicating
statutes and cases in particular circumstances. But it is beyond
question—unless the social sciences and their study of law and
socio-political institutions are to be ignored entirely—that the
law lawyers and legal scholars explain exists among people and
within organizations, themselves complex and dynamic, and
that those relationships and organizations must be understood
for the law they refashion through their actions to be compre-
hensible.

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5. *Id.* at 427–36.

I. INDIVIDUALS VERSUS INSTITUTIONS

When we study law, we rarely spend much time studying the actual law itself—the statute's words or its drafting history (although certainly there is robust scholarship relying on this method, constitutional law in particular).[6] Typically, we state the law, whatever we know about its history and justification based on evidence on which we are comfortable relying, and then we move on to describe and analyze the law's application in various circumstances. The law's applications are moving targets because the data we collect concerning those applications rapidly accumulates through the ongoing diverse, varied, and complex transactions from which the data emerge. Thus the "law" we typically study is not isolated or individualized (like a phrase or a sentence) but connected and structured (like a winding conversation or a bildungsroman). When we study law, we are studying human transactions and relationships as well as the institutional mechanisms that shape both the products and processes of social action.

This means that Burk's shift from studying the individual (a patentee or a patent) to the institution (a company or a university and their innovative activities) is critical for understanding patent law in practice.[7] Because the unit of measurement for knowing the "law" is never only the language of the statute but also its instantiation in practice over time—and not just the aggregate of those instantiations, either, as behavior cannot magically and arithmetically sum to an incontrovertible conclusion. The unit of measurement to understand patent law is not the individual patentee (and her motives or incentives) but the collection of experiences and behaviors that revolves around the patent process and the use of patents. Burk emphasizes this shift throughout the Article, but let me join him to explain further this shift from the individual to the institution, highlighting the shift from micro- to meso-levels of analysis as one of the "heuristic interventions" central to this Essay's point.[8]

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6. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT AND JUDICIAL REVIEW (1999).

7. Burk, *supra* note 1, at 430.

8. *See* George Ritzer, *Micro-Macro Linkage in Sociological Theory: Applying a Metatheoretical Tool*, *in* FRONTIERS OF SOCIAL THEORY: THE NEW SYNTHESES 347, 347–70 (George Ritzer ed., 1990) (explaining theoretical and analytical movement between micro foundations versus macro properties of societal systems as the basis of late-twentieth century development in socio-

By locating an understanding of patent law within organizations and among types of institutions, Burk rejects the "Chicago school" economic model that tends to rely on rational actors that "behave in predictable, strategic way[s] to further their material interests."[9] Because most patenting occurs within organizations, many of them large or aspiring to grow, basing an understanding of how patents function on individual behavior rather than organizational action is flawed. Moreover, as Burk explains, organizations are not simply the sums of individual motives or behaviors. As he writes of new institutionalism, it explains how "organizations make decisions, not necessarily to solve existing problems or to further functional needs, but out of the convergence of opportunity, strategic interests, and internal and external influences . . . [the analyses of which] observe uncertainty rather than rationality leading to the decisions, and just as often observe it leading to non-decisions or failures to act."[10] Burk explains how new institutionalists study organizations by observing and describing the routines of organizations that can produce stability and legitimacy, which are produced both endogenously and exogenously, sometimes by law and often by forms of professional expertise and culture. Critically examining the organizational structure and routines, as well as their adaptations and responses within the professional and local culture, reorients the study of innovation (as represented by patents or patenting) from the perspective of "do patents help or hurt innovation" to "how do organizations enforce or adapt patenting and patents as a feature of their structure and practice?"

Burk embraces this reformulated question to investigate patents and patenting within organizations as "symbolic practices that communicate legitimacy," a kind of "ceremonial function[] intended to demonstrate the organization's acceptance and adoption of external values" whether or not it produces revenue from licensing and indeed even when it costs more than it produces.[11] He points to the university technology li-

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logical theory); Diane Vaughan, *Beyond Macro- and Micro-Levels of Analysis, Organizations, and the Cultural Fix*, *in* INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME 3, 3–24 (Henry N. Pontell & Gilbert Geis eds., 2007) (explaining the theoretical integration of micro- to meso-levels of analysis in social science studies of crime to attain sufficient rigor and explanatory power as a scientific theory).

9.   Burk, *supra* note 1, at 425.

10.   *Id.* at 433.

11.   *Id.* at 434.

censing office as one such institutional structure performing this role,[12] and outside the patenting space, he describes the physician's white coat and stethoscope similarly enacting institutional and professional authority.[13] Studying patenting by empirically observing its generation, circulation, and discourse helps answer some of patent law's enduring puzzles, which Lemley contemplates as "faith-based" but Burk reveals through a lens of new institutionalism to be "rational" after all, just not based on the neo-classical economic model of efficiency and wealth-maximization. And here I would push Burk's heuristic intervention and offer a friendly amendment.

Burk describes the oft-observed "loose coupling" between "functional" structures of institutions and their "mythical" structures as a kind of strong bond sustaining both particular organizations and an institutional field's very existence.[14] Burk adopts the new institutionalists' descriptions of "myths" as a kind of script, not fantastical or false, but which "designate[s] pervasive social understandings or ideologies that bind communities together."[15] But when explaining patenting practice in terms of new institutionalism, Burk's designation of myths as "ceremonial" in contrast to "core functions" as a way of adopting the institutionalists' framework[16] unduly prioritizes the value of "function" as the preferred utilitarian goal (as if "core function" is self-evident and independent of other aspects of the institution).[17] Whether or not Burk (or the institutionalists for that matter) intends such a hierarchy, there is no need to imply rankings of "myths" or "scripts" and "core function."[18] For one,

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12. *Id.* at 445; *see also* Jason Owens Smith, *Dockets, Deals, and Sagas: Commensuration and the Rationalization of Experience in University Licensing*, 35 SOC. STUD. SCI. 69 (2005).

13. Burk, *supra* note 1, at 429–30.

14. *Id.* at 436–38.

15. *Id.* at 429.

16. *Id.* at 436–37.

17. *See, e.g.*, JEFFREY PFEFFER, NEW DIRECTIONS FOR ORGANIZATIONAL THEORY: PROBLEMS AND PROSPECTS 7–8 (1997) (describing canonical examples in social sciences of organizations reorienting themselves around new or multiple goals to survive, such as the March of Dimes and the Interstate Commerce Commission (ICC)).

18. To be sure, myths and scripts are also different kinds of available accounts of society. Scripts are a generic set of available linguistic and behavioral resources, and myths are scripts that are understood to be empirically untrue but nonetheless persuasive. *See, e.g.*, Kathryn Ryan, *The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape*, 65 SEX ROLES, 774–82 (2011).

doing so subverts the very project of a social science framework that explains the systemic relationships among semiotic resources (language and culture) and material resources (bodies, buildings, and tools) as inextricably intertwined and recursively related.[19] For another, it weakens one of Burk's critical contributions to the study of intellectual property, which is that narrative (in mythic or script form) and the way situations, relationships, and action are explained within institutions and among groups of people (e.g., made sense of through language) are essential both to the legitimacy and the sustainability of human organization.[20]

Burk does not resist trumpeting the power of narrative—he is a champion of the study of narrative theory and intellectual property[21]—but in this important Article sometimes narrative appears as a ruse (a forceful one, but still a ruse). I would emphasize instead, as Burk does at other times in his Article, that the capacity of malleable and polyvalent narratives to bind diverse constituents around sometimes conflicting and opposing interests demonstrates narrative's elemental and essential properties for understanding social organizations and their capacity for stability and change. As much as organizations need shared narratives to cohere, produce, or sustain social order,[22] narratives can sustain and produce multiple sub-narratives, buoying dimensions of institutions and thus making them more durable and open to evolution.[23] Narratives exist as a produc-

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19. ANTHONY GIDDENS, 1 A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM: POWER, PROPERTY AND THE STATE 27 (1981) (describing structure as "both the medium and the outcome of the practices that constitute social systems"); William Sewell, *A Theory of Structure*: *Duality, Agency, and Transformation*, 98 AM. J. SOC. 1, 4 (1992) ("Structures shape people's practices, but it is also people's practices that constitute and reproduce structures. In this view of things, human agency and structure, far from being opposed, in fact presuppose each other."). For a similar analysis in linguistics and discourse theory, see FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds., Roy Harris trans., Open Court Publ'g Co. 1986).

20. Burk, *supra* note 1, at 441.

21. *See, e.g.*, Dan L. Burk & Jessica Reyman, *Patents as Genre: A Prospectus*, 26 LAW & LITERATURE 163 (2014).

22. Burk, *supra* note 1, at 434.

23. Patricia Ewick & Susan Silbey, *Subversive Stories and Hegemonic Tales*, 29 L. & SOC'Y REV. 197 (1995); *see also* ROSS CHAMBERS, STORY AND SITUATION: NARRATIVE SEDUCTION AND THE POWER OF FICTION 212–13 (1984); David M. Engel, *Origin Myths: Narratives of Authority, Resistance, Disability, and Law*, 27 L. & SOC'Y REV. 785, 789 (1993) ("The role of narrative in constructing concepts of self and society has become clear in a multitude of stud-

tion of and as producing social interaction; there is no opposition of narrative and action. And thus, because the study of narrative (e.g., as "myths" or "scripts") presupposes relationships among people as the starting place for understanding and explaining society, like new institutionalism, narrative theory as a form of social theory rejects individuals as the relevant unit of measurement and instead focuses on the institutional discourse that materializes in human relations.

Indeed, the study of narrative and discourse as ways of understanding the structures of social and political relationships is a robust field in both the social sciences and the humanities. Narrative forms both the data and the explanatory tool of many social science and humanities investigations, and thus narrative's centrality, complexity, and breadth of utility should not be underestimated. It is an enactment of culture of which the law is a part. And in addition to observational ethnography as one sociological method, case studies and qualitative empirical research of varied forms draw their explanatory force from studying language and meanings produced through its use. Studying the role of patents through the framework of new institutionalism in sociology is a middle framework that importantly shifts the investigation about patent law from individuals to institutions. Not to be overlooked, however, is that this heuristic adaptation is built upon an understanding of narrative analysis as a foundation of the study of law and society.[24]

II. CAUSATION VERSUS EXPLANATION

Once we reject or modify the "rational individual" as the relevant unit of measurement to study whether patents work in the way we thought, the next set of questions arises: What do we study? And how? And what kind of knowledge is produced through different conceptual framings and empirical methods? In much social science research, of which the study of law is a part, the knowledge produced takes the form of explanations rather than causation per se. This contrasts starkly with the kinds of questions and answers that so much empirical intellectual property research produces, such as whether "patents cause (incentivize) innovation" or "piracy causes (disincentiv-

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ies, including those addressing a broad range of law-related issues such as race, gender, community, and the practice of law." (citations omitted)).

24. For a classic essay on discourse and the production of knowledge, see Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28 (1987).

izes) investment in production and dissemination of copyright-ed work." So instead of using an experimental design, with all the assumptions and constants required, to observe how a particular lever A causes behavior B, qualitative empirical work in the social sciences (and to some extent the humanities) takes another route to understanding social action by investigating accounts and activities within particular contexts to render a comprehensive explanation of them.[25] As mentioned above, this demands zooming out from the individual as the relevant unit of investigation (and the aggregate of individual action as a proxy for group behavior and preferences) to focus instead on social structure, institutions, and relationships among people and organizations. Explanations of these situations, taking into consideration the systems, institutions, and material structures in place, can identify commonalities, variations, and hypothesized contingencies that may be both further explained and validated within extended theoretical frameworks as well as tested with appropriate quantitative analyses.

Charles Ragin, a leading sociologist and scholar of research methods, writes that "social researchers seek to identify order and regularity in the complexity of social life; they try to make sense of it. . . . When they [describe] society—how people do or refuse to do things together—they describe whatever order they have found."[26] He goes on to say that "[a]nother fundamental goal exists for many social scientists: to generate knowledge with the potential to transform society. These social scientists conduct research with the hopes that their findings will lead directly to social change."[27] Importantly, social scientists test the accounts and explanations they generate to determine if the

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25. CHARLES RAGIN & LISA AMOROSO, CONSTRUCTING SOCIAL RESEARCH 7–8 (2d ed. 2011). This is not to ignore the important and foundational work looking for "mechanisms" as a more complex form of interactive causality. *See* DANIEL LITTLE, VARIETIES OF SOCIAL EXPLANATIONS: AN INTRODUCTION TO THE PHILOSOPHY OF SCIENCE (1991); Daniel Little, *Causal Mechanisms in the Social Realm*, *in* CAUSALITY IN THE SCIENCES 273, 273–95 (Phyllis McKay Illari et al. eds., 2011). Rather, it acknowledges that the more typical experimental design seen in legal scholarship in particular identifies but-for causation with problems such as that it (1) often limits greatly the ability to generalize; (2) usually observes only probabilistic outcomes within large populations; and (3) produces only aggregate probabilities within large populations rather than predictions or explanations for any individual's action. In other words, this kind of question and answer is so greatly simplified and abstracted to be helpful as an explanatory tool.

26. RAGIN & AMOROSO, *supra* note 25, at 33.

27. *Id.*

explanations can produce effective interventions that both impact our understandings and affect change we would like to see:

> One of the primary goals of social research is to improve and expand the pool of ideas known as social theory by testing their implications . . . and to refine their power to explain. . . . Hypotheses are derived from theories and their implications and then tested with data that bear directly on the hypothesis.[28]

With respect to qualitative field work, where the researcher is both the instrument of data collection and the analyst, repeated studies and collaborative projects create the opportunity "to produce similar data from multiple observers and to produce consensually agreed upon, corroborated interpretations and theoretical explanations of a site, person, or process."[29] This process strengthens or validates what might otherwise appear to be more particular rather than general theories about social action and organization.[30]

Burk argues that the theory of "loose coupling" within the field of new institutionalist sociology can explain how patents function to maintain an organization's legitimacy and stability separate from (and sometimes despite the lack of) wealth accumulation through patent licensing. "The new institutionalist inquiry is not whether a given activity optimizes either personal or social welfare"—a distinctly causal, individualist, and economistic inquiry—but "whether there is an acceptable legitimizing explanation for the activity. The explanation offered for a given behavior [such as patenting] may well be the purported optimization of personal or social welfare"—one half of the coupling—"but it is the *acceptability of the story, rather than its objective effect*, that is important."[31] Burk continues:

> As the literature on loose coupling suggests, social imperatives and efficiency may conflict with one another, dictating opposing organizational structures and incompatible resource allocation. An organization that is wholly indifferent to the efficiency of its functions is likely not long for this world, but it seems nonetheless clear that a highly efficient organization that lacks the trust and approval of its associated constituencies is also not long for this world. At the same time, highly inefficient organizations that have gained social respect and validation may endure a very long time indeed. Indeed, the framework of

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28. *Id.* at 39.
29. Joelle Evans et al., *Accounting for Accounts: Crafting Ethnographic Validity Through Team Ethnography*, *in* HANDBOOK OF QUALITATIVE ORGANIZATIONAL RESEARCH: INNOVATIVE PATHWAYS AND METHODS 143, 145 (Kimberly D. Elsbach & Roderick M. Kramer eds., 2016).
30. *See id.* at 145–46.
31. Burk, *supra* note 1, at 439 (emphasis added).

> institutional legitimacy offers a plausible theory as to the survival of
> any number of inefficient political, social and business organizations
> that would otherwise be expected to have failed and disappeared long
> ago.[32]

In other words, Burk says, it is more important for the organization's own sustainability that an organization act as though patenting improves welfare, whether or not it in fact does so. This is a theory worthy of testing in the context of firms and organizations that pursue patenting strategies, which, if corroborated in various circumstances and across relevant variations in contexts both descriptively and as a matter of interpretation, would significantly change our understanding of "what patents are for" and "how they work" within large parts of society. Hardly "faith-based," the explanation of what patents do and how they do it would be explained and grounded in factually specific contexts and generalizable conditions.

Burk's forceful reorienting of patent practice within a particular sociological framework could go further to explain and defend the social science research method and its potential to help those of us engaging in legal research and practice who also seek social change. First, Burk could more explicitly defend social science as empirical, which it is. The explanatory force of "loose coupling" is no less empirical or evidence-based than analyses measuring and calibrating patents, lawsuits, earnings, and costs of patent-holders across time or within particular sectors. Indeed, these quantitative measures may tell us nothing if we do not first understand through qualitative investigations what the values being measured mean to the actors engaging with them or whether we are measuring the most relevant values at all. Descriptive and thereafter interpretive accounts of organizational behavior based on observations, interviews, case studies, and historical studies can be corroborated and verified through transparent representation of their methods and evidence.[33] Moreover, relevant interpretative accounts must make sense both to the actors and organizations being studied and to the audience of the research.[34] This is what makes qualitative empirical work so powerful. If the researcher has "provided sufficient evidence to substantiate her claim or

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32. *Id.* at 440.

33. Evans et al., *supra* note 30, at 145.

34. *Id.* ("Interpretive validity seeks to capture the participants' perspective, providing an account in emic (actors' rather than theoretical—etic) terms.").

interpretation of what the events and actions *signify to the actors*" as well as to the research audience, she can move to a more abstract account that explains the circumstances within a broader, theoretical framework that may be generalizable across contexts.[35] The explanatory power of social science research done this way exemplifies the best empirical studies and its paradigm-shifting potential for both policy and our understanding of society.

Notably, Burk's response to Lemley's *Faith-Based Intellectual Property* incorporates too much of the language of the Lemley's critique—"faith," "myth," and "rational"—to effectively subvert the implications of these terms. Lemley appears to mean by "faith" the belief that patents generate wealth through licensing revenue (or to protect investments) absent supporting empirical evidence. But generating licensing revenue is only one particular way that patents may work. (To be sure, intellectual property law formally says that patents should generate revenue, but just because the formal law says "A should accomplish B" says nothing about whether it will or does.) Burk shows that patents may function well in other ways, not directly or indirectly to generate wealth but, for example, as an institutional practice helping to sustain an organization's identity and legitimacy by appearing committed to research and innovation. And so if I were to nudge Burk, it would be to use the terms "myth" and "faith" not in opposition to "rational," "function," or "efficient" but instead as more explicitly measurable, impactful, and material constructs that, like money or wealth, can be examined and analyzed for their influence, transactional opportunities, and networked pathways as related to law's objects.[36] Doing so will avoid analyzing institutional situations in terms of intentionality or motive, false consciousness or mistake, which are all concepts that rest on false binaries and oversimplified categories, to say nothing of the presumption of a mind, which institutions do not have. Instead, analysis of an institution or context proceeds in terms of myths as *discursive and material constraints* and of ceremonies as *norms and prac-*

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35. "Theoretical validity thus refers to an account's validity as a theory of some phenomenon." Joseph Maxwell, *Understanding and Validity in Qualitative Research*, 62 HARV. EDUC. REV. 279 (1992). More colloquially, we can ask: "What is this an example of and to what other examples should we compare it?" Evans et al., *supra* note 30, at 146.

36. *See, e.g.*, VIVIANA ZELIZER, THE SOCIAL MEANING OF MONEY: PIN MONEY, PAYCHECKS, POOR RELIEF AND OTHER CURRENCIES (1997).

tices with imbedded values, which should be understood as *cultural and political resources* distributed according to identifiable patterns among constituents.

A virtue of this kind of research—factually and contextually grounded, focusing on institutions and relations, describing the complexity of dynamic situations by attending to discursive and material reality, constraints and resources, rather than any one causal lever—is that it promises an explanation of both structure and change.[37] As William Sewell writes:

> Structures shape people's practices, but it is also people's practices that constitute (and reproduce) structures. In this view of things, human agency and structure, far from being opposed, in fact presuppose each other. . . . [And] those agents . . . capable of putting their structurally formed capacities to work in creative or innovative ways . . . may have the consequence of transforming the very structures that gave them the capacity to act. Dual structures therefore are potentially mutable.[38]

Burk's explanation of new institutionalism's relevance for patent law does not explicitly go this far, but he lays the groundwork for it. He gestures in this direction toward the end of his Article when he provides examples of "bottom up" or "endogenous" institutional additions to patent law reflected in professional routines and habits of the field.[39] Insofar as Burk seeks to account for practices that may disrupt the dominant story told about what patents are for and a way to change some of these practices or their outcomes (e.g., non-practicing entities (NPEs) or "patent trolls"), his focus on structure and its explanation from a sociological perspective makes excellent sense and should be embraced more widely in our field.

III. THE DOMESTICATION OF INTELLECTUAL PROPERTY LAW

Burk's reference to NPEs or "trolls" is a particularly rich example of the explanatory force of the new institutionalist concept of "loose coupling."[40] He explains that NPEs are disruptive patent-holding entities despite aligning with the theory of patents as property, because the criticized NPEs tend to be single-minded entities with wealth accumulation as their perceived and explicit priority. This single-minded focus on wealth

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37. Sewell, *supra* note 19, at 3.
38. *Id.* at 4.
39. Burk, *supra* note 1, at 449.
40. *Id.* at 446–47.

aggregation distinguishes NPEs from organizations in which patent practice reflects and instantiates diverse interests and values. As part of their routine and material structures, patent practice promotes part of broader strategies of organizational and institutional sustainability and legitimacy community-wide. As the story goes, NPEs view patents in a singular fashion (e.g., there is tight coupling between the theory of IP and their practice), whereas research and development institutions, whether or not earning revenue from their patents, engage in patent practice for a multitude of reasons, only a part of which may be the potential for licensing revenue. In other words, there is an over-determined narrative in NPEs, whereas the "dual structure" (or polyvocality) of universities, for example, or of manufacturing entities vis à vis their patent practice, maintains their stability internally and their legitimacy externally.[41]

Burk hints at this analysis early in his Article when he writes that "organizational structures implement ceremonial functions . . . to demonstrate the organization's acceptance and adoption of external values."[42] Tying this point to the patent troll example would strengthen the Article further. What external values do trolls represent (or claim to represent) beyond earning money for themselves and their licensees? Some NPEs argue they are the best hope for small inventors to recuperate their investment and defend their inventions against infringers, a story that resonates with championing the little guy with the help of righteous institutions, a story whose values the NPE shares with the myth of the distributed benefits of American prospector capitalism and with the intellectual property regime itself.[43] But the opacity of NPEs' firm structures, cash flow, and payouts makes these identity and value claims hard to substantiate. We are left with only a self-congratulatory description of what NPEs do. And when compared to what other firms with patent portfolios actually do (e.g., pharmaceutical companies, universities, or manufacturers) and with the diversity of values, interests, and communities those companies serve, the PAEs' account is unpersuasive at best. By comparison, the other firm/patentees in the system (whether or not "irrational" in the accumulation of patents left dormant) appear

41. This is an example of what Anthony Giddens calls "dual structure." *See* GIDDENS, *supra* note 19, at 27.

42. Burk, *supra* note 1, at 434.

43. Jessica Silbey, *Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 336–37 (2008).

virtuous and productive even if "inefficient" in their deployment of intellectual property.

All of this begs the question "what are patents for?," which is precisely the question that started Burk on his project. Burk hints at an answer, but I take this opportunity while commenting on his important Article to offer a more explicit account, which I am sure will nonetheless frustrate readers hoping for a singular, causal answer: patents are for and do a lot of things.[44] In a time when intellectual property is increasingly at the center of public debate—headline news reporting on high-technology and competition,[45] celebrities complaining about equitable distribution of revenue from institutional partners,[46] and access to medicine and the rising cost of health care[47]— intellectual property is increasingly being domesticated by an engaged citizenry. Previously the domain of isolated lawyers with specialized skills, intellectual property law and policy are more frequently topics of conversation in popular and organizational culture. Its domestication may be one explanation for the perceived misalignment that Lemley identifies between the everyday practices of creativity and innovation and patent law.[48] Burk explains the perceived misalignment in part through a specific sociological framework. I would add that it is also the predictable result of common law's evolution combined with the democratization of technology and its awesome production and dissemination capacities in the digital age.[49] The "bringing home" of IP—this domestication—inevitably threads

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44. Jessica Silbey, *Patent Variation: Discerning Diversity Among Patents Functions*, 45 LOY. U. CHI. L.J. 441, 459 (2013).

45. *See* Adam Liptak & Vidue Goel, *Supreme Court Gives Samsung a Reprieve in Apple Patent Case*, N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/technology/samsung-apple-smartphone-patent-supreme-court.html?_r=0.

46. *See* Vikas Bajaj, *Taylor Swift Versus Spotify*, N.Y. TIMES: TAKING NOTE (Nov. 12, 2014), https://takingnote.blogs.nytimes.com/2014/11/12/taylor-swift-versus-spotify.

47. *See* Editorial, *The EpiPen Outrage Continues*, N.Y. TIMES (Sept. 21, 2016), https://www.nytimes.com/2016/09/22/opinion/the-epipen-outrage-continues.html.

48. This misalignment is pervasive throughout intellectual property, in fact. *See* JESSICA SILBEY, THE EUREKA MYTH: CREATIVITY, INNOVATION AND EVERYDAY INTELLECTUAL PROPERTY 18–19 (2015).

49. Jessica Silbey, *Reading Intellectual Property Through the Lens of Constitutional Equality*, 50 TULSA L. REV. 549, 569 (2014) (describing this evolution in terms of the digital age and fundamental value of equality in Supreme Court cases on copyright).

intellectual property debates with everyday culture and politics concerning wage equity; health disparities; racial and gender justice; and personal, cultural, and communal identities. It also invokes broader, more fundamental values such as equality, distributive justice, and privacy.[50] Burk alludes to this domestication as a possible explanation for Lemley's critique of intellectual property when Burk writes that "the development of deontological intellectual property justification . . . may also be part of a fairly normal jurisprudential discussion."[51] I join Burk and ask more directly: Why would we think that IP is different from any other area of law?

Scholarship in the social sciences and the humanities teaches us that institutions shape culture and vice versa. We must investigate their entanglements if we are to guide both in ways we would hope to see. Within legal research in law schools, too often we avoid the complex questions of how that entanglement of culture and its institutions occurs through discourses, organizational structures, and relationships among coalitions and communities, which leaves the significant questions about law as a dominant and pervasive society-shaping system unanswered. What Burk calls for at the end of his Article as the "most sensible" next steps is also far from revolutionary, but Burk's impressive clarity belies the complexity of the task: "to simply accept that patents have settled into particular social roles as part of the ecology of business and technical innovation."[52] Instead of imposing onto patents specifically (and IP more generally) the view that intellectual property "incentivizes" innovation and creativity and then showing how IP is not working as it should, a social science investigation asks the empirical question that Burk urges we begin to ask with more determination: "[J]ust what roles [are] patents . . . playing"?[53] This, he says, with admirable humility for such an accomplished and forward-thinking patent scholar, may "lead to some discussion of whether those roles are a good thing or a bad thing, but the first order of business is to follow patents in action and build some understanding of their social function."[54]

Burk proposes a powerful role for social science and the humanities: to identify and explain the *things that are going on*

50.   *See id.*
51.   Burk, *supra* note 1, at 423.
52.   *Id.* at 452.
53.   *Id.*
54.   *Id.*

other than on the surface that the study of law on the books has failed to understand. Through these empirically and methodologically diverse heuristic interventions, we can break through hegemonic discourses such as "efficiency" and "investment-backed expectations" to reveal or further explain the kind of puzzles Lemley rightfully identifies and Burk pushes us to study in earnest through new lenses. One of the many impressive characteristics of the community of intellectual property legal scholars in the United States that both Burk and Lemley helped found and continue to lead is that debates such as the one between them regarding "faith-based" IP that describe core intellectual differences can occur between friends. I look forward to the collaborations inspired by the debate between Burk and Lemley that will "allow us to focus on how, rather than why the system is operating" in order to "open the field for sustained" and pragmatic investigation.[55] Such inquiry is the precursor to meaningful reform, which we welcome in the name of progress.

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55. *Id.*