

Course: Intellectual Property Law-Cambodia

Lecture 2: Moral Justification and Economic Theories of IPRs

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Topics

- Moral Justification
 - Personhood theory
 - Utilitarian theory
 - Natural right theory
- Economic Theory
 - Costs/Benefits
 - Supply/Demand Curve

Why do we need IPRs at all?

Cultural and technological inventions are needed for the well-being and progress of the humanity.

Investment and additional resources for further innovation are promised on the legal protection of new creations.

The promotion and protection of intellectual property spurs economic growth, creates new jobs and industries, and enhances the quality and enjoyment of life.

MORAL JUSTIFICATION

Arguments for intellectual property rights have generally taken one of three forms

Personhood Theory

Personality theorists maintain that intellectual property is an extension of individual personality

Utilitarian Theory

Utilitarians ground intellectual property rights in social progress and incentives to innovate

Natural Right Theory

Lockeans argue that rights are justified in relation to labor and merit

Personality-Based Justifications of Intellectual Property

Personality theorists such as Hegel maintain that individuals have **moral claims to their own talents, feelings, character traits, and experiences**. We are self-owners in this sense.



Georg Wilhelm Friedrich Hegel
1770–1831
German

Control over physical and intellectual objects is **essential for self-actualization**—by **expanding ourselves outward beyond our own minds and mixing these selves with tangible and intangible items**, we both define ourselves and obtain control over our goals and projects.

For Hegel, the **external actualization of the human will requires property**.

Moore, Adam, and Ken Himma. "Intellectual Property." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta and Uri Nodelman, Fall 2022. Metaphysics Research Lab, Stanford University, 2022. <https://plato.stanford.edu/archives/fall2022/entries/intellectual-property/>.

Schlesinger, Jakob. *1831 Schlesinger Philosoph Georg Friedrich Wilhelm Hegel Anagoria*. 1831. Oil. https://upload.wikimedia.org/wikipedia/commons/b/bf/1831_Schlesinger_Philosoph_Georg_Friedrich_Wilhelm_Hegel_anagoria.JPG.

Problems for Personality-Based Justifications of Intellectual Property

First, it is not clear that **we own our feelings**, character traits, and experiences.
It is true that we have possession of these things or that they are a part of each of us.

Problems for Personality-Based Justifications of Intellectual Property

Second, even if it could be established that individuals own or have moral claims to their personality, it does not automatically follow that such claims are expanded when personalities become infused in tangible or intangible works.

Rather than establishing property claims to such works, perhaps we should view this as an **abandonment of personality**—similar to the removing hair and skin cells.

Problems for Personality-Based Justifications of Intellectual Property

Third, personality-based moral claims may warrant nothing more than use rights or prohibitions against alteration. There's no justification of property rights.

Problems for Personality-Based Justifications of Intellectual Property

Finally, there are many intellectual innovations in which there is no evidence of a creator's personality—a list of customers or a new safety-pin design, for instance.

Given these challenges, personality-based theories may not provide a strong moral foundation for legal systems of intellectual property.

The Personality Theorist's Rejoinder

Even if we acknowledge the force of these objections, there does seem to be something **intuitively appealing** about personality-based theories of intellectual property rights.

Suppose, for example, that Mr. X buys a painting at a garage sale—a long-lost Crusoe original. X takes the painting home and alters the painting with a marker, drawing horns and mustaches on the figures in the painting. The additions are so clever and fit so nicely into the painting that X hangs it in a window on a busy street.

The Personality Theorist's Rejoinder

There are at least two ethical worries to consider in this case.

First, the alterations by X may cause unjustified economic damage to Crusoe.

Second, and independent of the economic considerations, X actions may damage Crusoe's reputation.

The integrity of the painting has been violated without the consent of the author, perhaps causing long-term damage to his reputation and community standing.

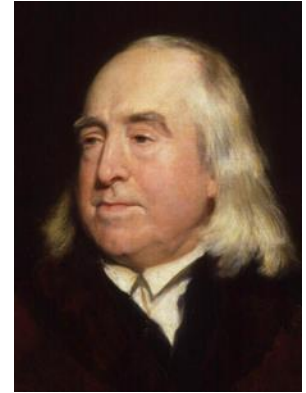
If these claims are sensible, then it appears that we are acknowledging **personality-based moral “strings” attaching to certain intellectual works.**

The Utilitarian Incentives-Based Argument for Intellectual Property

A necessary condition for promoting the creation of valuable intellectual works is **granting limited rights of ownership to authors and inventors**.

Absent certain guarantees, authors and inventors might not engage in producing intellectual property.

Although success is not ensured by granting these rights, failure is inevitable *if those who incur no investment costs can seize and reproduce the intellectual effort of others*.



Jeremy Bentham
1748-1832
English philosopher

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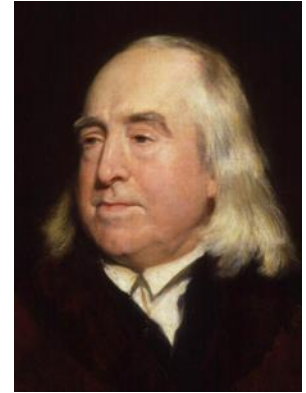
Pickersgill, Henry. *Jeremy Bentham*. Oil on canvas. Accessed September 30, 2023.

https://upload.wikimedia.org/wikipedia/commons/c/c8/Jeremy_Bentham_by_Henry_William_Pickersgill_detail.jpg.

The Utilitarian Incentives-Based Argument for Intellectual Property

Adopting systems of protection like copyright, patent, and trade secret yields an optimal amount of intellectual works being produced, and a corresponding optimal amount of social utility.

Coupled with the theoretical claim that society ought **to maximize social utility**, we arrive at a simple yet powerful argument for the protection of intellectual property rights.



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Problems for the Utilitarian Incentives-Based Argument

On the negative side there are many who argue that systems of IP protection actually **hinder innovative activity**.

One alternative to granting intellectual property rights to inventors as incentive is government support of intellectual labor. This could take the form of government-funded research projects, with the results immediately becoming public property.

Unlike a government-supported system of intellectual property rights, reward models may be able to avoid the problems of allowing **monopoly control and restricting access**, and at the same time provide incentives to innovate.

The Utilitarian Rejoinder

The utilitarian who defends the incentives argument may well agree with many of these criticisms and still maintain that intellectual property rights, in some form, are justified.

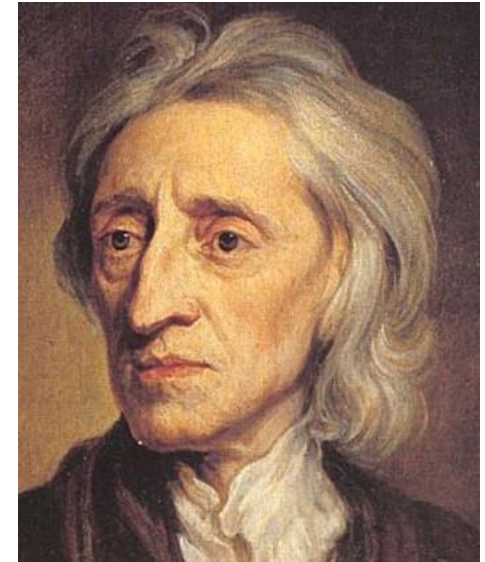
The current system of protection is better than government support of intellectual property creation, reward models, or nothing at all.

Lockean Justifications of Intellectual Property

A different strategy for justifying intellectual property rights begins with the claim that individuals are entitled to control the fruits of their labor.

In general, the intuition is that the person who clears unowned land, cultivates crops, builds a house, or creates a new invention obtains property rights by engaging in these activities.

Laboring, producing, thinking, and persevering are voluntary, and individuals who engage in these activities are entitled to what they produce.



John Locke
1632-1704
English philosopher

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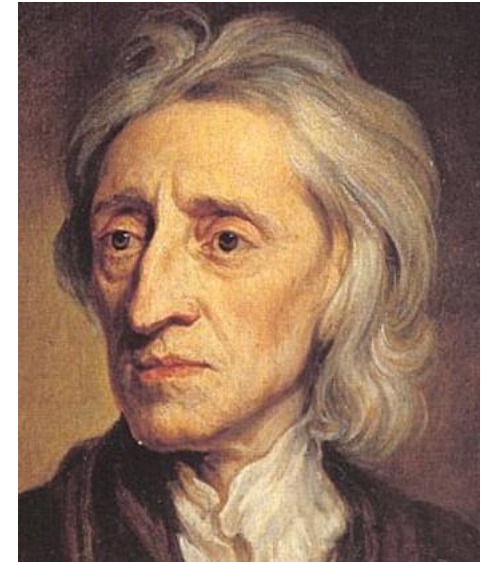
Kneller, Godfrey. *Portrait of John Locke*. 1697. Oil on canvas. https://upload.wikimedia.org/wikipedia/commons/b/b8/John_Locke.jpg.

Lockean Justifications of Intellectual Property

Restrictions or limits on acquisition include

- a labor requirement,
- a non-waste requirement, and
- the “enough and as good” proviso.

The “enough and as good” proviso is best illustrated by an example Locke gives. When someone takes a drink of water from a river it is as if he takes nothing at all. His fellows are, all things considered, unaffected by this acquisition



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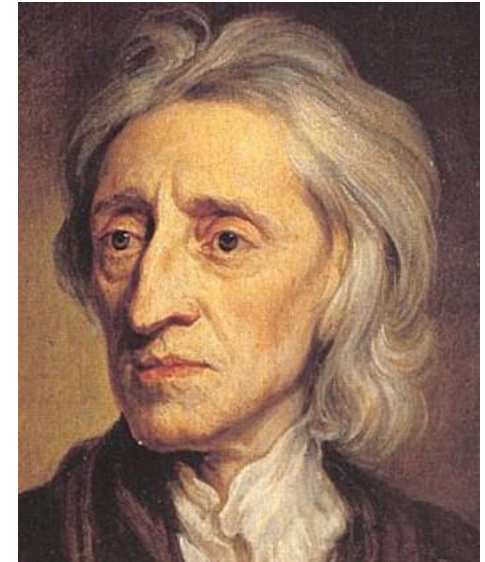
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Lockean Justifications of Intellectual Property

In terms of intellectual property, the act of creation or discovery typically **takes time, effort, and skill**.

Intellectual works don't spoil like apples, so there is no **“non-waste”** concerns. ‘

Moreover, the creation or discovery seemingly **leaves “enough and as good.”** Creating a poem, for example, and holding it as a secret does not preclude others from creating their own poems.



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That the idea of mixing one's labor is incoherent—actions cannot be mixed with objects.

Why labor mixing generated property rights rather than a loss of labor?

At mixing one's labor with an unowned object should yield more limited rights than rights of full ownership

If the skills, tools, and inventions used in laboring are social products, then perhaps individual claims to title have been undermined

The Lockean Rejoinder

After weeks of effort and numerous failures, suppose Y comes up with an excellent new recipe for spicy noodles—a recipe that she keeps in her mind and does not write down.

Would anyone argue that Y does not have at least some minimal moral claim to control the recipe?

Suppose that Z samples some of Y's noodles and desires to purchase the recipe. Is there anything morally suspicious with an agreement between them that grants Z a limited right to use Y's recipe provided that Z does not disclose the process?

And, Z didn't have to agree to the terms and, no matter how tasty the noodles, he could eat something else or create his own recipe.

Arguably, part of the moral weightiness of the agreement between Y and Z relies on the fact that Y holds legitimate title to the recipe.

General Critiques of Intellectual Property

Putting aside the strands of argument that seek to justify **moral claims to intangible works** and the rather focused problems with these views, there are several general critiques of the rights to control intellectual property to consider

Information is Not Property

Information is Non-Rivalrous

Information Wants to be Free

The Free Speech Argument
against Intellectual Property

The Social Nature of Information Argument

The Cost of Publishing Digital Information

ECONOMIC THEORY FOR IPRS

Do IPRs benefit the society overall?

So IPRs are merely **the means** to the end.

Copyright

Creative Works of Expression

Patent

Inventions and Innovation

IP Law - a grant of a right to exclude others from the scope of whatever that right is.
This is a form of a **property right**.

And so, in some ways, you can think about intellectual property **like real property**.

Intellectual property rights are an **interference** with the free market.

A free market would mean that you could copy anything you wanted once you saw it.

So IPRs must be justified.

We typically think that any interventions into the free market **need to have some sort of underlying justification.**

And one of the things to ask yourself is, is that intervention justified?

Would we get the same amount of creative goods **or the same amount of inventions even absent intellectual property law**, because people already have, sort of, built-in incentives to do the things we want them to do anyway?

Basic IP Economics

Invention, innovation, creativity is a lot like a lighthouse – public good.

Public goods have particular economic characteristics



- **Nonrival**
- **Nonexcludable**

Nonrival

Non-rival means that consumption of a good by one person does not reduce the amount available for others

For example, if I'm looking at the lighthouse from afar, I'm not interfering in any way with your ability to do the same thing.

You can look at the lighthouse, just like I can. We're not using up the good in any way. Intellectual property is a lot like that.

Just because I'm using **an idea** doesn't mean that you can't use **the idea**.

Just because I'm watching **a TV show** doesn't mean that you can't watch **the TV show**.

Non-excludable

Non-excludable public goods are public goods that cannot exclude a certain individual or group of individuals from using them.

Meaning it's very difficult, if not impossible, to prevent people from looking at a lighthouse. You can't if you're going to have the lighthouse out there sitting on the rock.

Everybody is going to be able to see it. There's no way to stop them from doing it. This is similar to intellectual property law.

If I broadcast **my idea**, if I tell people my idea, I'm not going to be able to **stop people from telling each other.**

It's going to be very difficult to exclude people from that idea once **it's out there in the world.**

So, absent some sort of government intervention, we won't have enough of the public goods.

Because there is **no economic incentive** to build lighthouses (public goods) if you can't exclude people from the ability to use it.

If I can't charge people to use my lighthouse, why would I do it?

Why would I spend my money to create a lighthouse and not be able to get any return on it?

And **ideas, creativity, innovations, are very much like that.**

If I can't prevent people from downloading my music, then why would I make music? I might, just because I'm creative and I want to do it.

But on the other hand, I might make more music, I might try harder at making my music, I might have higher production values, if I can exclude people.

And so the goal of intellectual property law,
is to address this public goods problem,
to convert what are otherwise non-rival, non-excludable goods
into **effectively rival and excludable goods**.

Is it really something that we wouldn't have enough of, absent
some sort of government intervention?

Note that **it's not going to convert somebody who has no musical bone in their body into the next major pop star.** That's not what a copyright law is all about.

It's not going to create somebody who has no capacity for invention to find a cure for cancer. It doesn't do that much.

The answer is that intellectual property law helps **on the margin.**
It makes a small change, a slight change in the incentives.

Instead of spending \$100 million on developing that drug, you might spend \$150 million.

Instead of spending an hour writing your new song, you might spend 5, 10, 15 hours because you **have some sense of economic return**.

And that way, we get more of the stuff that we want...

So what about trademarks? We're not directly trying to encourage the production of trademarks.

Trademarks protect investments and goodwill.

First, they make it easy for me as a consumer to find the goods that I want on the marketplace. Because if I know that I want an Intel chip in my next laptop, I can look for the Intel logo. It diminishes my search cost

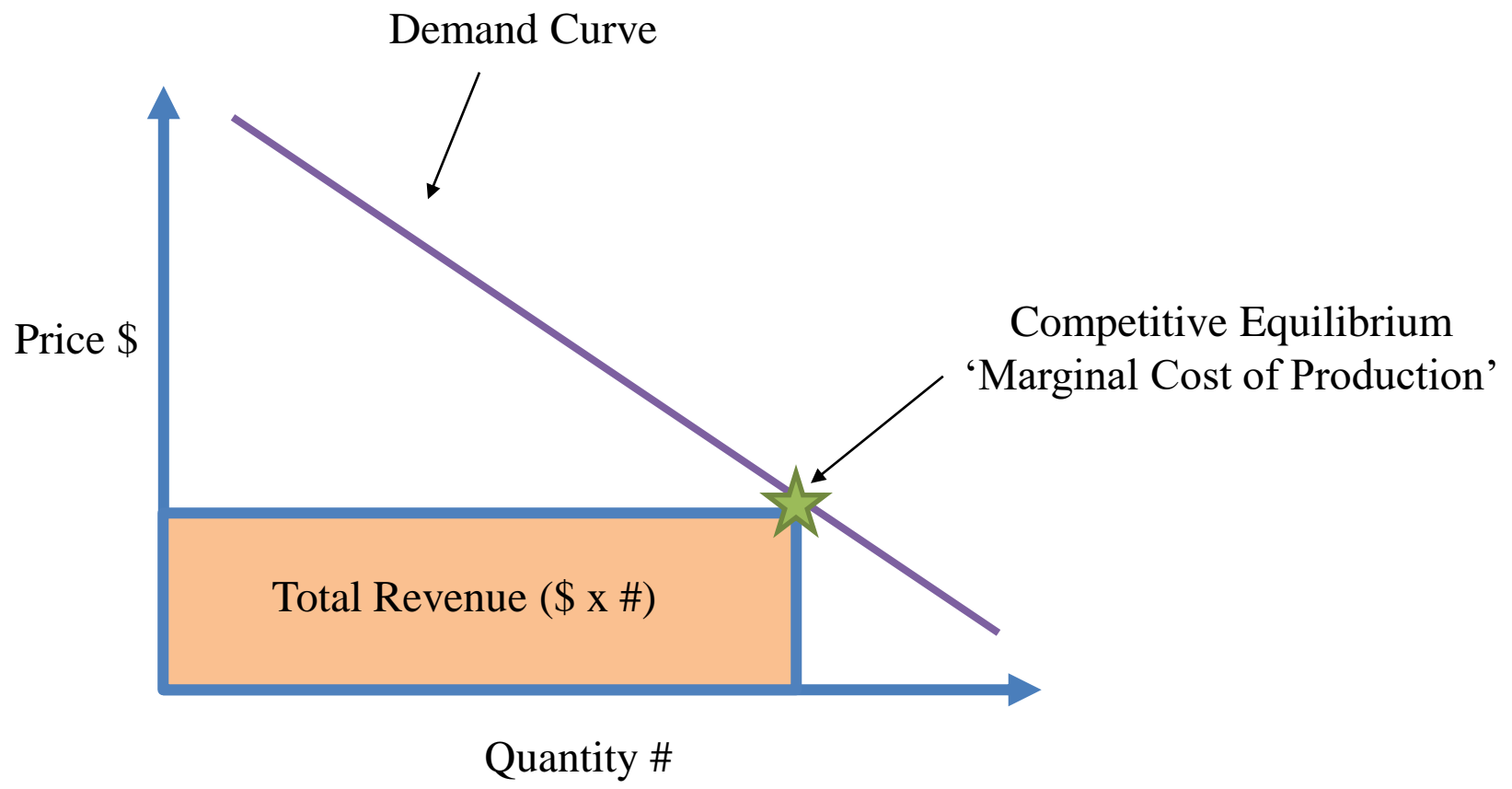
Second, they will invest in product quality. So how do you build up goodwill? You have high quality products. The Intel brand name, the Apple brand name, the H&M brand name stands for something

How do these things work?

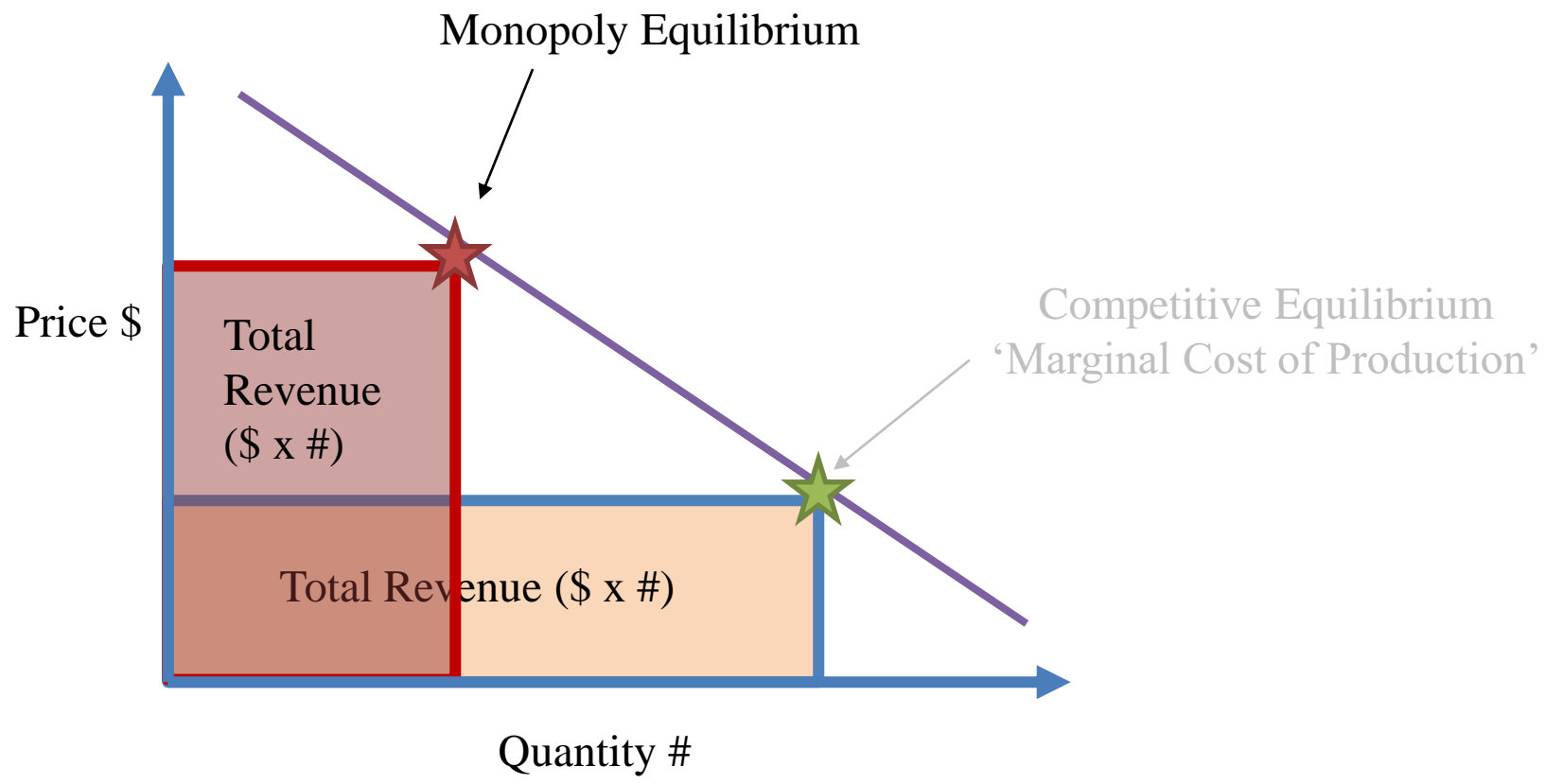
Well, in economic terms, what intellectual property rights do is they allow supra-marginal economic returns.

What they are is an intervention in the marketplace that allow the companies, the individuals who own these rights to get more **economic return than they would get otherwise.**

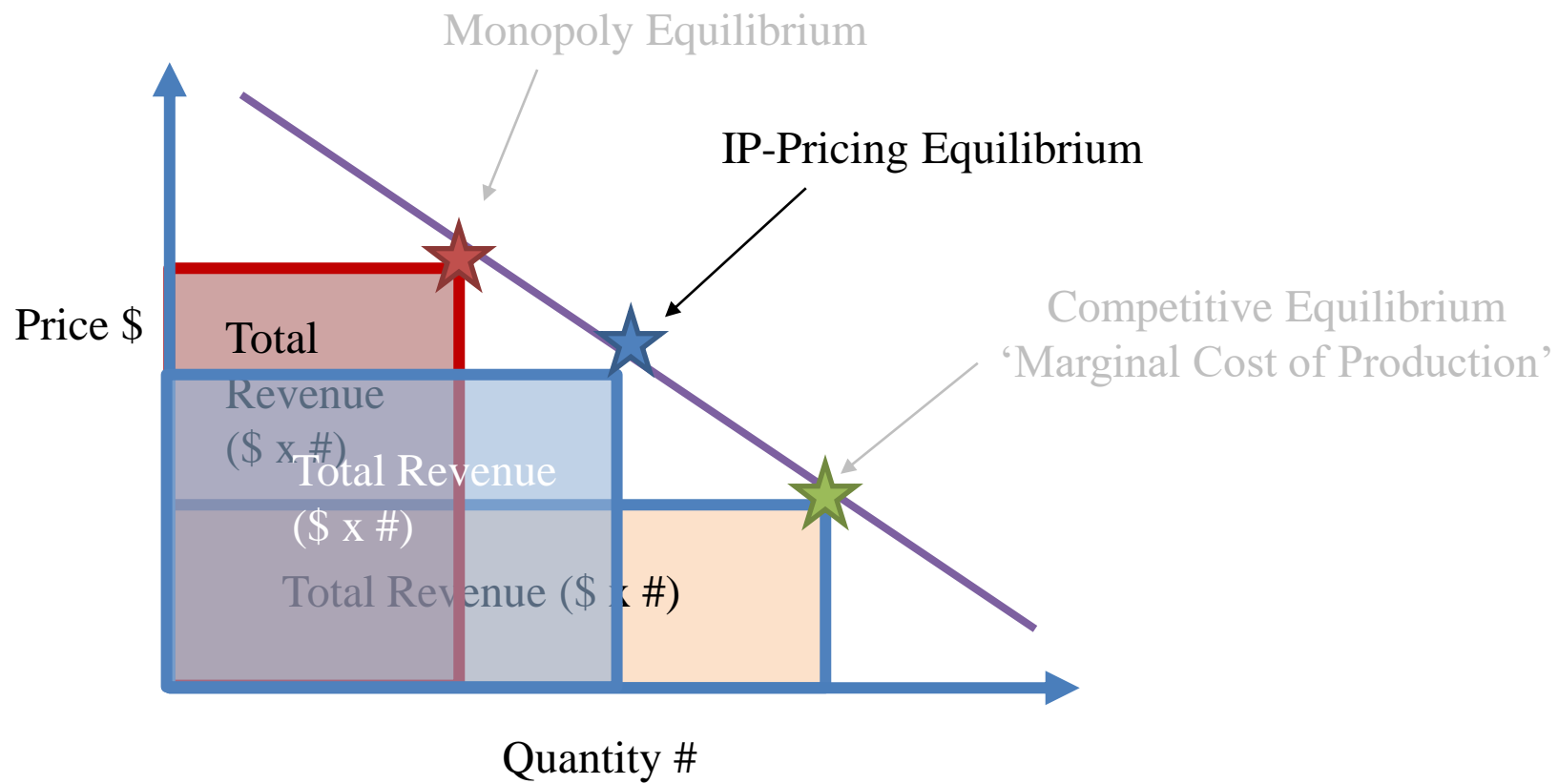
Macroeconomic Analysis



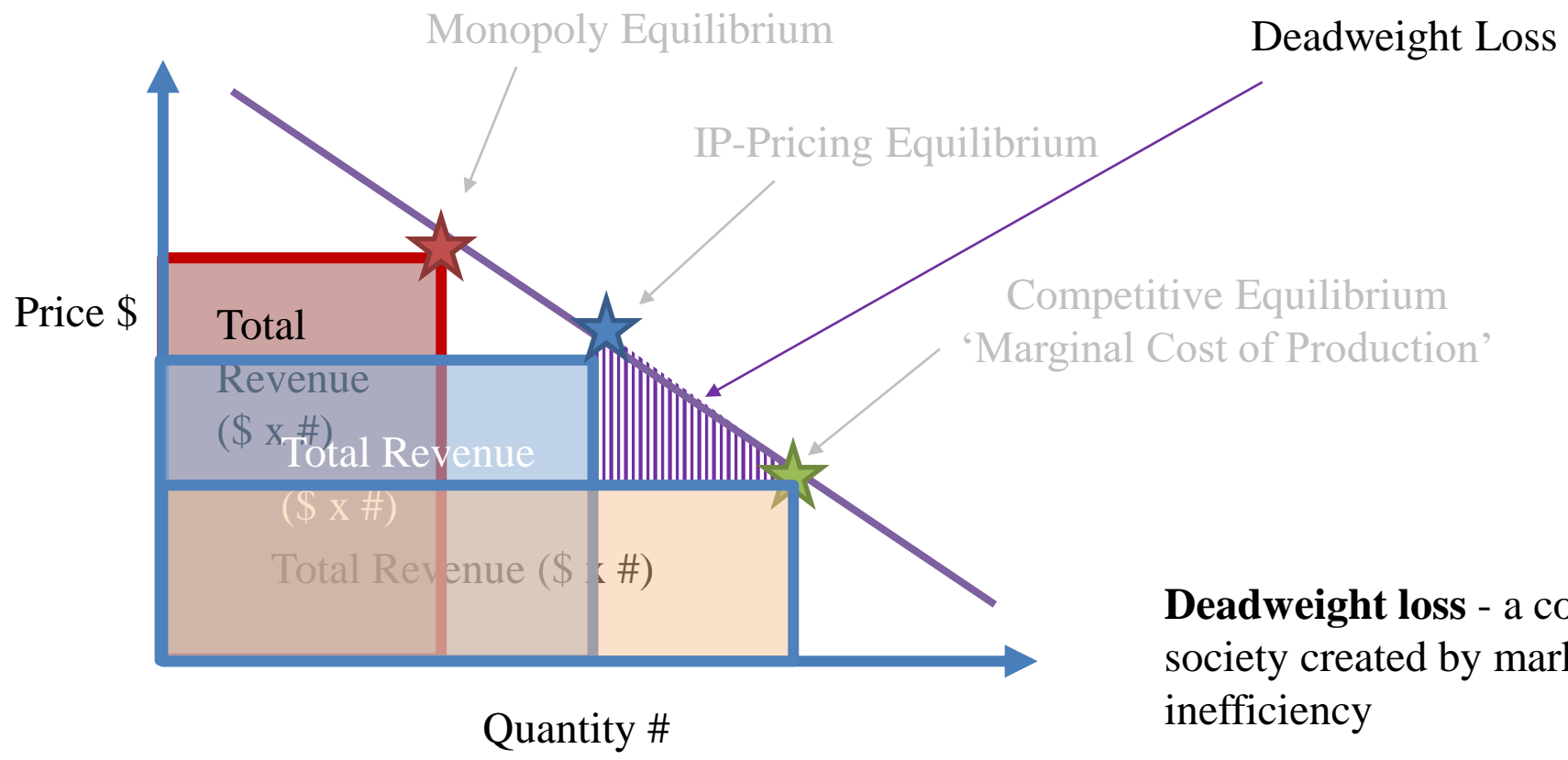
Macroeconomic Analysis



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Macroeconomic Analysis



Deadweight loss - a cost to society created by market inefficiency

Tuovila, Alicia. "What Is Deadweight Loss, How It's Created, and Economic Impact." Investopedia, 2022. <https://www.investopedia.com/terms/d/deadweightloss.asp>.

And although dead weight loss is an important component of the costs associated with intellectual property rights, **this loss is far from the only cost of intellectual property.**

Rent Seeking behaviors like “racing” or “patent trolls”

Restriction of Future Innovation

Administrative Costs

Real-world Implications

The economic reward they we're offering to people who get intellectual property rights is determined by the market.

And so that means the economic reward to your intellectual invention, to your intellectual creation-- whether it be an invention or worker creativity-- varies by one measure of social value, that is **marketplace value**

some markets more money other less money

<=>

*encouraging certain kinds of behavior and discouraging
other kinds of behavior*

Gains v. Loss

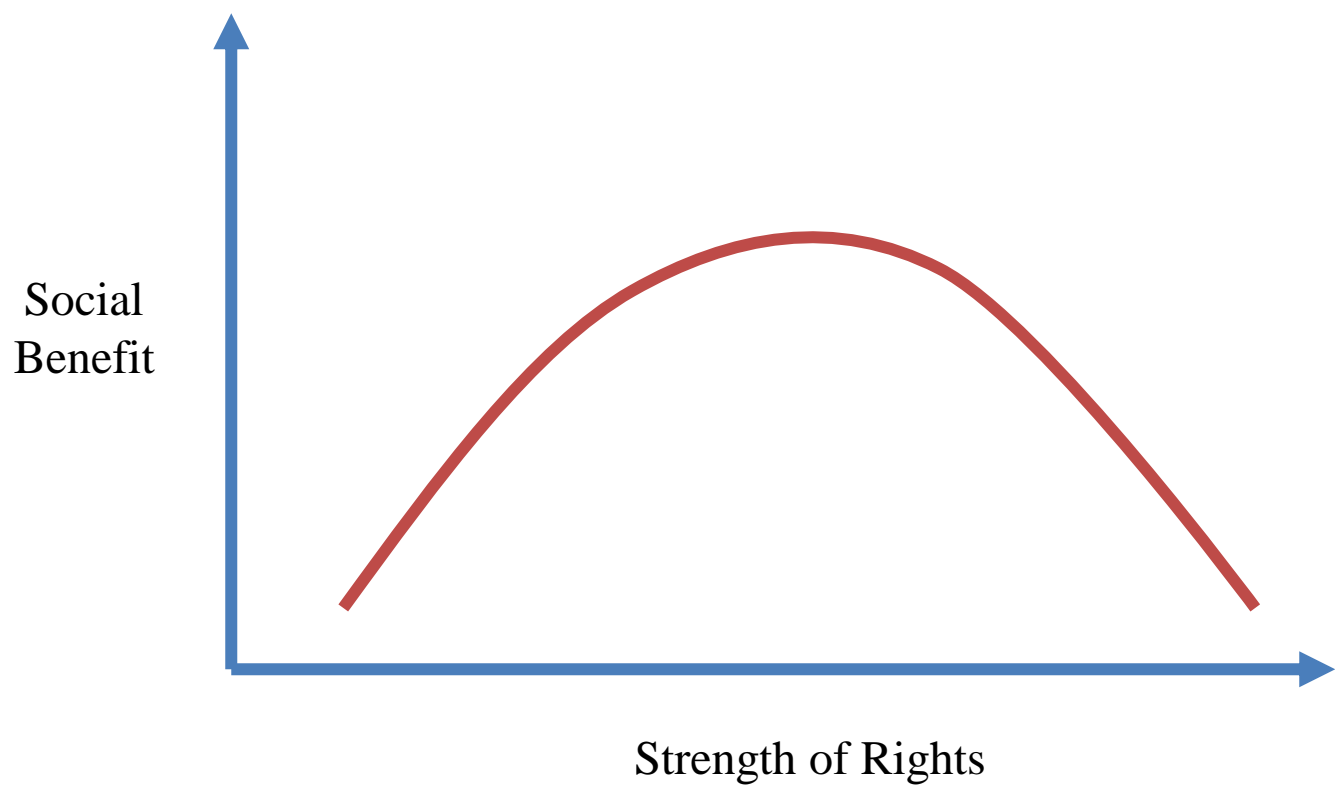
Gains

- More innovation/invention/expression
/goods
- More disclosure
- More commercialization/products
- More investment in
invention/expression/creativity

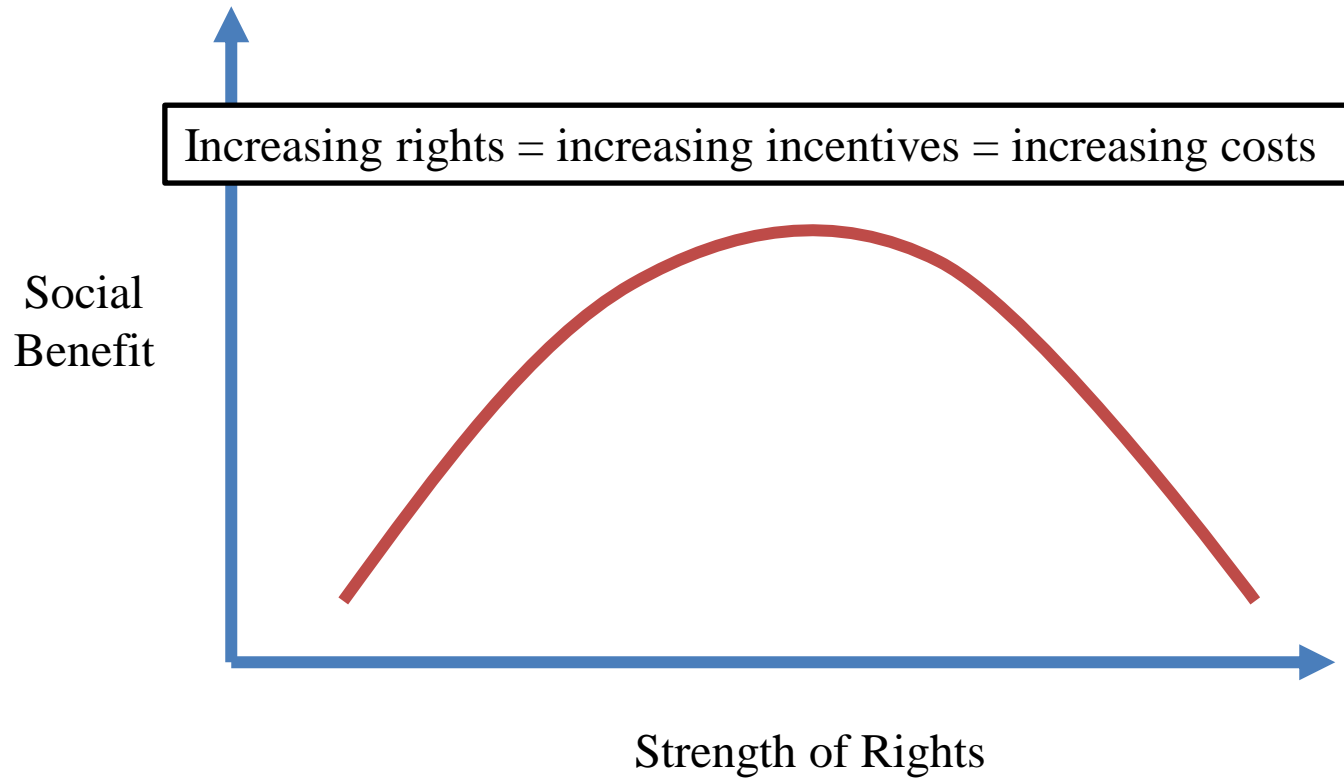
Costs

- Deadweight losses
- Rent seeking
- Restriction of future innovation
- Administrative costs

The key question?

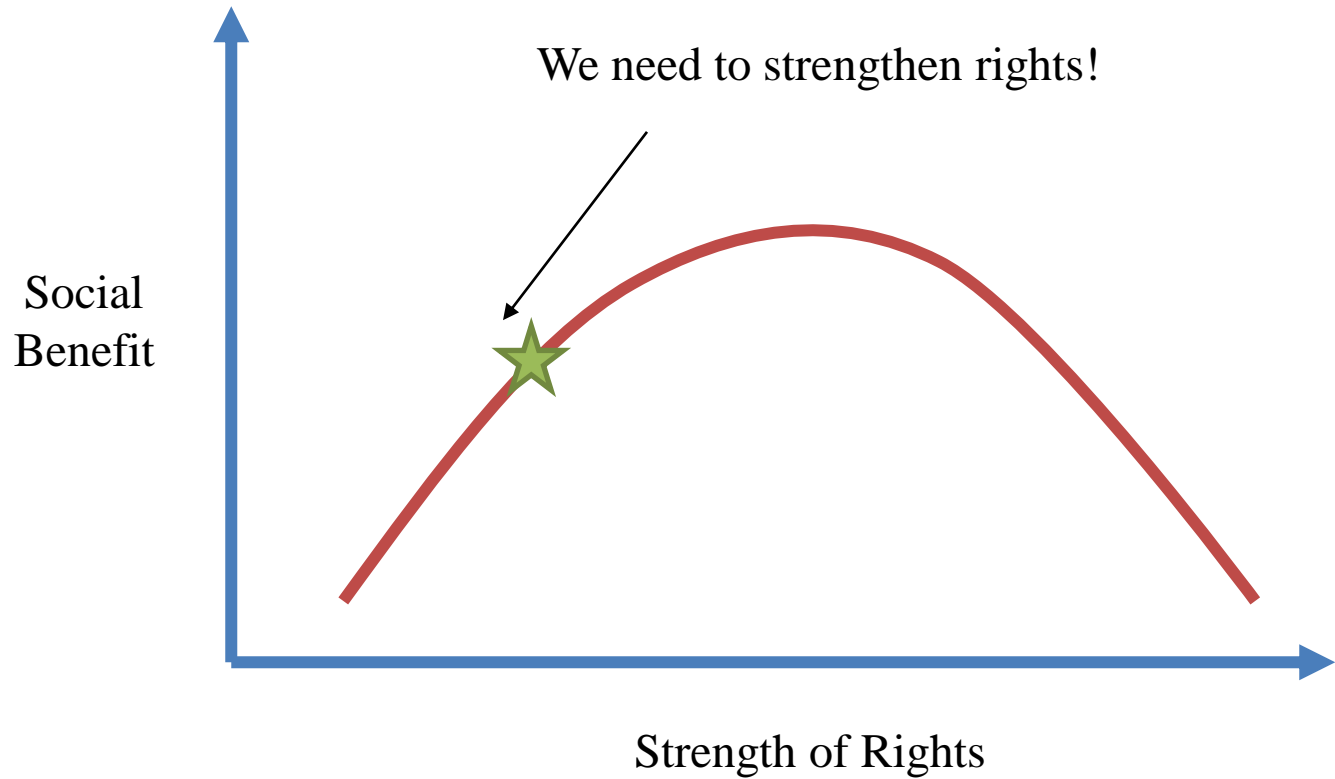


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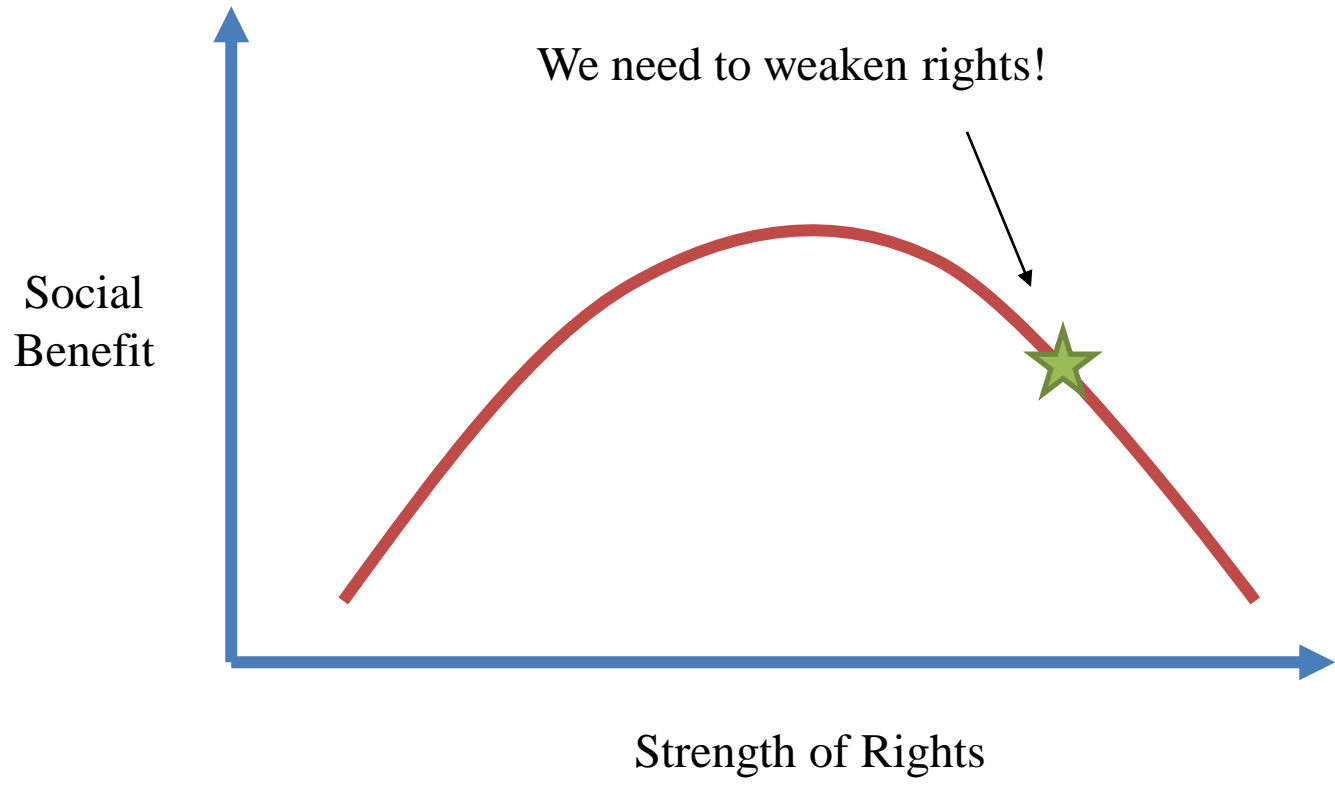
Do we know where we are on the curve?

The key question?



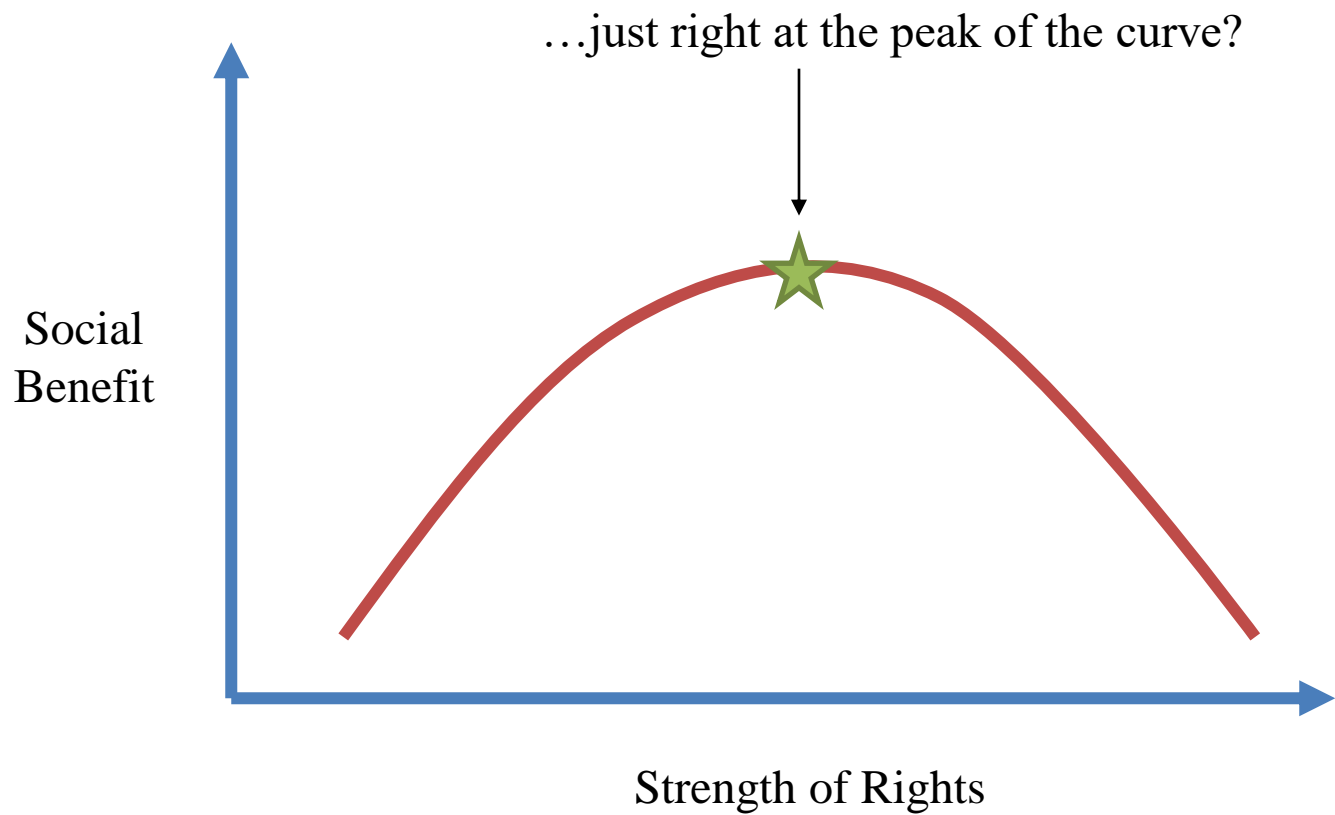
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Do we know where we are on the curve?

Tomorrow, the technology changes....

References

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