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Propertization, Contract, Competition, and Communication: Law's Struggle to Adapt to the Transformative Powers of the Internet

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PROPERTIZATION, CONTRACT, COMPETITION, AND COMMUNICATION: LAW'S STRUGGLE TO ADAPT TO THE TRANSFORMATIVE POWERS OF THE INTERNET

DAVID BARNHIZER

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This Symposium focuses in part on the ideas of Margaret Jane Radin as a point of departure for the various contributions. A key part of the analysis includes the process she calls *proptertization* in the context of intellectual property rules and the Internet. The approach taken in this introductory essay is twofold. The first part presents some key points raised by the Symposium contributors. Of course, that overview is necessarily incomplete, because the contributions represent a rich group of analyses about vital concerns relating to how our legal system should respond to the challenge of the Internet and information systems through the application and development of doctrines relating to areas of property and contract.

The general themes found in these contributions relate to the effects of what we are experiencing. This includes issues such as the impact on traditional legal doctrines of the new power of information acquisition, data-mining, privacy invasion and protection. A core question is who should be allowed to generate or possess access to information about people who never authorized its collection and use. As Radin and other contributors suggest, resolving such questions in the context of law requires careful thinking about the application of doctrinal areas involving property, contract, the rules of competitive behavior, and constitutional law.

Following the descriptive overview of contributors' analyses, I offer some thoughts about the context of what is being produced as a result of the emergence of the Internet and associated information capabilities. This is done through a consideration of the economic and social dynamics of the “event” we are experiencing, one I describe as a Kondratiev Wave whereby a society undergoes a shift in the basic nature of its economic system in ways so fundamental that the social and political context is also transformed. Also discussed are the impacts of information capabilities on government, business and individuals, and the role of the judiciary in responding to the rapidly changing environment. That judicial role is argued to be one that should seek to preserve the best qualities of the existing legal

order and avoid the application of ill-considered and unnecessary doctrines to what are seen as new contexts.

Throughout the Symposium can be found the attempt to answer key questions. These include considering why we should care about the Internet and intellectual property and about what is allowed to be propertized. Part of the discourse raises concerns about where the lines should be drawn as to how economic and governmental activities are conducted as a result of exponentially expanded information capabilities and which behaviors should be recognized as valid or invalid.¹

I. OBSERVATIONS ON SYMPOSIUM ESSAYS

The contributions in this Symposium relate in various ways to perceived threats to individual life produced by the greatly expanded capabilities of information technologies. With this goes concern with how courts and legislatures are reacting to the developments. This is a particular concern due to the widespread propertization of data about individuals that is made possible by data-mining, spyware, and information synthesis and interpretation software developed by the private sector and increasingly accessible to governments and large-scale corporate actors. As ordinary citizens realize that others have access to virtually everything they say or do and that they are generating electronic versions of themselves through Internet usage, consumer habits, and employer monitoring of behavior, this is likely to have a “chilling effect” on our communication activities and other behavior.² The

¹The debate over John Ashcroft’s proposed Terrorism Information and Prevention System (TIPS) reveals the inexorable tendency of government to use whatever technologies are available to achieve its ends and to unfailingly overreach for what seem to be the best of reasons. See, e.g., Jane Black, *Some TIPS for John Ashcroft: Mr. Attorney General, Forget Your Plan For a System to Promote Americans Spying on Americans. It Won’t Work—and is Un-American*, BUSINESSWEEK ONLINE, July 25, 2002, http://www.businessweek.com/bw/daily/dnflash/jul2002/nf20020725_8083.htm (last visited Aug. 1, 2005). The TIPS program was intended to be initiated in ten cities as a pilot program and to enlist 1 million “informers” to report on others’ activities. It was abandoned before it started but the capability remains.

²Admiral John Poindexter was initially authorized to create the Information Awareness Office in the Pentagon that mirrored much of what Ashcroft sought. The Guardian reports that:

the IAO has begun work on a global computer surveillance network which will allow unfettered access to personal details currently held in government and commercial databases around the world.

Contracts worth millions of dollars have been awarded to companies to develop technology which will enable the Pentagon to store billions of pieces of electronic personal information—from records of internet use to travel documentation, lending library records and bank transactions—and then access this information without a search warrant. The system would also use video technology to identify people at a distance. ‘Total Information Awareness,’ or TIA, was proposed to the Pentagon by Admiral John Poindexter after the terrorist attacks of September 2001. A former official in the Reagan administration who was convicted for his leading role in the Iran-Contra scandal, Poindexter was appointed head of the IAO in February.

Lawrence Donegan, *Pentagon Creates a Big Brother so Uncle Sam Can Keep His Eye on us*, Nov. 17, 2002, THE OBSERVER, <http://observer.guardian.co.uk/international/story/0,6903,841731,00.html> (last visited Aug. 1, 2005).

apprehension by citizens that there is no longer any reliable private dimension of their lives that can be counted on to be free of surveillance will produce protective behaviors and a distrust of governmental and economic actors.

In her essay, “A Comment on Information Propertization and Its Legal Milieu,” Margaret Jane Radin presents a set of orienting themes that offer points of departure and critique by the other contributors.³ Radin’s discourse covers the use of metaphor, conflict between systems, and changes in the area of intellectual property law. She observes that some judges are ignoring seemingly applicable existing legal doctrines in this dimension. An important element of Radin’s argument is her focus on propertization rather than property, emphasizing that the fields of intellectual property and information propertization represent a dynamic process rather than a fixed or established set of clear rules.

In discussing “property in the digital environment” Radin urges that analyses need to take account of other policy considerations, including contractual ordering, the effects of competition, and freedom of expression. It is important that Radin includes freedom of expression as one of her policy “neighborhoods” that should be given strong consideration as a priority value in legal decision-making. Justice Brandeis argued that apart from the more generic social justifications of free speech, the ideal is also intended to provide important benefits in facilitating the quality of our individual development as persons.⁴ The benefits of free expression to the overall society are based on the principle that a society comprised of free and “developed” humans is a qualitatively richer society. This advances the idea represented by Aristotle’s principle of *eudaimonia*, or human flourishing, in which a primary function of the State was to create conditions conducive to the maximum qualitative development of individual humans.⁵ The admittedly questionable premise is that a community comprised of the most progressive individuals who are all intent on attaining their maximum potential as humans would automatically be the best community.

Radin approaches her explanation of propertization by offering the metaphor of the neighborhood as a central analytical device—arguing for four “neighborhoods” bounding each other around the doctrinal collections of property, contract, competition and free expression. Radin suggests these policy “neighborhoods” are important elements in determining the boundaries of propertization. She also remarks on the existence of “grey areas” that are almost like a frontier where rules

³Margaret Jane Radin, *A Comment on Information Propertization and Its Legal Milieu*, 54 CLEV. ST. L. REV. 23 (2006).

⁴This is reflected in Justice Brandeis’s, concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927):

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile

⁵See ARISTOTLE, NICHOMACHEAN ETHICS, c. VII, Bk. I, for his description of *eudaimonia* or the promotion of human flourishing, as being the goal of society.

are not as clear or fixed and power and context play significant roles. Radin sees property itself not as a static phenomenon but as a scalar process—not an either this or that choice in which one choice necessarily excludes the other, or a zero sum exchange in which fixed and finite allocations result in winners and losers. Consistent with her idea of property as scalar is the argument that propertization is a scheme of mutual cooperation and negotiation of exchanges.

Radin also posits the need to preserve incentives for those who invest in or create information. These incentives almost certainly involve the legally recognized right to control and benefit from the use of information. This reveals the inherent tension between a policy of widespread access to information in a democratic society and the ability to control access and extract rents for the use of that information. This represents a fundamental boundary issue in the development of judicial and legislative policy relating to access to information.

Part of Radin's argument is that decisions about what should be propertized are pragmatic and cannot be dealt with through the interpenetration of competing and overlapping abstractions but require context, facts and awareness of circumstances. This means that in determining what policies to follow, information propertization should take explicit account of the abutting contextual "legal milieu" that bears on the particular issues in specific situations. This legal milieu is made up of the bundles of doctrines and rules that courts have traditionally used in analyzing related or conceptually similar issues. She develops this theme in the interplay of trademarks and what pejoratively became known as "cybersquatting"—a term that once accepted as a fair characterization helps decide the issue by the negative connotations of how the behavior is "framed".

In the context of "cybersquatting" Radin questions courts that have developed a doctrine that rewards trade mark holders who did not take the time at an early point to protect their options for Internet site creation by acquiring domains. The protection is afforded by denying those who acquired domains in anticipation of their growing value as the Internet evolved into a sales and marketing tool the ability to auction those sites to sellers with greater need, i.e., those with an existing market identity who discovered that the Internet-savvy domain purchasers had beaten them to a domain name that consumers were likely to think of when searching for products or services. The doctrinal contrast is that speculators in land are allowed to take advantage of developments that create demand and add value to land they purchase in anticipation of rising demand while dot.com speculators have had a far more difficult time.

Property and contract are inextricably connected at numerous points. One intersection is because contract is an important means of allocating, recognizing and enforcing the choices that have been made concerning what constitutes property. Jane Winn and Brian Bix, in "Diverging Perspectives on Electronic Contracting in the US and EU," focus on two distinct systems operating according to different value emphases.⁶ Their analysis discusses what interests are being protected and most highly valued in the U.S. in contrast with the EU. This includes examining what courts are doing in each context and how decisions on virtually identical facts will differ in the two distinct legal cultures. A substantial part of the discussion looks at

⁶Jane Winn & Brian Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175 (2006).

what have come to be known as “shrink wrap,” “click wrap,” “browse wrap,” and “terms in the box” forms of judicially enforced agreements in the U.S. These are “novel” ways of contracting that seem to offer ways of entering legally binding transactions that have little to do with what we have traditionally thought of as negotiated terms between bargaining parties, yet the strong tendency is for courts to allow the behavior.

While Winn and Bix suggest there is only a rough connection between Radin’s propertization idea and the electronic contracting rules they are critiquing, the use of state power to enforce and allow the “novel” forms of electronic contracting is a key element of at least part of the process of propertization. If such approaches are not enforced in a positive law system then they are not “property.” This includes “Rolling Contracts” in which one side to a “contract” is allowed the power to unilaterally alter contract terms and conditions. It can be argued that clickwrap, shrinkwrap and terms-in-the-box conditions may look like a contract but are equivalent to bait and switch tactics that violate many state consumer laws.

Winn and Bix also discuss the distinction in EU law in which greater protection for consumers is offered than for businesses. Like Radin, they comment on American judges’ undesirably loose treatment of UCC requirements regarding limitations on types of contract terms, including the need for conspicuous presentation of terms when the contract is constructed. They argue that the judiciary seems to be deliberately constructing rules favorable to business interests.⁷ In browsewrap contexts they argue that it is questionable whether actual assent to the terms exists. They offer an example of the conflict between traditional doctrine and the newer approaches, concluding that contract rules have tended to not take silence or inaction as assent or acceptance of terms but that the reverse is common with these newer electronic contracting approaches.

George Taylor and Michael Madison, in “Metaphor, Objects, and Commodities,” begin by recognizing that contract and property overlap.⁸ They commend Radin for her important contribution of the “relational view of property” while acknowledging and then challenging her argument that certain qualities of “personhood” should be inalienable in the economic market. While Radin seeks to prevent the reduction of the person to an object sundered from its essential self, relying on Hegel’s idea of alienation, Madison and Taylor argue that objectification of the person, and objectification of various features of the digital environment, may also have important system benefits.

Madison and Taylor present an extended critique of Radin’s analysis, basing it in part on Gadamer’s argument that meaning and application are interrelated and that meaning changes with application. Central to this interplay is the speculative form of analysis that seeks to *fix* meaning, contrasted with metaphorical thought that seeks to undermine some fixed meanings and create new meanings through interpretation. The result is that in our discourse the speculative and metaphorical forms are conjoined in an interactive process through which new adaptations emerge, much as in the classic Hegelian dynamic of thesis, antithesis and synthesis. Taking this critique an additional step, they use examples from contemporary intellectual

⁷*Id.* at 179-80.

⁸Michael Madison & George Taylor, *Metaphor, Objects, and Commodities*, 54 CLEV. ST. L. REV. 141 (2006).

property law discourse to demonstrate how an interactive approach can yield important insights.

Kevin Collins, in “Cybertrespass and Trespass to Documents,” argues that the Internet is not just electrons drifting in space but that it is physical in the sense of servers and technology that contain the information and owners who control these systems. The issues of propretization thus become ones of the rights of server owners to “own” the information contained on those information systems in terms of controlling others’ access, competition and use for economic or political reasons. Collins discusses the issue of policies of the scope and extent of control that should be accorded ownership in the context of two types of cases he defines as distribution and extraction. In distribution cases the context is one where an Internet user seeks to send a message through a server that is intended to arrive at a final recipient or site and the intermediate server owner seeks to enjoin the message based on its content. In the extraction situation a user “accesses publicly available information on a website and a server owner . . . seeks to enjoin the user’s continued access to the website because the user employs the information . . . in a manner that is legal yet contrary to the server owner’s interest.”⁹

Collins poses the critical question as how to deal with the policy regarding “cybertrespass.” An interesting point in the context of the use of terms such as “cybersquatting” and “cybertrespass” is that they are not value neutral. Framing an issue in such language generates an inchoate judgmental response that already moves a decision maker part way to the conclusion that such behavior should be sanctioned. He asks in our consideration of the appropriate policies and doctrines: “Who can access, transmit and use information on the Internet and under what circumstances can he or she do so?”¹⁰ He admits that “classic, old-world questions of tangible property . . . in isolation are ill suited to providing thoughtful answers in information-centered disputes.”¹¹

While he discusses trespass to land and chattels, Collins argues that courts have dealt historically with a more directly analogous situation through the doctrine of trespass to documents. He develops this analysis by looking at several recent cases. Part of the problem with using the doctrines of trespass to land and chattels is that they recognized only physical invasions as trespasses. It is then noted that electrons are not “physical” and that this poses an obvious problem for the application of those doctrines. This point is developed at some length through analysis of the *Thrifty-Tel* case relating to concerns about information intangibility and trespassory invasions by electronics.¹² Part of the *Thrifty-Tel* analysis is the holding that “small particles” thought intangible could be actionable invasions to land. For example, an equivalent situation arguably exists with the doctrines of trespass to land and nuisance in the area of environmental or toxic torts. Particulates and air pollution that could not be measured at one point historically due to technological limits evolved doctrinally into recognized trespasses as the ability to reliably measure the phenomena emerged.

⁹Kevin Emerson Collins, *Cybertrespass and Trespass to Documents*, 54 CLEV. ST. L. REV. 41, 43 (2006).

¹⁰*Id.* at 42.

¹¹*Id.*

¹²*Id.* at 46-48.

Collins suggests this analysis transferred to the Internet context in the *Thrifty-Tel* court's use of the idea of the invasion of system infrastructure by electronic information or data packets sent by others aimed at extracting information to which they had no right of access. The message is that it takes time for judges to determine how best to characterize new situations and how to adapt doctrines in ways applicable to new contexts.

Collins also develops the argument that although the physical servers are owned, they owe their ability to operate meaningfully and create economic value for their owners only through being networked with the myriad of other systems that comprise the Internet. A primary value-added component is therefore something created by others on whom they are piggy-backing or free riding. Both as a matter of social policy and economic legitimacy this fact of dependency and benefit created by the larger system at a minimum offers a counter to claims of entitlement to full and unfettered control and exclusive propertization. This shifts the analysis from a clear property and control context of rights granted by virtue of being the owner of the physical system to a public interest versus server owner interest conflict. Here it can be argued that for the server owners linking to the Internet indicates an acceptance of risk or consequences for the right to "play."

Daniel Barnhizer, in "Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age," takes a more philosophical tack.¹³ He is concerned with what this new system of communication and interaction does to the person. Part of this involves the questions of how we protect the individual in the context of invasions of privacy, data-mining, and the ability of others to access information about individuals that creates in effect a virtual person that can be manipulated for the users' benefit. Such electronic *doppelgangers* appear to provide producers with inordinate bargaining power over individual consumers by using consumers' personal information to exploit consumer needs, wants and foibles.

Included in the analysis are discussion of competitive efficiencies and the emergence of different kinds of power relations between producers and consumers. Although much remains the same, there are basic and important differences. One is the ability of producers, marketers and sellers to create sophisticated databases about consumers and specific customers. Barnhizer argues convincingly that the degree of targeting can be frightening. But he also suggests that consumers have obtained a heightened ability to obtain information, and to monitor sellers and producers for quality, integrity and behavior. In light of this incredibly complex and dynamic ability of both sides in the consumer contracting equation to manipulate and improve their bargaining power, Barnhizer concludes that legal conceptions of bargaining power should abandon traditional contract approaches to the phenomenon. Adapting the metaphor of propertization to the contract law context, Barnhizer reconceptualizes the traditional legal interpretation of bargaining power from an intuitively perceived gestalt arising from the parties' relationship to a series of discrete inputs that can be developed and owned by each party and that in turn serve as a wall or fence protecting an individual's "property" in self, including the ability to withhold consent.

¹³Daniel Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69 (2006).

Barnhizer raises concerns about the ability of marketers and purveyors of information to create “doppelgangers” or “virtual persons” based on information we unwittingly input to the Internet through web surfing activities, purchases and other inquiries that we naively thought were discrete and independent acts but when “mined” by sophisticated software systems can be brought together in ways that allow enhanced manipulation of us without our knowledge.¹⁴ This converts us into objects to be targeted by sellers on levels independent of rational choice. A key question involves not only whether such personalized data-mining should occur but, if it does, who owns the profile. If portrayals of celebrities can be propertyized to the degree that others must pay to use the profile and can do so only with the person’s consent, it is not an irrational leap to suggest that individual users of the Internet own their characteristics and that others either should not collect and integrate that data or, if they do, it can only occur with the consent of the individual user and with a negotiated value.

Anupam Chander, in “Exporting DMCA Lockouts,” argues that U.S. hegemony and dominance has led to efforts to control and dictate terms through the use of free trade agreements by the U.S. to impose its rules regarding copyright and anticircumvention provisions into free trade agreements as a condition of granting access to US markets. He argues that our free trade agreements include “mandates on ... database protections, domain names, encrypted program-carrying satellite signals, rights management information, and geographical indications. In effect, we are rewriting the intellectual property laws of our trade partners.”¹⁵ Chander maintains that in attaining this admittedly legitimate goal of protecting digital films and music, the U.S. has “ignored the legal milieu of intellectual property, in particular, competition law, foisting upon our trading partners rules that may be exploited to permit corporations to gain monopolies in the after-market for their products.”¹⁶

Abraham Drassinower, in “Capturing Ideas: Copyright and the Law of First Possession,” explores the “relation between authorship and ownership, originality and first possession.”¹⁷ He presents an intriguing analysis developed through a case, *Pierson v. Post*, in which the key issue is one of whose interest should be protected and at what point is one entitled to legal protection.¹⁸ Drassinower begins with a discussion of the rights of a frustrated fox hunter whose intent to gain his quarry was foiled at the last moment by another hunter. This device is used to raise the issue of the point at which ownership rights manifest.

He then moves from the issue of the conditions of intention and property right acquisition in *Pierson* to the essay’s basic question, one Drassinower poses as: “Just as originality describes what a person must do in order to constitute herself as an

¹⁴The spying and monitoring capability is quite extensive and frightening in its potential. See, e.g., Joseph Menn, *Now, Every Keystroke Can Betray You*, LOS ANGELES TIMES, available at http://news.yahoo.com/s/latimes/20050918/ts_latimes/noweverykeystroke.

¹⁵Anupam Chander, *Exporting DMCA Lockouts*, 54 CLEV. ST. L. REV. 205, 217 (2006).

¹⁶*Id.*

¹⁷Abraham Drassinower, *Capturing Ideas: Copyright and the Law of First Possession*, 54 CLEV. ST. L. REV. 191, 191 (2006).

¹⁸*Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805).

author for purposes of copyright law, so does first possession describe what a person must do in order to constitute herself as an owner for purposes of property law.”¹⁹ He explains: “I want to posit that the distinction between property and copyright cannot be adequately grasped as a distinction between tangible and intangible subject matter. The point of setting forth a correspondence between *animus* and *factum* in property and idea and expression in copyright is precisely to show that an emphasis on the intangibility of copyright subject matter is simply not sufficient to bring into relief the specificity of copyright *vis-à-vis* property.”²⁰ He continues: “My hope is to evoke ... the view that a positive theory of the public domain is impossible in the absence of a positive theory of authorship.”²¹

Frank Pasquale, in “Rankings, Reductionism, and Responsibility,” argues that: “as search engines become more authoritative, encompassing more and more sources of data, they become capable of harms commensurate with their benefits. So far public attention has focused on privacy concerns raised by these data aggregators’ storage of all search requests connected to given users.”²² Pasquale adds that: “Major players in the ‘creative industries’ have also claimed that search engines will ‘Napsterize’ their content or lead to a digital ‘WalMart’ capable of squeezing content providers as effectively as the brick-and-mortar retail behemoth drives down the prices it pays its suppliers.”²³

Pasquale warns of the consequences of granting too much power over information to the massive systems that increasingly control and have the power to shape social and political discourse. A central point at the heart of developing policy regarding ownership, control and ultimately propertization and contract enforcement is that: “Search engines are not merely one more voice in a pluralistic public dialogue, but are poised to become the chief *organizer* and *forum* for research, public discussion, and commercial competition among internet users.”²⁴ Echoing Radin’s policy concerns, Pasquale warns: “Only an ongoing concern for the *policy* behind freedom of expression will make that legal neighborhood an ameliorative influence on the gated privatopia of IP law it borders.”²⁵

Chris Sagers takes Radin’s piece in this Symposium as the starting point for a critique centered on a problem he argues runs throughout Radin’s work. Sagers defines this as the problem of the “public/private” distinction, a problem he claims Radin has explicitly avoided.²⁶ The difficulty in avoiding this distinction, Sagers concludes, is that it is an important one in most or even all the subjects she has discussed, and particularly in the technology contexts she considers in her

¹⁹Drassinower, *supra* note 17, at 191.

²⁰*Id.* at 192.

²¹*Id.*

²²Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 139 (2006).

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶ Chris Sagers, *Monoism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219 (2006).

Symposium essay. Sagers argues that her failure to grapple with this problem has left certain conceptual difficulties in her work, and he urges her to confront the distinction. Sagers surveys Radin's body of work to support his argument that the distinction is implicated throughout, though often muted. He ultimately claims that her own abiding objectives would be best served were she to take the public/private distinction head on.

There are reasons why authors such as Radin, Collins, Daniel Barnhizer and Pasquale focus elements of their policy analysis on the impact on individuals and our social community of legally authorized behaviors that have been made possible for the first time by information systems.²⁷ One need not be a Marxist to concede that economic systems play significant roles in defining who we are as individuals and how our social community functions. There is an intrinsic "morality" to economic behavior, not a morality in the value-positive common meaning of the term, but as a set of values necessarily attendant to and generated by the dictates of that system. That corrupted form of morality is often not a positive source of values for guiding our true moral behavior and ordering our institutions in ways that advance those goals.²⁸ When such goals are placed against the reality of a controlled society in which humans are shaped, prodded, lied to and manipulated by massive and

²⁷See, e.g., Jonathan Watts, *China's Secret Internet Police Target Critics With Web of Propaganda*, THE GUARDIAN [online], June 14, 2005, <http://technology.guardian.co.uk/online/news/1,12597,1505988,00.html>. Watts reports: "China's communist authorities have intensified their campaign against the party's biggest potential enemy - the internet - with the recruitment of a growing army of secret web commentators, sophisticated new monitoring software and a warning that all bloggers and bulletin board operators must register with the government or be closed down and fined." *Id.* Watts adds:

Although the existence of an internet police force—estimated at more than 30,000—has been known for some time, attention has previously focused on their work as censors and monitors. Countless critical comments appear on bulletin boards of major portals such as Sohu and Sina only to be erased minutes, or sometimes just seconds, later. In the most recent case, all postings that blamed corrupt local officials or slow-moving police for the deaths of 88 children in floods last Friday were removed almost as soon as they appeared.

Id. See also Becky Hogge, *The Great Firewall of China*, ARTS & LETTERS DAILY, May 20, 2005.

²⁸Aristotle argued that the ideal of the highest human development was a goal for defining who we are. See ARISTOTLE, *supra* note 5. One scholar sums it up as:

Aristotle teaches that each man's life has a purpose and that the function of one's life is to attain that purpose. He explains that the purpose of life is earthly happiness or flourishing that can be achieved via reason and the acquisition of virtue. Articulating an explicit and clear understanding of the end toward which a person's life aims, Aristotle states that each human being should use his abilities to their fullest potential and should obtain happiness and enjoyment through the exercise of his realized capacities. He contends that human achievements are animated by purpose and autonomy and that people should take pride in being excellent at what they do. According to Aristotle, human beings have a natural desire and capacity to know and understand the truth, to pursue moral excellence, and to instantiate their ideals in the world through action.

Edward W. Younkins, *Aristotle: Ayn Rand's Acknowledged Teacher*, THE AUTONOMIST, <http://usabig.com/autonomist/articles/aristotle.html>. (last visited Aug. 24, 2005).

sophisticated organizations using the most advanced technology to achieve their ends, the yawning gap between ideal and reality becomes dismally apparent.

II. KONDRATIEV WAVES AND THE SHIFT TO A NEW POLITICAL ECONOMY

It may be useful to step back for a moment from the subjectivity caused by immersion in our rapidly shifting social context and accept we are in a period of accelerating change with profound consequences. For this I offer the insights of Nikolai Kondratiev, a Soviet-era economist tasked by Joseph Stalin to prove through economic analysis that the capitalist system faced inevitable and final collapse. Interestingly for us, but unfortunately for Kondratiev who was encouraged by a displeased Stalin to winter in Siberia for an extended period, Kondratiev proved through his examination of the economic history of capitalism that rather than collapsing it experienced massive transformative shifts every sixty to seventy-five years or so, shifts that have become known as Kondratiev Waves.²⁹

The premise of Kondratiev's analysis is that after a lengthy period of often chaotic change, a new form of economic and necessarily political society emerges that is different in kind from its predecessor. Joseph Schumpeter followed Kondratiev's path when he concluded in relation to what he called "creative-destruction" that: "The capitalist process not only destroys its own institutional framework but it also creates the conditions for another. Destruction may not be the right word after all. Perhaps I should have spoken of transformation."³⁰ The Internet and associated information technologies and integrative software systems have generated a Kondratiev Wave, and our entire social and economic order is being altered as a result. Nor is the process of transformation complete, including the changes in law required to accommodate, shape and facilitate the emerging environment.

The process we are undergoing as a result of the emergence of the Internet, communication innovations, and the revolutionary potential of data acquisition capabilities is sufficiently different from that which it has displaced that we are left grasping for ways to comprehend, order and control what is unfolding. A consequence is that our policy makers, including judges and legislators, are making up rules "on the run." No specific interpretation can account adequately for all aspects of what we are experiencing or even provide much more than an ephemeral snapshot of conditions at a specific moment.³¹ I don't want to suggest there have not

²⁹NIKOLAI D. KONDRATIEV, *THE WORLD ECONOMY AND ITS CONDITION DURING AND AFTER THE WAR* (1922); Nikolai D. Kondratiev, *The Long Waves in Economic Life*, in *ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK* (1926) (transl. 1935, REStat). Asked by Stalin to demonstrate the inevitable "death" of capitalism, Kondratiev identified the recurrent half-century "long wave." He was rewarded by Stalin with imprisonment in a Siberian prison camp where he died.

³⁰JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 162 (1950).

³¹In considering the necessity of basing positive law choices on some set of fundamental "quasi-natural" principles, and the increasing difficulty of doing so, I have always appreciated historian Daniel Boorstin's observation that the abandonment of belief in a divine or natural source for the laws that governed human societies uncomfortably shifted the burden of responsible choice of fundamental values to us. He concludes:

The discovery, or even the belief that man could make his own laws, was burdensome [N]early every man knew in his own heart the vagueness of his own knowledge

been similar transforming events in our history or that anything is entirely new. In fact that is Kondratiev's point—that there are recurring, though not cyclical, periods in which innovations and conditions coalesce to generate profound effects on societies of a kind that change the rules of operation and create a different order of economic and social system. The fact that other waves of change have swept through our economic and social order and altered the form and quality of an existing order in ways that produce a different system does nothing to deny the fact that we are undergoing another such change at this moment.

III. THE EMERGENCE OF “CYBERHUMANS”

A theme that intrigues me, and one that I think is implicit in several of the Symposium contributors' concerns with the impact of the Internet and information technologies on humans, is the degree to which the new power of information is not only external to us as an extrinsic technology but is redefining us in social and individual terms. In this sense I wonder if information technology (and here I intend it broadly to include software, the Internet and all similar elements) is encompassing and altering humans and their societies much in the way that Marshall McLuhan remarked occurred with printing. McLuhan offered the intriguing insight that with printing came the rise of what he called “typographical man” where the new powers offered by Gutenberg's technology of printing expanded human capacities consistent with the power of widely available written discourse.³² Until that point written information was conveyed through a very limited number of painstakingly copied manuscripts and religious works done by clerics and scribes. Reading and writing were abilities possessed by few, in part because there was no real purpose to the development of those skills if they could not be put to use.

It is almost impossible for us to appreciate the revolutionary impact on people, institutions and governments of the vastly enlarged power granted by the invention of printing to disseminate ideas and criticisms, including anonymous attacks on those in power, and to communicate to large numbers of people over extensive areas. Humans were drawn toward and altered by the power of printing and the ability to create, share and disseminate information.³³ This not only altered society and educational systems, it undermined the ability of dominant institutions to control discourse and to remain immune from criticism. It is fascinating that the doctrines

and the uncertainty of his own wisdom about his society. Scrupulous men were troubled to think that their society was governed by a wisdom no greater than their own.”

DANIEL BOORSTIN, *THE DECLINE OF RADICALISM* 74 (1963).

³²See generally MARSHALL MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHICAL MAN* (1962).

³³See, e.g., JAMES MARTIN, *THE WIRED SOCIETY* (1978), particularly Ch. 11, “The Information Deluge” where Martin indicates that in 1660 there was only one scientific journal, in 1750 ten journals, 1,000 by 1850, and 100,000 by 1950. *Id.* at 116. See also GENE ROCHLIN, *TRAPPED IN THE NET: THE UNANTICIPATED CONSEQUENCES OF COMPUTERIZATION* (1997), where we see that while the computer is offered as a technology of freedom, it in many ways has become one of subjugation, monitoring and dependency as employers, marketers and others learn how to use it for their purposes with the result of increased workloads for employees, monitoring of activity, micro-management, and invasions of privacy through data mining and profiling.

relating to speech suppression and punishment have to deal with the emergence of communications technology. The judicial system of the Star Chamber was created independent of the Common Law courts apparently in response to the heightened capability of mass printing and the ability to spread criticism more widely than could be done by simple rumor and word of mouth.³⁴ We are experiencing an event through the power of the Internet and associated information and communications capabilities that is every bit as compelling and revolutionary as that of printing and the emergence of “typographical man.”

I am not arguing that the transformation caused by printing was instantaneous, only that as printing became more widespread, commercialized and available it created radically different capabilities over time. The society into which the technology of mass printing was first introduced was not one in which the numerous institutions necessary to take advantage of the innovation existed. They needed to develop over time, and as they did they produce a new form of education, ability to disseminate speech and ideas more broadly, and the opportunity to challenge political power. With the Internet and communication technologies the process has been accelerated and intensified because the necessary systems were already in place.

Although I am arguing the *coup de grace* is being applied through the power of information capabilities, the table has been set for more than a generation in terms of the grossly expanded power of corporate entities to shape our lives and impose their will on American society by the manipulation of wants and consumer choices. I have great admiration for various writers speaking in the 1950s and 1960s who saw the social transformation with wonderful, if depressing, clarity. Paul Tournier captured the essence of the cultural forces when he observed: “[people] have become merely cogs in the machine of production, tools, functions. All that matters is what they do, not what they think or feel. . . . [T]heir thoughts and feelings are . . . moulded by propaganda, press, cinema and radio. They read the same newspaper each day, hear the same slogans, see the same advertisements.”³⁵

³⁴See Consultation Paper on the Crime of Libel, The Law Reform Commission, Dublin, Ireland 1991, http://www.lawreform.ie/publications/data/volume10/lrc_65.html (last visited Aug. 24, 2005), where it is stated that:

In 1476, Caxton set up the first printing press at Westminster and in 1488, the Star Chamber was set up in order to monitor and suppress criticism of Church and State, which were at that time closely interwoven. The primary libels with which it was concerned were therefore libels of a seditious or blasphemous nature. However, the Star Chamber also wished to suppress duelling, which was the fashionable means of vindicating attacks upon honour or reputation, and to this end it also punished defamatory libels i.e. libels which impugned the integrity a private individual. In 1606, the Star Chamber held in the celebrated case of *De Libellis Famosis* [(1606) 5 Co. Rep. 125a.] that it was an offence to defame the deceased Archbishop of Canterbury. The nature of the tasks of the Star Chamber and common law courts were therefore altogether different; while the Star Chamber was attempting to discourage matter which either threatened state security or might cause a breach of the peace, the common law courts were concerned with rectification of damage done to the reputation of an individual.

³⁵PAUL TOURNIER, *THE MEANING OF PERSONS* 40 (Edward Hudson trans., Harper & Brothers 1957).

In criticizing the effects of market-morality, Jules Henry argued that it operates according to a different value related to what is considered appropriate and true. He explains, for example, that: “[t]he heart of truth in pecuniary philosophy is contained in the following three postulates: Truth is what sells. Truth is what you want people to believe. Truth is that which is not legally false.”³⁶ He went on to say that one result of market-morality is the tendency to find a substitute for true human meaning, explaining: “The average American has learned to put in place of his inner self a high and rising standard of living, because technological drivenness can survive as a cultural configuration only if the drive toward a higher standard of living becomes internalized; only if it becomes a moral law, a kind of conscience.”³⁷

The power, shaping effects and scale of institutional structures are part of the phenomenon that Jacques Ellul defined as *technique*. In two prescient works, *The Technological Society* and *Propaganda*, Ellul warned of the transformation of social structure and behavior through the rise of *technique*.³⁸ Ellul argued we are increasingly trapped within a “technological society” that defines and dictates the terms of human behavior and causes a progressive loss of our humanity. What is occurring may therefore not be “new” in the sense that it emerged solely as a consequence of the Internet and information capabilities, but a dismal trend has been allowed to intensify and accelerate as the information capabilities evolved and been seized on by economic and governmental actors.

One would be either naïve or disingenuous not to accept that such a system has effects on those who practice it or are subject to its values as objects. If that concern is valid, then failing to understand the implications of information systems, the consequences of the choices judges and legislators are making as to what should be propertized, the effects of privacy invasions and similar matters including the radical shift in contracting power allowed by non-negotiable and often hidden terms or by unilateral alterations of the conditions of agreement based on factors entirely under the control of one party to the “agreement” do have profound implications for the integrity and balance of power within our political community.

IV. DEFENDING AGAINST THE MISALLOCATION OF POWER IN THE SURVEILLANCE SOCIETY

My argument, and that of several of the contributors to this Symposium, is that vital policy issues relate to how we protect the individual and the ideal of what we consider the appropriate conditions of humans in community from abuses of power by institutions that dictate the terms of our existence and undermine our ability to pursue the ideal of the human that has guided our philosophies for several millennia. The choices being made by judges, legislators and regulators are neither neutral, nor should they be thought of as simple economic behavior. They are choices that impact on the essence of society and our sense of who we are.

Choices from the array of options found in Radin’s “neighborhoods” of propertization, contract, competition, and free expression, along with others we can identify once we look closely at the metaphor, will be vital tools for protecting and

³⁶JULES HENRY, *CULTURE AGAINST MAN* 51 (Vintage Books 1965).

³⁷*Id.* at 162.

³⁸See JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (1964); JACQUES ELLUL, *PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES* (1965).

preserving values to which we claim to assign the highest priority. It is important in our environment of transformative change to have that larger discourse because the source of tyranny is not found solely in government. This is particularly important to accept at this point because powers have been assumed by default or granted to private sector institutions of a kind far beyond what they should possess.

How to restrict that power consistent with the wellbeing of the social community is one of the most compelling challenges we face. Max Lerner prefaces Mill's *On Liberty* with the observation that:

The great strength of [*On Liberty*] ... lies in its moving away from a narrow view of human freedom as an immunity from the power of the state. Mill takes two giant steps away from this, toward a broader view of freedom. One step is to see that the enemies of human freedom may be found in the attitudes of the people themselves, and that the tyranny of the majority may be as hostile to the expression of a man's life and temperament as the tyranny of the state.³⁹

Lerner adds: "Mill was a pioneer in seeing, with the growth of social egalitarianism and mass culture, the shadow of "an oppressive yoke of uniformity in opinion and practice."⁴⁰

In this context the core issue we must confront is no longer a simplistic conception of neat domains of public or private power but power itself. Mill's idea of the tyranny of the majority and the state need to be expanded to add the category of the tyranny of uncontrolled, non-transparent and unaccountable non-state institutional actors in possession of levels of power they were never intended to wield. The need to control the allocation of such power is particularly vital when we consider that the emergent points of private economic power that have traditionally been allowed to operate in a particular way because of the inherent competitive limits, functions and cycles of their activities now possess power without transparency. They control power without democratic accountability, and apply that power without the balance of a comprehensive social agenda or sense of responsibility to the political community to act as a check on their self interest.

In this context it would be wise to heed the words of Justice Rehnquist, dissenting in *Furman v. Georgia*. He quotes from John Stuart Mill's *On Liberty*: "The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power."⁴¹ Decisions about propertization and "novel" or illusory forms of contracting are central to our ability to control or at least mitigate the behavior of such actors.

³⁹MAX LERNER, ED., *ESSENTIAL WORKS OF JOHN STUART MILL* 250 (Bantam 1961).

⁴⁰*Id.*

⁴¹*Furman v. Georgia*, 408 U.S. 238, 467 (172) (Rehnquist, J., dissenting) (quoting J.S. MILL, *ON LIBERTY* 28 (1885)).

V. THE “SURVEILLANCE ECONOMY,” NATIONAL SECURITY, AND THE EMERGENCE OF THE UNACCOUNTABLE CORPORATE ACTOR

Another important problem is the increased difficulty of drawing clear lines between what we have thought should be separated into the spheres of economic, political and social activity we traditionally labeled public and private. While it may be argued that the purported distinction is more mythical than real, judges and legislators continue to act as if the dichotomy exists.⁴² In a Rule of Law society where language shapes our perception of reality, the belief that something is as claimed creates a degree of substance even if underlying reality belies that doctrinal belief. We continue to see the “naked” emperor as if he is fully clothed.

To the extent the division into public and private has been based not only on specific types of functions but on a belief that certain degrees or forms of power should only be vested in a democratic government subject to popular control, the transfer of large-scale, pervasive and often invisible and unaccountable power to private economic entities poses a threat to effective governance. This threat justifies the use of strategies of control and limitation that have not traditionally been applied to economic actors in a market-based political economy.

The tradition of the public/private distinction is particularly problematic in the field of information acquisition and propertization. An unhealthy relationship that is not in the interest of the citizenry has emerged between government and information businesses. The symbiosis exists for several reasons. One is that the greatest opportunity to profit financially from control of information as property is found in the private sector. Another is that the private sector attracts the best talent with high levels of innovative ability. Just as with the military-industrial complex and the oft-proclaimed economic benefits of the U.S. space research program that generated new technological breakthroughs for private sector economic actors, when government wants and is willing to pay for a product it stimulates a host of private sector industries.

The problem with such a powerful stimulus is that these industries become intimately connected with government to the point they operate as surrogates in a profitable dependency relationship even to the extent they function as unofficial servants of governmental activity. The pressure to develop and propertize information is in some ways driven by the government’s ability to pay for the results. An example is found in the context of the National Security Agency (NSA). NSA works through a global surveillance system called Echelon that has incredible power. When it was first created almost thirty years ago Senator Frank Church warned that it posed a fundamental threat to America’s democratic system and the relationship between citizens and governmental control.⁴³

⁴²See, e.g., Sagers, *supra* note 26, at 242.

⁴³See the remarks of Senator Frank Church, quoted in ECHELON America's Secret Global Surveillance Network:

[T]hat capability at any time could be turned around on the American people and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide. If this government ever became a tyranny, if a dictator ever took charge in this country, the technological capacity that the intelligence community has given the government could enable it to impose total tyranny, and there would be no way to fight back, because the most careful effort to combine together in resistance to the

As we saw with the Congressional concern about former Reagan National Security Advisor John Poindexter's TIA (Total Information Awareness) proposal, the political sphere is sensitive to public concern about governmental intrusiveness.⁴⁴ But as we have also seen with the informational aspects of the Patriot Act in which intelligence agencies seek data on citizens based on arguments of national security needs, our officials still desire the information.⁴⁵ The debate over former Attorney General John Ashcroft's proposed Terrorism Information and Prevention System (TIPS) reveals the inexorable tendency of government to use whatever technologies are available to achieve its ends and to unflinchingly overreach for what seem to be the best of reasons.⁴⁶

government, no matter how privately it was done, is within the reach of the government to know. Such is the capability of this technology . . . I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.

PATRICK S. POOLE, ECHELON: AMERICA'S SECRET GLOBAL SURVEILLANCE SYSTEM (1999-2000) (quoting Senator Frank Church, *Meet the Press* (NBC, Aug. 17, 1975)), available at <http://fly.hiwaay.net/~pspoole/echelon.html>.

⁴⁴See Clyde Wayne Crews, Jr., *The Chill from the Pentagon*, CATO INSTITUTE, Nov. 25, 2002, <http://www.cato.org/research/articles/crews-021125.html> (last visited Aug. 1, 2005). Crews warns:

Government has become too large and pervasive. TIA's commitment not to monitor innocent individuals is not credible. There are so many compulsory cradle-to-grave databases that the mere act of combining, sorting, sifting and interpreting them may no longer be possible without violating our Fourth Amendment rights The information economy and electronic commerce increasingly depend on secure and specialized private databases, and TIA could undermine those as well. Corporate America needs to be able to make credible privacy assurances to the public. People need to know that the data they relinquish is confined to an agreed-upon business, transactional or record-keeping purpose, and isn't automatically included in a government database. If the TIA project ends up routinely requiring banks, airlines, hotels, Internet-service providers, and other businesses to hand over such private information, it will undermine evolving commercial-privacy standards, drive transactions underground, and make criminals out of ordinary people who simply want to be left alone.

Id.

⁴⁵The USA Patriot Act is an acronym representing the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001." For useful analysis and description, see Robin Rice, *The USA Patriot Act and American Libraries*, INFO. FOR SOCIAL CHANGE, Vol. 16, Winter 2002-03, available at <http://libr.org/isc/toc.html>; NYCLU, *The Dangers of Expanding the Patriot Act*, http://www.nyclu.org/patriotact_sunset_pr_071205.html (last visited Sept. 8, 2005); Brigid O'Neil, Book Review, FREEDOM DAILY, Mar. 2004; (reviewing JAMES BOVARD, *TERRORISM AND TYRANNY: TRAMPLING FREEDOM, JUSTICE, AND PEACE TO RID THE WAR OF EVIL* (Palgrave Macmillan 2003) <http://www.fff.org/freedom/fd0403g.asp> (last visited Aug. 12, 2005); Rachel Marsden, *'Patriot' Dangers: To Serve and Oppress*, <http://www.rachelmarsden.com/columns/patriotact.html> (last visited Aug. 14, 2005).

⁴⁶See, e.g., Black, *supra* note 1; Donegan, *supra* note 2.

The path to the actual development of deeply intrusive and pervasive information systems and technologies lies with the private sector. This is because it has more flexibility and better talent as well as a highly developed drive for innovation and profit. While systems such as ECHELON may be used by governmental actors they are developed by the private sector for use in governmental activities. The United States' nuclear weapons program depends on private defense contractors not only for weapons manufacture but for management of weapons research laboratories. The military may be the end users of other weapons systems but the weaponry is designed and produced by private sector defense firms. These represent immensely profitable economic activities for companies that in a technical sense are "private", but that are also well-compensated arms of government. The same kind of relationship is evolving in the information context. The private sector information systems are thus able to do what government cannot do without incurring substantial political risk as "Big Brother." While the process is working at one level of distance in the U.S., in China the connection is both direct and transparently sinister, with U.S. information giants Google, Yahoo, and Microsoft selling their democratic souls in service to the repressive behaviors of the Chinese government.⁴⁷

VI. THE STABILIZING FUNCTION OF THE JUDICIARY IN A RAPIDLY CHANGING CONTEXT

Gaining a fuller perspective and paying close attention to the implications of wise and unwise policy choices implemented through legal doctrine and regulatory rules is critical. As Lawrence Friedman argues: "it is through law, legal institutions, and legal processes that customs and ideas take on a more permanent, rigid form. The

⁴⁷See the chilling example reported in Jonathan Watts, *Microsoft Helps China to Censor Bloggers*, THE GUARDIAN [online], June 15, 2005. Watts describes:

Civil liberties groups have condemned an arrangement between Microsoft and Chinese authorities to censor the internet. The American company is helping censors remove 'freedom' and 'democracy' from the net in China with a software package that prevents bloggers from using these and other politically sensitive words on their websites. The restrictions, which also include an automated denial of 'human rights,' are built into MSN Spaces, a blog service launched in China last month by Shanghai MSN Network Communications Technology, a venture in which Microsoft holds a 50% stake. Users who try to include such terms in subject lines are warned: 'This topic contains forbidden words. Please delete them.' Even the most basic political discussion is difficult because 'communism,' 'socialism,' and 'capitalism' are blocked in this way, although these words can be used in the body of the main text. Many taboo words are predictable, such as 'Taiwanese independence,' 'Tibet,' 'Dalai Lama,' 'Falun Gong,' 'terrorism' and 'massacre.' But there are also quirks that reflect the embryonic nature of net censorship and the propaganda ministry's perceived threats. The word 'demonstration' is taboo, but 'protest' is all right; 'democracy' is forbidden, but 'anarchy' and 'revolution' are acceptable. On MSN Space, Chinese bloggers cannot use the name of their own president, but can comment on Tony Blair. 'Tiananmen' cannot be mentioned. A Microsoft spokesman said the restrictions were the price the company had to pay to spread the positive benefits of blogs and online messaging.

Id. Others are apparently "paying the price" as well. See Reuters, *Yahoo Accused of Helping Jail China Internet Writer*, ABC NEWS, Apr. 19, 2006, <http://abcnews.go.com/us/wirestory?id=1861295>.

legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking.”⁴⁸

Francis Bacon observed several centuries ago that judicial decisions are inherently and appropriately limited to the “immediate cause.” The reason for this, he argued, is: “It were infinite for the law to judge the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree.”⁴⁹ The problem is that in a fluid context such as we are now experiencing it is much too easy for judges to wander off base in their decisions and attempt to explore what Bacon called the infinity of the “causes of causes.”

In the vital areas where judges and legislators are making choices about what should be propertized and made an item of exchange, and what should be denied that authoritative characteristic due to priorities assigned other fundamental policies, those choices determine the shape, content and texture not only of the economic environment but of the political, social and individual cultures within which we operate.⁵⁰ Just as with the propertization of land where the owner of the bundle of rights associated with private property is allowed to fence out others from the specific territory or demand rents for its negotiated use, decisions to propertize information along with its use and access fences out others from the domain and allows the owners of the new property to negotiate rents for access and use. Propertization of information for economic benefit generates a self-sustaining stimulus for the further expansion of invasive information systems because allowing

⁴⁸LAWRENCE FRIEDMAN, *AMERICAN LAW* 257 (1984).

⁴⁹FRANCIS BACON, *THE MAXIMS OF THE LAW*, Regula I (1630).

⁵⁰*See, e.g.,* Brian Bergstein, *In the Data-Mining Society, Privacy Advocates Shudder: The Internet Makes Public Information Much Easier to Access—and Exploit*, SEATTLE POST-INTELLIGENCER, Jan. 2, 2004, http://seattlepi.nwsource.com/business/154986_privacy_challenge02.html. Bergstein reports:

Privacy advocates say far more worrisome intrusions are due as improving technology gives government, advertisers and insurance companies new ways to harvest precise information. ‘We are really on the cusp of creating a surveillance society where every action, every utterance—some might say every thought—can be traced,’ said Barry Steinhardt, director of the American Civil Liberties Union’s technology and liberty program. The next year will bring more debate over radio-frequency identification, or RFID, which lets stores and suppliers track inventory. Critics fear that it could secretly monitor consumers’ behavior or whereabouts; retailers say those worries are overblown partly because RFID tags will be disabled at checkout counters. Meanwhile, the U.S. government, acting on post-Sept. 11 mandates, will be monitoring travel more closely. The government plans to begin scanning and storing foreign visitors’ facial images and fingerprints in 2004. It also is developing CAPPS II—the Computer Assisted Passenger Prescreening System—which is expected to check travelers’ credit reports, consumer transactions and other personal data. While a privacy outcry led Congress to scale back the Pentagon’s Total Information Awareness data-mining program last year, several states are cooperating on a similar terrorism and law-enforcement database project called Matrix, which is maintained by a private company in Florida. Critics of such systems say they enable an unprecedented amount of snooping on law-abiding citizens but do little to actually enhance security—consequently creating a dangerous, false sense of safety.

Id.

data miners to profit from such activity increases the scale, intensity and degree of penetration of the search.

How should judges be approaching issues of propertization and “novel” electronic contracting tactics? The nature of the Common Law is that it is a mechanism that works in large part because it changes the internal meanings of its doctrines slowly, carefully, and even by employing fictions and simplistic assumptions that are taken as valid. The Common Law is not static, but it is incremental, slow and strategic in a very muddled sense. Put the idea of the pace of change within Common Law systems in the context of Bruce Ackerman’s remark that: “it is most unlikely that a court will accept a novel legal argument on its initial presentation. Most probably, such an enterprise will only serve to win somebody else’s case ten or twenty years from now....”⁵¹ Certainly the judicial struggle to develop new rules in the seemingly unfamiliar territory of information propertization and novel contracting behaviors that seem to fly against the logic of precedent is made more difficult by the muddled environment of the Internet and the capabilities of information systems. Yet that is a reason for caution rather than bold interventions in which judges issue proclamations without a sense of tradition, fuller context and balance.

The language of the Common Law is open textured. Edward Levi captured the nature of legal doctrine in his observation that: “The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas.... [A]greement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in statute or constitution, are molded for the specific case.”⁵² Levi adds: “The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.”⁵³

Judges in the kinds of cases discussed in the various contributions to this Symposium are faced with novel questions. On one hand the matters at issue seem to have little precedent on which judicial choices can be made, but the controversies and claims also involve words, doctrines and concepts that still feel familiar enough that existing doctrines can serve as guides for decision-making. The cases discussed in the Symposium can even be thought of as landmark or determinative articulations of novel legal doctrine that possess heightened ability to shape not only the specific issue in the case but that can generate unknown consequences for the society itself.

David Cole has argued that: “in landmark cases ... the Justices alter the puzzle itself and create law. Thus, while judicial legitimacy requires faithful adherence to precedent, legal development turns on creative acts.”⁵⁴ If the cases now being decided in the realms of information propertization and electronic contracting are novel, landmark and “hard” then we must hope that judges making these decisions and constructing new doctrines take heed of the appropriate role of the judge and

⁵¹Bruce Ackerman, *The Marketplace of Ideas*, 90 YALE L. J. 1131, 1139 (1981).

⁵²EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1949).

⁵³*Id.*

⁵⁴David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L. J. 857, 859 (1986).

seek to apply relevant precedential analyses. We must insist that judges limit the decision only to the concrete and necessary context, and be aware of the dangers of making “bad law” through hard cases. The problem is that in “hard” or “landmark” cases judges step outside their roles and seek to answer questions for which they are ill-suited and ill-equipped.

While the aesthetic of creative acts sounds compelling and admirable, creative acts by judges can easily be wrong or dangerous. It is also somewhat misleading to imply that the Common Law’s faithfulness to precedent is not itself creative, particularly given the numerous instances in which doctrine has almost mystically changed its nature in terms of the internal meaning of the doctrine even while managing to use the same words to characterize its purported principle. The question is in part the nature, obviousness and pace of change. I raise this point in light of Aristotle’s argument that our obedience to law is based more on habit and for tradition rather than any inherent substantive characteristic of the law and that too rapid or too frequent change in law undermines the habit of obedience.⁵⁵

Within precedential structures of doctrine that have been slowly and carefully developed and critiqued over time the incremental shifts by judges who are gradually adjusting and even altering judicial doctrines are in an important sense tested as to their effects. Law cases of any complexity are incompatible mixtures of fact, rationality, values, judgment, analogy, scientific assumption, metaphysics, and doctrinal principle.⁵⁶ When judges wander from reasonably close adherence to working precedent they are in a political and philosophical wasteland. It is fair to ask in the context of the judicial interpretations noted throughout the contributions to this Symposium whether some courts have altered the appropriate role with which they are charged and rendered decisions that may be within their power but outside their responsibility and range of wisdom.

Decisions as to propertization are precisely ones that transfer the force of law to new conditions. Here they are conditions that have been imperfectly considered, and reflect decisions that create a kind of “gravity well” that pulls us into its ambit and distorts the social space we inhabit for good or ill. Doctrine is not a universe of idiosyncratic episodes with disparate pieces. As Radin indicates, doctrinal choices represent a system of decisions by which a political community is defined, integrated, and regulated. Power is created and distributed and consequences are applied through the choices. Legal doctrine is a mechanism for achieving distributional goals and all doctrines are chosen, implicitly or explicitly, to achieve ends.⁵⁷ Because it is goal-oriented, judicial doctrine is not neutral. Judges, operating within the rules of choice articulated for a powerful institution with critical functions, make important choices about values.

⁵⁵Aristotle suggests why legal doctrine should not be altered too rapidly in his warning that: “the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.” ARISTOTLE, *THE POLITICS*, Bk. II, ch. 8 (W.D. Ross ed., Clarendon 1957).

⁵⁶ On such matters, see David Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles for Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988).

⁵⁷For a further explanation of the structure and functions of doctrine as a system, see David Barnhizer, *The University Ideal and the American Law School*, 42 RUTGERS L. REV. 109, 164-71 (1989).

The questions being asked in this Symposium include what are the wisest choices, on what policies and values should they be grounded, what effects do the choices have on our political order, and what mechanisms, laws and doctrines are needed to protect the community and individuals against the power granted government and business by the Internet and associated capabilities? Decisions about propertization, privacy, contract and competition policy are at the heart of the choices.