

# Foucault in cyberspace

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LAW AND POLITICS ON THE NET

*by*

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## Telephone Cults and Mail Murders      chapter 1

There are many uninteresting things to say about cyberspace. The newspapers prove it every day. Here we have a set of technological, economic and cultural changes that occasionally merit even the burbling enthusiasm of the Internet's devotees. Yet the newspaper coverage of the subject concentrates largely on things that have absolutely nothing to do with the Net itself.

Some time ago, for my sins, I got into some journalists' Rolodexes as a law professor who knew something about the Net. Now, whenever a web-designing cult commits collective suicide, a child is accosted by a pervert in a chat room, or a murderer persuades his victim to turn up by sending an e-mail message, I get a flood of calls looking for the "Internet angle." The trouble is that there rarely *is* an Internet angle. The murderers, sexual predators and crackpot religions are largely independent of the communications technology they happened to use. One reporter was particularly persistent in trying to get me to cough up an appropriate sound-bite. Searching for an analogy, I asked her whether, if I called her up and asked her out on a blind date and murdered her, she would think it was a "telephone-related murder"? She rang off shortly thereafter, probably more convinced of my emotional instability than by my argument. But the analogy is worth pursuing and it has something to teach the technophiles as well as the tabloids.

In the early '90's — before “.com” could be found plastered all over the backs of buses — I went to a conference at Duke University devoted to explaining the technological wonders that lay in wait for us.

At the culmination of the presentation one of the panelists said that, with access to better technology, we could actually have ordered a pizza on-line and had it delivered to us *right in this classroom*. There was a reverential pause at this piece of information, then a North Carolina voice spoke up hesitantly from the back of the room. “There’s a phone on the wall, you know.”

Imagine a *really* revolutionary communications technology. Imagine a future in which we have a communications system with unprecedented market penetration, reaching more than 98% of the families in the United States, the majority of households in the developed world and a fairly substantial portion of the entire world’s population. Imagine that the system would allow *real-time* communication, point to point, with terminals everywhere; so that in many cases you could actually send a message to your friends at their office desks, in their cars, or even on personal communicators small enough to fit into a shirt pocket. Make the system carry a live audio stream, (or perhaps even textual communication), through both analogue and digital protocols. Abolish practically all of the problems of systems incompatibility and make the prices absurdly low; for the price of a cup of coffee, or at least a short *latte*, you could maintain a real-time link to someone across the country for 10 minutes. Throw in the cost of a biscotti and, at a whim, you could tap out a simple string of numbers and be in contact with someone halfway around the world.

Distances that used to take months and risk lives to travel would be annihilated by five seconds and a little keyboard work.

Beyond the social implications, imagine the effect it would have on commerce to have almost *every* business in the world, even the least technologically savvy, wired into the network. Goods could be purchased, prices compared, advice procured, and all the disadvantages of distance obliterated.

Amazingly, this little act of imaginative futurism was perfectly unnecessary. We already *have* such a system, though one would never know it reading the contemporary gushing accounts about the magic qualities of the Net. We have had some parts of this futuristic communications technology for ninety years, most of it for forty, all of it for ten. It is called the telephone and, more recently, the fax.

Everything that is said about the Net should be put to the “telephone test.” We have been told that the Internet will revolutionise government, that e-mail will cut through corporate bureaucracy like a knife, that the Web would give children access to sexually explicit material of the foulest sort, or let terrorists exchange information across great distances. For each of these predictions, take the word “Net” or “e-mail” or “Web” and substitute the word “phone.” Try the game of technological extrapolation for yourself with some of the most familiar claims about the Net.

## The Telephone Test

“The telephone will mean a new era in government; even the illiterate constituent will have direct access to his or her representatives.

Goodbye to smoke-filled rooms and the power of those who have the ear of the politicians. By simply “dropping a dime,” anyone could be talking to the President himself, right at his desk. America will become the new Periclean Athens, with John and Jane Q. Public always “on the line” to give their views! Economically under-developed areas will be revitalised, with the poorest resident having access to the world-spanning communications technology of a “public phone”, right there on the street outside their house. In the business world, the telephone will allow the lowliest worker to contact, or “call,” the CEO directly with a helpful suggestion, or to check her messages from the comfort of a “phone booth” in a local hostelry; goodbye to office cubicles and executive secretaries! Corporate bureaucracy will melt like butter under

the pressure of such a technology, as organisation charts are undermined by the simple alphabetical ordering of the “telephone directory.” Schools will be revolutionised, with the best teachers from around the country using “speaker-phones” to teach students in remote areas, while doctors will practice “telephone medicine,” eliminating the need for time-consuming office visits.

Of course there are terrors to be faced in the world of the “phone.” Unscrupulous porn merchants could offer sexual audio content for the payment of a fee. Because of the faceless anonymity of the transaction, even the youngest child could potentially “dial” one of these services: a worrying prospect to those parents who suspect that their children spend a lot more time “on the phone” than they do themselves. Indeed, parents tell us that the kids are the only ones in the household who can reprogram the “speed-dial numbers.” Worse still, terrorists and criminals will doubtless seize on the potential of this technology. Vast criminal enterprises could be run by shadowy figures who simply “call in” their instructions to their underbosses; terrorists could exchange information and co-ordinate attacks, even across continental distances. With all of these dangers it seems undeniable that the technology should be heavily regulated and permanently monitored by law enforcement, and that all telephones should be fitted with child locks, but still, what a future!”

## Internet Realism

The telephone test provides two, much needed, correctives to discussions of the Net. First, it imposes a little modesty on our futuristic predictions; True, the telephone has caused major changes to contemporary society, including some recognisable, if distant, versions of the predictions made above. (Indeed, the rapidity of the Net’s growth comes in part because it could frequently use the existing phone-lines.) Yet our familiarity with the technology makes both the optimistic prophecies and the doom-saying pessimism seem naively over-blown.

Corporate bureaucracy and unresponsive government have survived and even flourished in a “dialled world”; many children manage to grow up unscarred by phone sex and society has coped with the advent of the telephone-equipped terrorist. The effects of the Net will similarly fall short of what both its boosters and its critics might predict. Straight-line extrapolations from technological capability to social function are almost always wrong. Second, the telephone test helps us focus on the things that actually *are* interestingly different about the Net, about cyberspace, about a wired world; that is the goal of this book.

Despite the curmudgeonly skepticism of the telephone test, I will admit to being something of a starry-eyed Net devotee myself, but with a difference. What I love about the Net is its effect on *ideas*; the way in which it can undermine some of our certainties, can destabilise some of our notions about politics and markets and civil liberties and property. I like the fact that, at least at the moment, people’s opinions on Internet issues lack the rote quality of much political debate. The Net actually *is* uncharted space in some senses; we have not yet decided how to “map” many of its conflicts onto our familiar political, economic and social categories. It is still possible to disagree fundamentally about where a particular controversy fits in our mental landscape and so viewpoints are hard to predict, opinions can still be shifted by discussion.

Will a conservative libertarian think that heightened copyright protection on the Net is a defence of the sacred rights of private property, or an intrusive government regulation conferring monopolies on state-loving corporations? Will a card-carrying ACLU member support or oppose “filters” embedded in Internet browsers that allow users to exclude web sites that have been rated as somehow undesirable? Are filters merely a private aid to personal choice, or a hardwired version of Big Brother, the New York Times best-seller list or a McCarthy era blacklist?<sup>1</sup> How do the ideas of economics apply to an area where giving away your product can be seen as a smart business strategy? Is Bill Gates the ultimate monopolist, someone who

has copyrighted the alphabet, or is he merely a smart business person in an intensely competitive market characterised by increasing function, falling costs and wide consumer choice?

I have my own answers to these questions, and the reader will be left in no doubt about what they are, but the first goal of the book is to introduce the questions themselves. Admittedly, my list of interesting issues may seem quirky to a lot of readers. There are worthy books to be written on the effects of the Net on self-conception and on community, on medicine and scientific research and so on. Personally, I am fascinated by ideas, large and small, by the clash of concepts, by struggles over the basic geography of the political and economic landscape. The issues gathered here reflect that set of interests, but their real common feature is simply that during the last five years of researching and writing about the Net, they have engaged and absorbed *me*. At the very least, I hope they will persuade the sceptical reader that there is something to cyberspace beyond the latest sex scandal that can have the word “Internet” crammed into its topic sentence.



## Shibboleth and Anathema in Net Policy

I have to confess, though, that this book is intended to be more than a guidebook, a conceptual Baedeker to the puzzles that the Net poses for political theory, economic analysis and legal regulation. Like most tour-guides, I have an agenda. We are at a moment in history when a lot of important decisions are being made, by both public and private actors, about the future of the Net. Those decisions are influenced by assumptions held with varying degrees of conviction by people in and outside of the digital mafia. The assumptions that I want to focus on are the following:

- that it is almost impossible to exercise state power effectively in cyberspace because the technology, the geography and the content are all profoundly hostile to regulation. (The digital libertarians would add, “and a good thing too!”)
- that the biggest danger to free expression on the Net is that of blundering attempts to censor it by ill-informed legislators (the Communications Decency Act of 1996 is the most obvious example) but that the First Amendment and the technology itself will combine to protect users of the Net and thus that speech is, and will continue to be, “free” in cyberspace.
- that to the extent there *are* problems of Net governance, there is a consensus in favour of neutral, technical solutions that facilitate private choice. We need a “V-chip” for the Net, in President Clinton’s words.
- that copyright law does not currently apply to cyberspace, that the Net poses an enormous threat to intellectual property rights, and thus that we need to give copyright owners larger and more powerful rights, protected by harsher penalties in order to make up for the losses they will undoubtedly suffer from piracy. This view is not particularly popular with people who are familiar

with the Net, but it is frequently heard on Capitol Hill and in the mainstream press.

- that the key to the success of the Net is to get national governments to leave it alone (which they will have to do anyway, given the assumption of their technical, geographic and regulatory impotence). Left alone, free speech and laissez faire markets will produce a set of optimal results: a process that will only be accelerated by the incredible speed and efficiency of information flow on the Net. (Bill Gates is fondest of the “unregulated markets” part of this argument, the ACLU of the “unregulated speech” portion; interestingly, each is willing to pay lip-service to the other.)

In this book, I will argue that all of these assumptions are at least partly wrong: wrong in interesting ways with important consequences. I will happily concede that my descriptions are caricatured, that no-one makes all of these assumptions and many people make none of them, that they have varying effects on the making of policy, that they are sometimes majority views and sometimes minority views and so on and so on. I will concede all of this, because I believe that intellectual honesty would force anyone to admit that in fact these assumptions are widely held and frequently heard and that — if they are caricatures — they must at least be exaggerating a real feature in order to be recognisable.

My final and more general goal in writing this book is to try to use the Net to illuminate the wider world of policy, politics and culture.

I said earlier that one of the things that attracted me to the study of the Net was the instability of the terrain. We divide our world up into contiguous and opposing territories -- public and private, property and sovereignty, regulation and laissez-faire, the family and the market -- “solving” problems by inquiring as to their placement on this map.

In the everyday world these divisions seem comparatively solid and lumpish to most people, even if clever academic critics may harp on their *theoretical* indeterminacy. On the Net things are different.

Scholars and policy wonks have generally responded to this situation by casting themselves as explorers and cartographers; their goal is to restore order and stability to this situation by introducing correct analogies and appropriate classifications; cyberspace would become more like normal space. From time to time in this book, I will engage in this project, but my real interest lies in the opposite direction: exporting some of the indeterminacy, openness and contingency of the conceptual landscape in cyberspace back into our discussions of regulation, property, liberty and economics in the "normal" world.

The great thing about classifications in cyberspace is that they are so obviously socially constructed, just "made-up." It is not entirely clear to me that making them seem as natural, normal and inevitable as some of our more familiar conceptual schemes is a good idea. In fact, quite the reverse. The final goal of this book, then, is to bring some of the open-ness of the Net back into meatspace; in the end, contingency and imagination may be cyberspace's most important exports.

A note on style may be in order. In this book I have tried to make a set of complex arguments more accessible than they normally are. Supplementary information and discussion that might break the flow of the text have been banished to the endnotes and I have tried to avoid too heavy a reliance on esoteric terms. I found this task extremely difficult and productive of much insecurity; specialised language gets invented for good as well as bad reasons. Distinctions often collapsed even by highbrow writers (like those between "rights," "privileges" "powers" and "immunities" or between "public goods" and "collective goods") actually matter a great deal, though they may make for lumpy reading. At the same time, the process of separating the essential distinction from the one that simply made the thesis harder to attack proved to be extremely helpful to my own thinking. Arguments often looked different without the encrustation of familiar terms and insiders' references. The reader will be the best judge of my success or failure. Either way, the process of writing this book, convinced me that

the contemporary assumption that academic writing can and should be impenetrable to the non-specialist is both pernicious and wrong. On the other hand, popular assumptions to the contrary notwithstanding, sometimes ideas are just *hard*; extensive background knowledge or careful qualification may really be necessary to get a point across. I have a lot of people to thank for helping me to walk this tightrope, most notably Larry Lessig, but I owe my largest debt of gratitude, as always, to my wife Lauren Dame.

## Libertarianism, Property & Harm chapter 2

*“One big reason that the future will be libertarian is the arrival of the Information Age. The Information Age is bad news for centralized bureaucracies. First, as information gets cheaper and more widely available, people will have less need for experts and authorities to make decision for them... Second as information and commerce move faster it will be increasingly difficult for sluggish governments to keep up... Third, privacy is going to be easier to maintain. Governments will try to block encryption technology and demand that every computer come with a government key — like the “Clipper Chip” — but those efforts will fail. Governments will find it increasingly difficult to pry into citizens’ economic lives. Finally, as techno-entrepreneur Bill Frezza puts it, “coercive force cannot be projected across a network.” As digital bits become more valuable than coal mines and factories, it will be more difficult for governments to exert their control.” David Boaz, *Libertarianism: A Primer*<sup>2</sup>*

One of the first things that newcomers to online culture notice is the prevalently libertarian cast of thought and speech. There is a general suspicion and hostility toward state power and — although the participants might not describe it in those terms — a repeated defense of a core libertarian ideal; that it is wrong to infringe my individual

liberty except where necessary to prevent me doing harm to another.

Admittedly, it is sometimes hard to know how to interpret the passion and commitment behind these libertarian sentiments because Internet discourse tends towards hyperbole, rant and damnation. Mike Godwin, the Electronic Frontier Foundation's lawyer, coined "Godwin's law" to describe the process; "When the number of people in a newsgroup rises above two, the probability of someone being called a fascist approaches unity." But even if one is unsure exactly how strongly people's views are held, it would be a strange journey across the world of Usenet newsgroups, chat rooms, home-pages and the like, that did not show libertarianism to be the "default" point of argument, the place from which discussion begins.

It is quite possible that as the demographics of the average Internet user become a little more like the demographics of the average member of the world's population — namely less American, less rich, less technically educated, less white and less male — this libertarianism will diminish. Anecdotal evidence supports the idea that there is some correlation between some of these characteristics and the intensity of libertarian sentiment, though Ayn Rand, Friedrich Hayek, and Camille Paglia would strongly argue otherwise. But the first generation of Net users have already put their stamp on the Net's politics and culture, formed its origin myths and moulded its discourse.

What's more, as I will explain in a moment, there are certain structural features of the Net itself that make libertarianism a more attractive way to view the world. For both of those reasons, then, a set of views I will call "digital libertarianism" is likely to be central to the politics of the Internet.

Before I turn to digital libertarianism, it is worth looking at libertarian ideas more generally to see some of their central characteristics, to understand both the points of strength and the fault lines in libertarian analysis. I apologise to those who expected every page of this book to be firmly located in cyberspace. In this case, the journey really is necessary. Libertarianism is both familiar and

comfortable, so much so that it is often hard to realise that it is actually a point of view at all rather than simply “the way things are.” Only by laying out its premises and contradictions is it possible to understand the particular opportunities and problems that the Net poses for libertarian thinking.

### **Baseline Problems and Nonsense-on-Stilts**

Libertarianism has lots of attractions. It seizes a concept that has an obvious *cachet*. It is hard to imagine anyone saying “Give me regulation or give me death.” It stakes out a position -- “let people make up their own damn minds” -- that seems a lot more attractive than some “paternalist,” “statist” alternative. The ideal of making one’s own choices, ignoring the beliefs of the majority and forging one’s own destiny is one that reaches far beyond teenage readers of *ATLAS SHRUGGED*. Above all, libertarianism generalises an argument that might seem selfish if made for an individual person (let me do what I want) into a positively altruistic universal principle; *everyone* should be allowed to do anything that causes no harm to others. The libertarian is protecting everyone’s liberty, not merely his or her own.<sup>3</sup>

Underlying most of these attractions is the fact that libertarianism appears to solve the question of value. If we all agreed on what was right and what was wrong, beautiful and ugly, good sex and vile perversion, fine literature and porno trash, then there would be little need for libertarianism.<sup>4</sup> Who would want it? Who would need it? It is partly because we do not agree, precisely because we can remember times when others imposed their views on us, that we can find libertarianism appealing. We may be moved by a belief that individuals each following the dictates of their own desires will create a more beautiful, worthy and efficient society, or we may be moved by a kind of abstracted self-interest: protect the liberty of others lest your own be infringed. I am willing to allow you to practice a form of sexual

behaviour I find abhorrent, because I want to preserve my own right to listen to disco music, wear bicycle shorts and collect purple garden gnomes.<sup>5</sup>

Law's role in the libertarian scheme is that of the guardian: guardian of a set of shells which citizens may fill as they like. The law must protect guaranteed liberties, particularly property rights, and enforce contracts. It should do so without inquiring into the worthiness of the goals that individuals are pursuing with their rights and through their contracts. The state's job is to protect the shell, the box, not to assess the worth of the particular contents. Shylock, in the Merchant of Venice, is an unlikely proponent of the idea. Offered three thousand ducats to give up his right to a pound of Antonio's flesh, Shylock refuses, insisting that the law must protect the lawfully contracted desires of individuals; it cannot pick and choose between them because we cannot account for tastes, there is "no firm reason to be render'd."

He offers a wonderfully absurd list of particular likes and dislikes and suggests that these shape our passions and values.

Some men there are love not a gaping pig;  
Some, that are mad if they behold a cat;  
And others, when the bagpipe sings i' the  
nose,  
Cannot contain their urine: for affection,  
Mistress of passion, sways it to the mood  
Of what it likes or loathes.

Unable to say that some choices are rational and others irrational without jeopardising the liberty of all and the rule of law itself, the state — here in the person of the Duke of Venice — must simply enforce the "bonds" or contracts that come before it.

If you deny it, let the danger light  
Upon your charter and your city's freedom.  
You'll ask me, why I rather choose to have  
A weight of carrion flesh than to receive  
Three thousand ducats: I'll not answer that:  
But, say, it is my humour: is it answer'd?  
What if my house be troubled with a rat  
And I be pleased to give ten thousand ducats



To have it baned? What, are you answer'd yet?

But Shylock's plea brings up one of the basic problems for libertarianism; exactly what rules, what rights, what contracts must the state enforce? Libertarianism accepts the notion that values are relative and tries to solve the problems that relativism poses by letting individuals make their own choices and implement them, always with the limitation that they must not injure anyone else. So far so good. But we can only know what choices are legitimate, non-harmful, decisions by knowing what rights we have in the first place. If values are relative, how do we decide the rights we have, the boundaries between the freedom of my fist and the security of your nose.? The problem is not as simple as one might think.<sup>1</sup>

Do workers have the "right" to organise together and strike for higher wages or would that be a criminal conspiracy in restraint of trade? Do I have the "right" to copy your idea for a good business, your way of dressing, your invention of a new machine? Do corporations have the "right" to combine together to keep prices up?

Does my neighbour upstream have the right to divert the flow of the river that feeds my land? Do I have the "right" to tell the town in obscene detail exactly what I think of my neighbour and his sexual practices, even if my opinions are unsupported by evidence and hurt

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<sup>1</sup> I will use the term "right" in the discussion that follows, though in fact not all of these legally protected interests are rights at all. The distinction does matter, but here I am talking about the difficulty of drawing lines between harm and non-harm. The name of the particular legally protected interest is not as important in that context.

both his feelings and his business? Does Antonio have the “right” to pledge a pound of flesh against Shylock’s bond? Would Shylock have the “right” to collect, even if it meant Antonio’s death?

In each of these situations, the question of whether a harm has been inflicted or a crime committed depends on the baseline set of rights that are chosen. If the workers have a “right” to organise and strike for higher wages, then state action that interferes with such a right is an interference with individual and collective liberty. If, on the other hand, a trade union counts as a criminal conspiracy in restraint of trade (a position that a number of legal systems once took), then unionised workers are harming their employers, and perhaps the entire society. State action to break up this attempt at monopolistic collective action is not an interference with liberty, indeed it is a matter of duty. The problem of value that libertarianism seemed to solve merely reappears on the next level up -- the choice of the framework of rights within which I exercise my liberty. We cannot simply say “Well, individuals have a right to do anything that does not harm another” because that answer simply dissolves into another value-laden debate about what counts as “a harm” in the first place.

There are three possible lines of argument to solve this problem, none of them entirely satisfactory.

1. **Positivism and the Civics Class:** The first argument is a variant of what lawyers would call legal positivism. We assume that rights and harms are defined by whatever the local legal system says. If our legal system says that libel, price fixing and repeated offers to trade workplace advancement for sexual favours *are not* harms, but that public displays of genitalia, heresy or homosexual affection *are* harms, then we adjust our libertarian principles accordingly. The trouble with this line of thought is that it renders libertarianism entirely toothless as a critical ideal. Libertarianism becomes simply the injunction that one may do whatever the law does not forbid (or at least what the law does

not class as a form of civil damage.) Tomorrow, when the rules change, so will our rights. We might as well have stayed in civics class.

There are however more substantial versions of this idea. The more interesting ones are derived from the work of Friedrich Hayek. Hayek's 1945 book, *The Road to Serfdom*, dedicated to "socialists of all parties," is a sustained exploration of the dangers of "planning." In it, and in his more sustained and developed work on the subject, such as *Law, Legislation and Liberty*, Hayek argues that law must be generally applicable, ideally it should also be "spontaneously developed." Above all, laws should not aim at some particular social goal, such as ameliorating the environment, encouraging the development of minority businesses or what have you. To make law with a particular social goal in mind is to take the first step down the slippery slope towards the totalitarianism of the "planned society" and, in the process, to play favourites among social groups, taking the property of one and redistributing it to another. Laws should be general and should only be made when we are ignorant of their precise effects.

Alongside this hatred of goal-directed law-making, goes a romanticism that might seem unlikely to anyone who isn't a lawyer or a libertarian: a romanticism of the common law, the Anglo-American system of judge-made law that provides many of the ground-rules for the market: the rules of property, contract and civil damage. Libertarians love the common law because it seems to them to be not merely the foundation *of* the market but to bear a great similarity *to* the market. Like the market, the common law is an example of "spontaneous order," a method of organisation that does not come from a single, central source, but rather is developed in myriad individual interactions. In the process of making this argument, libertarians indulge in some rather dubious legal history.

The market is not the only case of spontaneous order. ..Consider ..law. Today we think of laws as something passed by Congress, but the common law grew up long before any king or

legislature sought to write it down. When two people had a dispute, they asked another to serve as judge. Sometimes juries were assembled to hear a case. Judges and juries were not supposed to make the law; rather, they sought to “find” the law, to ask what the customary practice was or what had been decided in similar cases. Thus, in case after case the legal order developed.... Law, language, money, markets — the most important institutions in human society — arose spontaneously.<sup>6</sup>

I, too, am a fan of the common law but I have to say that while this legal creation-myth has an important element of truth it is more misleading than accurate. True, the common law is a relatively decentralised law-making system in which the law is developed in many particular cases. In that sense, the common law determines value in a way that is more like a market than a command economy. Rules and prices emerge from many particular interactions rather than being set by a single will. This point is far from trivial. But it would be a mistake to move from that claim, as libertarians often do, to a claim that the common law is a realm where we find neither instrumental value judgements, political choices and directed intervention in society. In fact, the history of the common law is replete with directed state intervention, both structural and substantive, and with judges, such as Lord Mansfield, who had very definite goals in mind. Indeed, one commonly articulated defence of the common law is precisely that law could be made in particular cases by intelligent judges in ways that would further some set of social goals more precisely than the one-size-fits-all approach of legislation. In other words, the common law is frequently described by its boosters as a system for *better planning*, not the absence of planning. Having a common law system allowed the state to wield a scalpel through the court system as well as a shovel through the legislature.<sup>7</sup>

Skeptics might believe that there is another reason that libertarians like the common law: simple outcome-preference. In many cases common law rules favourable to employers rather than workers,

manufacturers rather than consumers, and landlords rather than tenants, were modified by progressive legislatures in the first three decades of the twentieth century. Odes of praise to the common law, and mistrust of legislative modifications of it, allow libertarians to say that the *true* benchmark of rights is provided by the older rules, not the newer ones. Judged against this standard, of course, the rules that benefit employers, landlords and manufacturers simply *define* liberty and property rights whereas the rules that benefit workers, tenants and consumers are *interferences* with liberty. The rules one likes are the foundations of sacred property rights, those one does not like are meddlesome *regulation*. This is a nice trick and its equivalent will turn out to be very important in the regulation of cyberspace.

Nevertheless, skepticism about the libertarian use of the common law as a stalking horse should not obscure the importance of one of the issues that libertarians have raised. Suppose we leave aside the fantasy that the common law is a politically neutral set of universal rules deduced from particular cases and free from a particular instrumental agenda. This marks the abandonment the libertarian project of finding in the common law a neutral set of baselines from which to measure liberty. Yet it still leaves us with an important question – one that the followers of Hayek deserve great credit for raising – namely, whether something about the common law’s relatively more decentralised method of decision-making actually presents particular advantages in regulating society in general and the Net in particular? Is the common law, even if not entirely *cybernetic*, nevertheless somehow fitted to *cyberspace*? That is a topic I will return to later. For the moment, we must return to the broader libertarian project.

2. Making Rights Naturally: The second possible way to give libertarianism the definition of harm that it needs is to rely on the idea of natural rights. We assume that people have rights before (and after)

any *legal* system is created. It is these natural rights that provide the line marking where your freedom leaves off and my right to be free of harm begins. These rights may be laid down by God, revealed to you by a burning bush or supposedly deduced from some *extremely* general postulates based on beliefs widely held in our particular society. (For example, everyone owns their body and can dispose of it as they will.)

The natural rights idea is a little more promising, but it runs into two major problems: 1.) the idea of natural rights contradicts the very premises of libertarian thinking and 2.) the rights themselves are too vague actually to solve problems on any level of specificity.

The first problem is that libertarians seem to assume in their “natural rights” mode all the things they reject in their relativist mode.

One of the reasons we need libertarianism is that much of modern philosophy, political theory and popular discourse rejects the notion that it is possible to come to objective conclusions about value judgments. Thus, libertarianism’s big selling point is that it lets people make their own choices. To base our libertarian political system on a presumed set of objectively true “natural rights” is just solving the problem by assuming it out of existence, like solving an energy crisis by assuming perpetual motion machines. To put it another way, if we could actually agree on natural rights, then surely we are *not* living in a world of moral relativism in which libertarianism is both necessary and desirable?

This seems like a glaring problem to me, but it never appears to bother libertarians. The irony is that many libertarians have exactly the kind of faith in the objective truth of their personal set of *natural rights* as a method of social organisation, that they mock in those who believe that their particular set of *moral values* provide a correct method of social organisation. The member of the Christian coalition who says that his moral and religious beliefs demonstrate that certain forms of speech and behaviour are objectively right and others objectively wrong is taken for a foolish zealot. The libertarian who asserts that individuals have exactly the set of natural rights that his particular

culture or philosophy reveres is seen as a calm rationalist. This inconsistency in moral assumptions between the two levels of argument is one of the reasons that Bentham referred to natural rights as not just nonsense but nonsense on stilts.

The second problem with the idea that we all have natural rights is the terminal vagueness of the actual rights that are offered. With political systems and sets of rights, the devil is in the details.

The more sophisticated libertarian philosophers — Robert Nozick for example — tend to build their libertarianism on extremely vague statements that command a high degree of acceptance in our society: for example, “individuals own their own bodies.” Now it is worth noting that, while this is a pretty uncontroversial claim in any Western democracy, it is already sacrificing the extremes (albeit the silly extremes) of moral relativism. Large numbers of people through history have believed, and still believe, that women, children, black people, kulaks, slaves and so on did *not* own their own bodies. What’s more, apart from relying on brute force, these “people-owners” actually had arguments to support their position. The arguments ranged from ingenious definitions (blacks aren’t people), to the manifest necessities of God’s plan, to the scientific truths of eugenics.

Personally, it doesn’t bother me much to think that an imposition of a libertarian system on such groups would actually restrict “rights” they believe they have when *to their eyes* there is no “harm” involved in, say, denying women the ability to own property. I think it is inevitable<sup>8</sup> (and in this particular case, good) that values will be imposed on groups who disagree with those values. It is inevitable because definitions of “harm” will be socially contentious. My philosophy of state-neutrality tells me that we must restrict your community’s ability to decide that kids should pray in your town’s schools every morning; even as your school board is fined, I will still be sternly lecturing you the need for a type of “tolerance” that seems to you like the harshest and most dogmatic paternalism, the most *intolerant* imposition of an alien set of values.<sup>9</sup> As I walk away from

the meeting, I will shake my head at some bigots' inability to respect the liberty of others; you, however, will do the same.

My point is that even with supremely vague statements such as “everyone owns their own body” we are already making contentious moral and political judgements. As a result of these judgements about “rights” and “harm” the “liberty” of some will be restricted and that of others protected.<sup>10</sup> As I said before, in the present case, this doesn't bother me; I happen to believe that owning people is a great harm and wouldn't suffer much anguish over the thought that kinds of conclusions libertarians draw from this definition will be coercively imposed on those who honestly disagree. I just wouldn't pretend — as the libertarian does — that I am being value-neutral and non-coercive while I am doing it because *my* system's definition of harm is somehow a fact, rather than a value.

So far, I have tried to argue that, while many libertarians like to pose as those who are truly value-neutral, “I despise what you say and would die for your right to say it,” they cannot maintain that pose long enough even to state a few vague first principles. When the vague first principles turn more specific, then the fun really begins.

3. Property as a Solving Idea: Working from the idea that each person owns his or her own body, the next step in a libertarian argument is to derive from this basic property right a horde of other property rights acquired by purchase, transfer, sale and the like. Inside the castle of our property rights, each of us exercises absolute power, with none to gainsay us. In fact, it is partly for this reason that libertarians (at least, meatspace libertarians) like the idea of abolishing the notion of public space. If space is public, such as a state-owned airport, public television station or online system, then we would have to balance claims of liberty. The religious devotee would claim a right to convince the polity to put up a creche and the atheist would claim



that this infringed on *his* right to be free of the dogmas of established religion.

Now imagine that the public space has been privatised. Because the libertarian schema imagines property rights to be absolute and unlimited, there is no need to consider any countervailing interest. If it is my property, I may do with it as I want. Indeed, for many libertarians, the ideal situation is to make sure that *everything* is privately owned, thus simultaneously collapsing all civil rights into a single all-encompassing property right, and solving the problem of the clash of values over the use of public space. Murray Rothbard puts forward perhaps the most thoroughgoing version of the argument.

In the profoundest sense there *are* no rights but property rights...

Freedom of speech is supposed to mean the right of everyone to say whatever he likes. But he neglected question is: Where?

Where does a man have this right? He certainly does not have it on property on which he is trespassing. In short, he has this right only either on his *own* property or on the property of someone who has agreed, as a gift or in a rental contract, to allow him in the premises. In fact, then, there is no such thing as a separate “right to free speech; there is only a man’s property right: the right to do as he wills with his own or to make voluntary agreements with other property owners...”<sup>11</sup>

Boaz makes the same argument for slightly different reasons: Government money always comes with strings attached. And government must make rules for the property it controls, rules that will almost certainly offend some citizen-taxpayers. That’s why it would be best to privatize as much property as possible, to depoliticize decision making about the use of property.<sup>12</sup>

I will call this argument ‘the solving-idea of property.’ Though it is not a new or unfamiliar idea, it turns out to be particularly important when we turn to the politics and property of the digital environment. In areas ranging from cryptography and the assignment of domain names to the rise of “click-wrap” contracts, proponents of

privatisation have touted its ability to “depoliticise” conflict and resolve clashes between parties, each of whom has a compelling argument to make about the use of some resource. Thus, for example, if a company wants to stop a reporter from bringing out certain facts about its operation, we would merely ask if the company “owns” those facts or not. If any compilation of facts is protected by a special database property right, as the United States recently argued should be the case,<sup>13</sup> then the reporter cannot extract the facts and use them.

The supposed advantage of this system is that we have avoided the need to make rules that decide who should own a particular domain-name, who should get access to a public forum, or what information a journalist should be able to report. By turning to “property rights” the decisions are supposed to be depoliticised. Yet they are not. “Property rights” are both the result and the manifestation of a continuing political struggle. The same arguments about rights of access to or use of public spaces will reappear as questions of the *extent* of private property rights. Even if we do decide that there should be a special property right in compilations of facts, we will still need to make the decision whether or not that right entails the right to prevent the reporter from being able to report those facts. These are political and social choices which constantly have to be fought and re-fought. The libertarian argues for private property rather than public property because “government must make rules for the property it controls, rules that will almost certainly offend some citizen-taxpayers.”<sup>14</sup> The point this argument misses is that the same is true for the definition of *private* property.

The libertarian argument here proceeds as if the property rights were facts and, what’s more, facts with natural and logically necessary implications. But within a legal system, even one designed by Hayek, von Mises and Nozick, things just would not turn out that way. Say that you own your house, that you have a “property right” in it. Your ownership will actually turn out to be a sheaf of legal rights, powers, immunities and privileges, stuffed into an envelope we call a property

right; The right that most people think of first is that you can decide when to sell the house and for how much. Does that automatically mean that you may dam up the stream that feeds your neighbour's property or remove the bank of earth on which his wall rests? Can you block the light from his solar heater by erecting an extension? Prevent a household worker from expressing an opinion about the need for higher wages? Can you turn your house into a commercial establishment, a church or the site of an ongoing political demonstration, thus disrupting the slumbrous peace of the suburbs? Saying that you have "a property right" in the land does not answer any of these questions.

The libertarian response to the point that property is actually a cluster of rights, privileges and powers is to say that the property owner should have a right to do anything which does not injure his neighbour.

The law even has a Latin maxim to this effect; *sic utere tuo ut non alienum laedas*. But the argument has now moved full circle. Libertarians argued that as many issues as possible should be "solved" by assigning private property rights precisely because the political debate about those issues would reveal conflicting and contradictory definitions of harm. They cannot now turn around and define property rights as "anything that does not harm one's neighbour." Are you "harmed" if, every time you walk through an airport, you are harassed by patchouli-scented bald guys dressed in orange robes who try to peddle you over-priced pamphlets touting a religion you find annoying? To turn the libertarian's argument on its head, if we cannot agree *here*, how can we assume that we will be able to agree on a definition of harm when private property is involved?

Faith in the power of property to solve questions of social policy behind our backs is particularly difficult to maintain in cyberspace -- though that does not seem to have affected its popularity. First, in cyberspace it is harder to fall victim to the physicalist fallacy that helps the libertarian move from a largely geographic claim about real estate (I am standing on *my property*) to a claim about the particular set of

legal entitlements (therefore I have the right to do X.) Precisely because this is *cyber* space, geography seems less like destiny; on the Net even the question of *where things happen* is clearly a matter of social convention.<sup>15</sup> When you sit in your house and use an Internet service provider in another state to buy books from Amazon.com, a web bookstore, incorporated in Delaware and headquartered in Seattle, where exactly is the contract formed?<sup>16</sup> Second, most of the property rights of cyberspace are rights in intellectual property and these are particularly obviously neither natural nor absolute. Legal scholars would point out that *all* property rights are socially created, limited in extent and qualified in relation both to certain types of actors and certain types of conduct. Even with a house or a car, then, the solving-idea of property is problematic, but with intellectual property its problems are just easier to see.<sup>17</sup> Could it really be the case that you have a *natural* right to prevent copying of a computer program (but only for 75 years, and not to the extent that a competitor needs to copy your program in order to make her programs compatible with yours)?

Now, it will surprise no-one if I say that current wonkish conventional wisdom (outside of the Christian coalition) is that the state should stay out of the Net. The Net shouldn't be taxed, it shouldn't be censored (much) and it should be freed from the heavy-handed intervention of the government. Ira Magaziner, vilified for his role in the Clinton Administration's health care plans, was much caressed by digital policy-types when he produced a report that echoed this conclusion. But the idea of "deregulation" seems to imply the notion that there is an 'unregulated' set of affairs to which we can return; a world where the state hasn't interfered, hasn't picked winners or made politically contentious choices, but has left these decisions to the individual choices of private actors, each working within the sphere of their own property rights. It depends in part, that is, on the solving idea of property.

One thesis of this book is that many of the current ideological battles over the regulation of cyberspace stem from this peculiar

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emerging conflict. Net politics is dominated by classical liberalism and by a rhetoric of de- or non-regulation even more powerful than that seen in contemporary neo-liberal politics elsewhere. Yet, at the same time, Net politics frequently compels a particular and subversive recognition: that one of the pillars of that deregulatory faith; the existence of an a-political world of non-regulatory, property rights -- is undermined by the particular context of the Net *more obviously than it ever was in meatspace*. Crudely put, the dominant rhetoric of digital libertarianism both aggressively insists upon and aggressively undermines the solving idea of property rights. The Net, then is both uniquely hospitable to and uniquely hostile to, libertarian ideals; future chapters try to chart the transformations that are being wreaked in both libertarianism and the Net as a result.

## The Internet Trinity

## chapter 3

For a long time, the Internet's enthusiasts have believed that it would be largely immune from state regulation. It was not so much that nation states would not want to regulate the Net, it was that they would be unable to do so; forestalled by the *technology of the medium*, the *geographical distribution of its users* and the *nature of its content*. This tripartite immunity came to be a kind of Internet Holy Trinity, faith in it was a condition of acceptance into the community. Indeed the ideas I am about to discuss are so well known on the Net, that they have actually acquired the highest status that a culture can confer; they have become cliches.

**“The Net interprets censorship as damage and routes around it.”<sup>18</sup>**

This quote from John Gilmore, one of the Founders of the Electronic Frontier Foundation, has the twin advantages of being pithy and technologically accurate. The Internet was originally designed to survive a nuclear war; its distributed architecture and its technique of packet switching were built around the problem of getting messages delivered despite blockages, holes and malfunctions.<sup>19</sup> Imagine the

poor censor faced with such a system. There is no central exchange to seize and hold; messages actively “seek out” alternative routes so that even if one path is blocked another may open up.

Here was the civil libertarian’s dream, a technology with *comparatively* low cost of entry to speakers and listeners alike, technologically resistant to censorship, yet politically and economically important enough that it cannot easily be ignored. The Net offers obvious advantages to the countries, research communities, cultures and companies that use it, but it is extremely hard to control the amount and type of information available; access is like a tap that only has two settings — “off” and “full.” For governments, this has been seen as one of the biggest problems posed by the Internet. For the Net’s devotees, most of whom embrace some variety of libertarianism, the Net’s structural resistance to censorship — or any externally imposed selectivity — is “not a bug but a feature.”

**"In Cyberspace, the First Amendment is a local ordinance."<sup>20</sup>**

To the technological obstacles the Net raises against externally imposed content filtration, one must add the geographic obstacles raised by its global extent; since a document can as easily be retrieved from a server 5,000 miles away as one five miles away, geographical proximity and content availability are independent of each other. If the king’s writ reaches only as far as the king’s sword, then much of the content on the Net might be presumed to be free from the regulation of any *particular* sovereign.

As I pointed out before, the libertarian culture that dominates the Net at present starts from the premise that state intervention into private action is only necessary to prevent “harms.” Seeing the Net as a “speech-dominated” realm of human activity in which harm would be comparatively hard to inflict, libertarians have been even more resistant

to state regulation of the digital environment than of, the disdainfully named, "meatspace." "Sticks and stones can break my bones but bytes can never hurt me," or so goes their assumption. Thus, the postulate that a global Net cannot be regulated by national governments has been seen as an unequivocally positive thing.

John Perry Barlow's description of the First Amendment as a local ordinance has been read by many as a claim that our ultimate faith should be in technology and geography rather than law to protect freedom of speech. Since individual sovereigns will neither be able to protect, nor to repress speech effectively because the medium in question stretches well beyond their borders, better to rely on TCP/IP<sup>21</sup> and a global net, rather than nine black robed judges on First Street, S.E., Washington DC.

The same faith in the power of geography and technology to make regulation impossible can be seen in discussions of encryption and, in particular, in the writings of the cypherpunks. Cypherpunks believe that advances in encryption technology, coupled with the global architecture of the Net, will permit communication, virtual community and economic activity beyond the reach of states. Unbreakable codes, anonymous transaction systems, public key encryption, digital signatures and trusted private third party systems, will allow a virtual economy to flourish beyond the reach of national governments. In this view, the encryption revolution is the final step in the ability of corporations and individuals to evade unwanted regulations by relocating their activities in the jurisdiction with the least restrictive laws. As Timothy May puts it "The ability to move data around the world at will, the ability to communicate to remote sites at will, means that a kind of 'regulatory arbitrage' can be used to avoid legal roadblocks."<sup>22</sup> Deprived of the power to tax and to regulate much of the economy, the state will wither away, ushering in 'crypto-anarchy,' a regime that has more of a libertarian than an anarchist tone.

First, the "anarchy" here is not the anarchy of popular conception: lawlessness, disorder, chaos, and "anarchy." Nor is



it the bomb-throwing anarchy of the 19th century "black" anarchists, usually associated with Russia and labor movements. Nor is it the "black flag" anarchy of anarcho-syndicalism and writers such as Proudhon. Rather, the anarchy being spoken of here is the anarchy of "absence of government" (literally, "an arch," without a chief or head). [sic] This is the same sense of anarchy used in "anarchocapitalism," the libertarian free market ideology which promotes voluntary, uncoerced economic transactions.<sup>23</sup>

The supporting citations in crypto-anarchist work, show a mixture of the Austrian school of economists such as Hayek, with other libertarians and anarcho-capitalists who view the modern state as unable to deal with contemporary technology. David Friedman's *Machinery of Freedom*<sup>24</sup> and Ithiel de Sola Pool's, *Technologies of Freedom*<sup>25</sup> are frequently cited texts, as is Kevin Kelly's *Out of Control*.<sup>26</sup> (As one might expect from the prior chapter, little attention is paid to the role of the state in defining and policing property rights, or the political judgements that will be involved therein. Cypherpunks seem to imagine that most of the default rules in the economy will be set by digital possession and protection, not legal definition. I will return to this point later.)

For the cypherpunks, this move towards state impotence is both desirable and technologically inevitable. Law enforcement agencies portray encryption primarily as a shield for drug traffickers, child pornographers, terrorists and spies to hide behind. This particular parade of horrors is so familiar that it is now dismissively referred to as "the Four Horsemen of the Infocalypse." But to the cypherpunks, many of whom have a libertarian, anarcho-capitalist view of the world, it is states rather than private actors who are most to be feared.

If local laws can be bypassed technologically, the.. implications for personal liberty are of course profound. No longer can nation-states tell their citizen-units what they can have access to, not if these citizens can access the cyberspace world through

anonymous systems. The implications are, as I see it, that the power of nation-states will be lessened, tax collection policies will have to be changed, and economic interactions will be based more on personal calculations of value than on societal mandates. Is this a Good Thing? Mostly yes. Crypto anarchy has some messy aspects, of this there can be little doubt. From relatively unimportant things like price-fixing and insider trading to more serious things like economic espionage, the undermining of corporate knowledge ownership, to extremely dark things like anonymous markets for killings. But let's not forget that nation-states have, under the guise of protecting us from others, killed more than 100 million people in this century alone. Mao, Stalin, Hitler, and Pol Pot, just to name the most extreme examples. It is hard to imagine any level of digital contract killings ever coming close to nationstate barbarism. (But I agree that this is something we cannot accurately speak about; I don't think we have much of a choice in embracing crypto anarchy or not, so I choose to focus on the bright side.)<sup>27</sup>

A slightly different tone, concentrating more on the need for privacy, can be found in Eric Hughes' famous 'Cypherpunk Manifesto.'<sup>28</sup> But Hughes, like May, makes clear that the primary protections of privacy in an information society will be *technological* and *geographical* rather than constitutional.<sup>29</sup> The Fourth Amendment, too, is a local ordinance in cyberspace. But a civil libertarian tradition that puts its trust in technological and geographical freedom from regulation may be especially vulnerable if that freedom proves to be overstated.

### **“Information Wants to be Free”**

I pointed out earlier that the political cartography of the Net is unstable. Issues have not yet been securely and safely settled in one area or another. Nothing illustrates this point better than the debate over intellectual property on-line. In the digital environment, is intellectual property just property, the precondition to an unregulated market, just another example of the rights that libertarians believe the state was specifically created to protect? Or is intellectual property actually *public regulation*, artificial rather than natural, an invented monopoly imposed by a sovereign state, a distorting and liberty-reducing intervention in an otherwise free domain?

While it would be hard to find anyone who believes entirely in either of these two stereotypes, recognisable versions of both do exist in the debate over intellectual property and — more interestingly — can be found across the political spectrum. George Gilder of the conservative Manhattan Institute, a fervent booster of capitalism and *laissez faire*, shows considerable skepticism about intellectual property<sup>30</sup> — Peter Huber, from the same conservative think tank, pronounces it the very acme of liberty, privacy and natural right.<sup>31</sup> The Clinton Administration attempts to extend intellectual property rights on-line<sup>32</sup> and is roundly criticised by both civil liberties groups and right wing intellectuals.<sup>33</sup> This isn't just a disagreement as to tactics among people who might be said to share the same ideology: it is a fundamental set of disputes over the very social construction and normative significance of a particular phenomenon -- as if the Libertarian party couldn't agree on whether its motto was to be "Taxation is theft" or "Property is theft."

In this contested terrain Stewart Brand's phrase "information wants to be free" marks out the territory of those who are sceptical of both the need for and the utility of restraints on the flow of information *and* who frequently extend that skepticism to intellectual property rights. The phrase has now penetrated the culture sufficiently deeply that it is now actually parodied in *advertisements*.<sup>34</sup> Yet its ubiquitous nature may actually work to conceal the claims that it makes.

John Perry Barlow begins his famous essay “Selling Wine Without Bottles: The Economy of Mind on the Global Net” with this quote from Jefferson.

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.<sup>35</sup>

The quotation expresses perfectly the mixture of Enlightenment values and upbeat public goods theory that typifies Net analysis of information flows. Information *is* costless to copy, *should* be spread widely, and *cannot* be confined. Beyond the Jeffersonian credo lies a kind of Darwinian anthropomorphism. Information really does *want* to be free. Barlow credits Brand’s phrase with recognizing

both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a “desire” in the first place. English biologist and philosopher Richard Dawkins proposed the idea of “memes,” self-replicating patterns of information which propagate themselves across the ecologies of mind, saying they were like life forms. I believe they are life

forms in every respect but a basis in the carbon atom. They self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. Like any other life form they evolve to fill the possibility spaces of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us. Indeed, the sociobiologists like Dawkins make a plausible case that carbon-based life forms are information as well, that, as the chicken is an egg's way of making another egg, the entire biological spectacle is just the DNA molecule's means of copying out more information strings exactly like itself.<sup>36</sup>

Viewed through this lens, the Net is the ultimate natural environment for information and trying to regulate the Net is like trying to prohibit evolution.

## **The Trinity as Catechism**

Taken together the three quotations assert that the technology of the medium, the geographical distribution of its users and the nature of its content all make the Net specially resistant to state regulation. The state is too big, too slow, too geographically and technically limited to regulate a global citizenry's fleeting interactions over a mercurial medium.

Though I do not subscribe to the full-throated versions of any of these slogans, I have sympathy with each of them. It does excite me that the Net is highly resistant to externally imposed content filtration -- though I tend to worry about structural private filters as well as command-based public ones, and I recognise that speech and information can and will produce harm as well as good. I do think that the global nature of the Net is -- by and large -- a positive thing, though we need to pay more attention to things like the cost of the technology required to play the game, or the effects on workers of a networked economy in which companies can relocate around the world and find

a new on-line workforce in an afternoon.<sup>37</sup> Finally, I am optimistic about the historical conjunction of technologies based on nearly costless copying and a political tradition that treats information in a more egalitarian way than other resources.<sup>38</sup>

It is possible, of course, to conjure up a world in which rampant info-kleptocracy undermines scientific and artistic development. I have argued elsewhere that the main danger is not that information will be unduly free, but that intellectual property rights will become so extensive that they will actually stifle innovation, free speech and educational potential. In any event, I want to set aside my agreement or disagreement with the values behind the Net catechism, and focus instead on the factual and legal assumptions on which it relies.

My argument is that digital libertarians should not be so quick to write off the state. In the chapters that follow, I argue that digital libertarianism has become the victim of four simplistic (and ideologically important) conceptions of law, technology, market and property:

First, a **positivist jurisprudence** eerily close to that of John Austin: law is seen as set of sovereign commands, backed by threats, aimed at a geographically defined population who render the sovereign habitual obedience and who are punished *ex post facto* for violations of these, paradigmatically criminal, norms. (One could hardly imagine a view of law better guaranteed to fail at regulating the Net.)

Second, a **historicist, meliorist and positivistic** vision of the development of **technology** in which communications technologies – particularly those involving distributed networks – are seen as inherently liberatory, while technical fixes to regulatory problems are seen as somehow neutral and facilitative, rather than as (also) value-laden and constraining. Third, a **naive conception of the market and the private law rules which constitute it**, a vision that recalls to mind the formalist conceptualism of classical legal thought. Apart from technological fixes, contract is the preferred method of ordering in

cyberspace, but everything learned about contract in the last fifty years has, it seems, been forgotten in the process.

Finally, **an incoherent vision of property** with relation to both **a.) state action** and, thus, the constitution and **b.) to the value and function of property's 'outside'** – that which is not owned, namely the fertile fields of the public domain.

Extrapolating from these tendencies in isolation, one would project a fairly unattractive future; a sort of high-tech Gilded Age with privatised censorship, digital spite fences, enormous concentrations of corporate power, regulatory impotence, and large scale enclosures of the public domain. But, thankfully, as we will see – things are not so simple. Indeed, the opposite way to portray each of the points I have made would be to say that the Net is the place where classical liberalism, technological meliorism and laissez-faire ideology become hardest to maintain. Ideologies are not static. One goal of this book is to imagine the ways that the Net might actually redefine the ideology of neo-liberalism, rather than merely being shaped *by* it.

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Endnotes to Chapters 1-3

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1. I owe the analogy to Marc Rotenberg.
  2. David Boaz, *Libertarianism: A Primer*, 284 (1997).
  3. Ayn Rand would have rejected this idea, believing as she did that philosophies based on “altruism” paved the road to damnation. Thus she clung defiantly to the idea of selfishness as a positive good. The end result however would have been much the same.
  4. Libertarianism can also be seen as a response to the problem of the bad ruler or dominating private party who attempts to take away your liberty even though he or she knows the act to be wrong; evil domination, not moral disagreement would seem to be the source of danger. Yet though libertarianism may be a way of building a community of resistance against such aggression, its appeal is only to those who are willing to concede that reasonable people differ about conceptions of the good and who actually draw some practical conclusions from that point. Put more crudely, what use is making libertarian arguments *to the bad guy*? The Inquisition sees my moral relativism as merely another proof of heresy and the slaver just doesn’t care what I think. The people who might be convinced are those who accept some of my premises about the subjectivity of value, but haven’t thought through their implications. In a world without widespread agreement that values are relative, at least at the margins, libertarianism is irrelevant as a moral or political doctrine.
  5. While I have libertarian sympathies myself at many points, everyone draws the line somewhere; I would not like to be understood to be advocating disco.
  6. Boaz, *Libertarianism: a Primer* p.41
  7. This tension between the way that lawyers think of common law and the classical liberal version of the common law, produces some tensions, as when Hayek quotes Lord Mansfield approvingly in the context of a passage that portrays the common law judge as a person who  
is not concerned with any ulterior purpose which somebody may have intended



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the rules to serve and of which he must be largely ignorant; and he will have to apply the rules even if in the particular instance the known consequences will appear to him to be wholly undesirable Friedrich A. Hayek, *Law, Legislation and Liberty* vol 1. Rules and Order 87 (1983).

8. Inevitable for a number of reasons, one being that, whatever happens a value system not shared by the local inhabitants is going to be imposed. . . When we choose not to interfere with clitoridectomy or suttee because all values are relative and socially constructed we determine the future of a community by applying a meta-moral set of assumptions called moral relativism to a culture that does not share them. When we choose instead to say that our universalist Kantian, human rights tradition tells us that this behaviour is wrong, we are again imposing our values. There is no neutral position. Most people use the act/omission distinction to solve this problem, thus decisively privileging the moral systems that have such a distinction.

9. Arrow's impossibility theorem — Patrick's essay.

10. Hale

11. Rothbard, *Power and Market*,

12. Boaz, p. \_\_

13. Database treaty cf. Misappropriation based statute

14. Boaz, p.

15. Where did you buy that book? In your study as you clicked the button, in whatever state or country the bookstore's server is located? Or in the state where Amazon.com is incorporated? Of course, legal systems have been making determinations like these over contracts or harms at a distance since long before the arrival of the Net. The difference is that, on the Net, that is pretty much all there is.

16. The answer is probably either Seattle, or wherever Amazon says the contract is formed.

17. To be sure, anyone who engages in a historical and comparative study of rights in

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tangible property would soon realise the same thing about them, too.

18. There are a variety of versions of the claim but the content is pretty consistent. *See, e.g.,* John Perry Barlow, *Passing the Buck on Porn* (visited June 24, 1996) <[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/porn\\_and\\_responsibility.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/porn_and_responsibility.html)> “The Internet, in the words of ... John Gilmore, ‘deals with censorship as though it were a malfunction and routes around it.’” Judith Lewis, *Why Johnny Can’t Surf*, LA WEEKLY, Feb. 21, 1997, at 43. “[I]t’s not easy to push standards of decency on a network that, as ... John Gilmore put it (though even he can’t remember where), treats censorship as damage and routes around it.”

19. *See generally*, Todd Flaming, *An Introduction to the Internet*, 83 ILL. B.J., 311, (1995); JOSHUA EDDINGS, *HOW THE INTERNET WORKS* 13 (1994); BRUCE STERLING, *SHORT HISTORY OF THE INTERNET* (Feb. 1993), (available at <<gopher://gopher.isoc.org:70/00/Internet/history/short.history.of.Internet>>). The writing closest to my own position on these issues comes from Larry Lessig; *see generally* Lawrence Lessig, *The Zones Of Cyberspace*, 48 STAN. L. REV. 1403 (May 1996), *The Path Of Cyberlaw* 104 YALE L.J. 1743 (May 1995). For a very interesting libertarian argument focusing on the importance of geography and geographical metaphors see David R. Johnson & David Post, *Law And Borders--the Rise Of Law In Cyberspace* 48 STAN. L. REV. 1367 (May 1996).

20. John Perry Barlow, *Leaving the Physical World* (visited June 24, 1997) <[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/leaving\\_the\\_physical\\_world.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/leaving_the_physical_world.html)> (discussing the inapplicability of physical-world standards in Cyberspace).

21. TCP/IP is the name of the communications protocol that enables much of the Net’s traffic.

22. Timothy May, *Crypto-Anarchy and Virtual Communities*

23. Timothy C. May, *Crypto Anarchy and Virtual Communities*

24. David Friedman, *Machinery of Freedom*

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25. Ithièl de Sola Pool, *TECHNOLOGIES OF FREEDOM* (1983).

26. Kevin Kelly, *Out of Control*

27. *Id.*

28. Eric Hughes, A Cypherpunk Manifesto.

29. “Since we desire privacy, we must ensure that each party to a transaction have knowledge only of that which is directly necessary for that transaction. Since any information can be spoken of, we must ensure that we reveal as little as possible. In most cases personal identity is not salient. When I purchase a magazine at a store and hand cash to the clerk, there is no need to know who I am. When I ask my electronic mail provider to send and receive messages, my provider need not know to whom I am speaking or what I am saying or what others are saying to me; my provider only need know how to get the message there and how much I owe them in fees. When my identity is revealed by the underlying mechanism of the transaction, I have no privacy. I cannot here selectively reveal myself; I must *always* reveal myself. Therefore, privacy in an open society requires anonymous transaction systems. Until now, cash has been the primary such system. An anonymous transaction system is not a secret transaction system. An anonymous system empowers individuals to reveal their identity when desired and only when desired; this is the essence of privacy. Privacy in an open society also requires cryptography. If I say something, I want it heard only by those for whom I intend it. If the content of my speech is available to the world, I have no privacy. *Id.*

30. One of the strongest statements of his position comes in the manifesto he co-authored with a number of other prominent members of the digerati. “Unlike the mass knowledge of the Second Wave -- public good knowledge that was useful to everyone because most people's information needs were standardized -- Third Wave customized knowledge is by nature a private good. If this analysis is correct, *copyright and patent protection of knowledge (or at least many forms of it) may no longer be necessary*. In fact, the marketplace may already be creating vehicles to compensate creators of customized knowledge outside the cumbersome copyright/ patent process, as suggested by John Perry Barlow.” George Gilder, Esther Dyson, Jay Keyworth,

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Alvin Toffler, *A Magna Carta for the Knowledge Age*, 11 NEW PERSPECTIVES QUARTERLY 26 (1994) (emphasis added).

31. Huber, in fact, has taken a direct shot at the notion that "information wants to be free." See Peter Huber, *Tangled Wires: The Intellectual Confusion and Hypocrisy of the Wired Crowd*, SLATE, Oct. 18, 1996 at <<http://www.slate.com/Features/TangledWires/TangledWires.asp>>. Huber labels the intellectual property rights skeptics as hypocrites whose real attitude is merely a desire for liberal redistribution of everyone else's stuff. His views are frankly dismissive; he is criticising a group of people, some of whom have argued in favour of maintaining the existing intellectual property rules in cyberspace and others of whom have argued that reliance on rules rather than technological innovation would actually inhibit the operation of capitalism online. Yet his description of this "Wired Crowd," many of whom make Ayn Rand sound like Vladimir Ilyich, is that their position is that of a hypocritical New Dealer -- "My property is mine; yours is for sharing." *Id.* Wired, we are supposed to believe, is the Economic and Philosophical Manuscripts in cyberspace. (Would that it were true! In fact, Wired's ideal of scathing social commentary is to claim that someone's computer is out of date.) Huber seeks to restore normative appeal to intellectual property by arguing that it "is just a commercial form of privacy law. Indeed for some, it's the only kind of privacy they still own." This powerful argument suffers a little from the example that follows. "Madonna can no longer stop you from gazing at her breasts. Copyright at least makes you pay for the pleasure." *Id.* Our sympathies are with her.. (and with him if this is the best illustration that comes to mind.) Stopping the world from gazing at her breasts has never seemed to be particularly high on Madonna's list of priorities -- at least as a matter of "privacy." True, Madonna might prefer a legal regime which would allow her to wring the maximum commercial advantage in every market for images of her and references to her -- for example by making people like Huber pay if they wished to use her as an example, restricting the fair use privilege, limiting news reporting and biography to authorized images and so on. Yet it is not clear why this desire, in itself, makes the notion of such a regime normatively compelling as a matter of social policy. There is also a danger in labelling critics of extensive intellectual property rights "anti-privacy." If there is a "privacy" interest consisting solely in the extraction of the maximum rent for one's intellectual property, then was the Justice Department's investigation of Microsoft's allegedly anti-competitive practices an attempt to cut down on Bill Gates' "privacy" interest in Windows 95? Or are we referring simply to spin-off effects in a particular case? Are Federal automobile emissions standards "anti-privacy" if they

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make it harder for me to leave the paparazzi in the dust? Intellectual property *can* be used to preserve privacy and I have used a stout and WASP-y pair of wingtips to hammer in a nail; this does not mean that the manufacturers of Birkenstock sandals are “anti-carpentry.” There are indeed profound and interesting linkages and tensions between property and privacy, and this point has been made for some time. Compare Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 113 (1890). with Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (Jan. 1993). Yet, as these articles both show, intellectual property most definitely is not “*just* a commercial form of privacy law.”

32. See generally INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995)

33. See James Boyle, *Intellectual Property Policy On-Line: A Young Person’s Guide*, 10 HARV. J.L. & TECH. 47, 52 (1996)

34. One advertisement for Internet services shows a long haired hippy type, saying vacuously, “information wants to be free”; the pitch asks whether or not you want this person running your business on the Web? Hippy types may have pioneered the Web, it implies, but now they are being shouldered aside by hard-headed business people.

35. John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, WIRED 2.03 (1993) at 86 (visited Jun. 24, 1997)  
<[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/idea\\_economy\\_article.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html)> (quoting 13 THE WRITINGS OF THOMAS JEFFERSON 333-34 (Albert E. Bergh ed., 1907) (letter from Jefferson to Isaac McPherson, Aug. 13, 1813)).

36. John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, (visited Jun. 24, 1997)

<[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/idea\\_economy\\_article.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html)>

37. Global, lightspeed mobility of *labour* is not something that Adam Smith had contemplated; is it a quantitative or a qualitative distinction?

38. See JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* at 182-83 (Harvard University Press 1996) “To someone like me, who believes a lot of our social ills come from the restriction of egalitarian norms, [the] fact [that our current ideas about information have strong egalitarian underpinnings] has an optimistic ring.” See also Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805, 1847 (May 1995) “[T]he Supreme Court has based its jurisprudence on an idealized view of the world, a view that doesn't quite correspond to the world in which we live.... [T]his idealized world ... is much closer to the electronic media world of the future than it is to the print and broadcast media world of the present. If my predictions are right, the new technologies will make it much easier for all ideas, whether backed by the rich or the poor, to participate in the marketplace. ... [D]uring the print age, the Supreme Court created a First Amendment for the electronic age. The fictions the Court found necessary to embrace are turning, at least in part, into fact.”