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Adjudicative Technologies: Privatisation as Jurisdiction

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Abstract

Within the last several years, courts and legislatures have encountered a first wave of issues concerning digital tech-nology. While frequently presented (and often disposed of) as discrete, technical problems, these questions necessarily raise broader challenges to the authority, purpose and identity of law within a networked society.

This paper is animated by Grant Gilmore's observation that 'rapid technological change unsettles the law quite as much as it unsettles people.' It employs this notion to explain a unique phenomenon within digital jurisprudence: the ceding of traditionally public activities and institutions to private regulation.

The problem is examined within legislative, administrative and judicial contexts. Within these frameworks, the paper traces the interplay between digital communication systems and legal structures. It demonstrates how these relation-ships create confusion in roles, purposes, responsibilities and ultimately, in the public law's participation in the "information revolution."

I. Introduction: Institutional Embtyonics

"People rely on the law when it is based on silence as much as on the common law." Joseph Raz [1]

The relationship of law to any new phenomenon is rarely an easy affair to describe. Grant Gilmore noted this situation when he stated that 'rapid technological change unsettles the law quite as much as it unsettles people' [2]. The quote concerns America's experience with post-Civil War industrialisation - a time when jobs, methods of production and entire ways of life underwent profound upheaval. Its message finds a new poignancy in the contemporary chronicles of jurisprudence.

Several years ago, this paper would have required a somewhat lengthy description of the conventional uses of digital technologies. Today, such an exercise is largely unnecessary as even those with little technical awareness of computer-mediated communication (CMC) are constantly bombarded by accounts of its ubiquity and impact. The general rush to wire a digital world - whether in the areas of commerce, recreation, education or discourse has arguably become the defining characteristic of the age. Not surprisingly, the cultural forces have been felt in the courtrooms, legislatures and their connecting corridors.

Digital jurisprudence is a term which is as vague as it is encompassing. Attempts to define its boundaries are repeat-edly thwarted - not by the predictable convening of any legislative term - but with each announcement of a new proc-essor or systems protocol. Indeed, one of the very few firm statements which can be made about computer-mediated law is that it has hardly existed for a decade. To this may be added the observation

that like its practitioners, the legal system has in the main, been caught unprepared for this phenomenon.

Law is not alone in failing to anticipate the coming of the Internet and its associated technology. It is instructive and somewhat comforting to know that as recently as 1984, psychologists described computer culture as "individualistic and idiosyncratic [where] social co-operation or co-ordination is rarely necessary" [3]. Such evaluations hardly pre-pared any scientific or social discipline for the networked surprise to come.

The following sections will expand upon these observations as they consider another relatively recent phenomenon known as privatisation. The genesis and development of privatisation or CMC could easily fill volumes. Here, the focus will be upon their intersections. I define these as points at which the greater society is faced with decisions about its interests in the construction and operation of digital information systems. Specifically, I want to explore how cer-tain perspectives about computing can influence decisional outcomes and in the process, scrutinise the stability and integrity of these visions.

Finally, I want to submit that the historical juxtaposition of these two issues is not purely coincidental. In a recent ar-ticle, Peter Lyman states that digital networks may represent a new institution, complete with its own culture, dynam-ics and reach [4]. In writing about privatisation, sociologist, Paul Starr characterises it as an "institution-shaping" movement, [5] one requiring, "an active effort by the state to design new laws and institutions" [6]. These comments suggest that what is being considered is more complex in its combination than in its separate pieces. The transforma-tional elements may lie at the intersections.

II. Justifying Privatisation

A. The *Analog* World:

Like "cyberspace" and other popular terms of digital nomenclature, privatisation elicits a number of meanings and ideas. In practice, it can take several fundamental forms. These include the selling of governmental assets, the use of voucher systems to allow public use of private, alternative services, contracting out to private vendors [7] and govern-mental disengagement from a "sphere of service provision" [6]. Beyond these manifestations, are the more subtle and complex justifications which underlie the process.

Privatisation is not an entirely new idea. The contractual voyage of Christopher Columbus, the establishment of the Bank of the United States and the Homestead Act are early examples of this endeavour [8]. It has been suggested that what is unique to contemporary privatisation can be located less in its actions than in the ideology which has given rise to its current, unprecedented degree of support.

The subjects upon which this enthusiasm is centred, and about which this paper is concerned have little to do with the newly-democratised Eastern bloc's return of formerly Soviet-controlled commerce. Instead, its focus is upon the par-ticularly Western practice of privatising entities which have, for significant time periods, been associated with gov-ernmental functions. These include public education, social security, tax collection and health care.

The justifications for these transformations often reach beyond the needs of a given moment. Privatisation has been characterised as a movement which "is an outgrowth of political and economic theory" [7, p. 636]. Starr has noted that when examined, motivations are found to be grounded upon an ideology which "represents the most serious conserva-tive effort of our time to formulate a positive alternative [against the growth of government]" [5, p. 6].

Arguments favouring conventional privatisation centre upon three general areas. Currently in vogue is the clearly po-litical theme of governmental minimisation. This view may be traced to the Thatcher-Reagan years during which the majority parties articulated an ideal which emphasised the preferability of market forces to governmental intervention in almost all matters of social affairs [8, p. 243]. In America, it is carried on, largely, though not exclusively, through the Republican Party's legislative goals to devolve government - a project which often enjoys at least tacit bi-partisan approval.

A second general justification involves economic analysis. This most often appears in a supporting, rather than pri-mary role and emphasises straight profit and savings which can be realised through the divestment of state-owned entities [9]. Economic calculi have been successfully used to support the engagement of private contractors in order to reduce state expenditures imposed by various unfunded mandates [7, p. 634].

Underlying both the political and economic variations is the theoretical keystone of efficiency. This argument em-braces the dual private sector virtues of competition and managerial control to arrive at the best possible price and most efficacious delivery. Inherent in these premises are characterisations of governmental agencies as unwieldy, overly-complex and unresponsive [7, p. 635]. Specific assessments frequently dovetail with general condemnations of the essential competency of public administration. As such, they lend support to Starr's observation that while "[p]rivatisation is one route out of the procedural thicket....it is never simple efficiency that is at stake in such deci-sions" [5].

In addition to those criticisms which analog privatisation shares with its digital counterpart (and which will be ad-dressed within), several general problems have been suggested. Much has been written about the lack of firm data proffered in support of the savings realised by these initiatives [10]. Methods of review have been challenged as being too specific for the assessment of global effects produced in such areas as the workforce or in the costs of compliance monitoring [11]. In a more sceptical vein, it has been proffered that as an institution-changing device, privatisation is an ideal tool for a newly-empowered political party to challenge and undo the reforms of its predecessors [5].

Finally, as may be inferred from Professor Starr's quote about simple efficiency, privatisation is inextricably connected to theory, politics, and practice. This web operates to make it all but impossible to evaluate discrete characteristics without the loss of the whole picture. It is a quality of complexity which is only further exacerbated when privatisation is considered within the digital landscape.

B. The *Digital* World:

Perhaps the most fertile ground for contestation in the privatisation debates concerns whether certain activities are of a public or private nature [5]. In the analog world, these investigations are often pursued with the aid of analogy and precedent. The advent of digital information systems has muddied this process by providing a subject which has no clearly defined tradition and no concrete analogical counterparts.

Computers have indeed found a primary place in "politics and the public imagination" [12]. At the same time, the rapidity and breadth of digital technology's force leave politicians and the public no choice but to rely upon their imagination for clues as to its role and place within society. In American jurisprudence, this situation is reflected in conflicting court decisions such as those analogising Internet service providers to libraries [13] or publishers [14]. It is also typified in the finding that many conventional regulations do not apply to digital environments [15].

The ambiguous status of CMC is due to a variety of factors, but primary among these must be that of surprise. As al-ready mentioned, the popularity of digital systems has startled many within the social and computing sciences. Conse-quently, our analyses of "virtual" life are only beginning to yield information. In contrast to our more conventional interests, only small amounts of data about such issues as networked communities, user behaviours and the like have been collected and presented.

As a discipline, law interprets its world through analogical argument, or as one theorist has put it, "if metaphor is the dreamwork of language, then analogy is the brainstorm of jurists'-diction" [16]. An extension of this statement - par-ticularly as it pertains to technology - might be that experience is the fuel of analogy. When first confronted with the problem of telephone surveillance, the United States Supreme Court declared the instrument to have no intrinsic con-stitutional value [17]. Decades later, this opinion was reversed, largely on the basis of the Court's expanded knowl-edge of social patterns of telephone use [18].

Experience allows comparison and provides contrast. Telephones could move from technical artefact to the status of a privacy-endowed necessity only when behaviours surrounding the device were examined. Currently, our store of social knowledge about CMC is limited by the brevity of its existence. Moreover, our abilities are hampered by a perceived lack of technological expertise which is often presumed to be required for adequate comprehension. As a result, popu-lar narratives of computing frequently draw deeply from the imagination, as expressed in the rhetorical and the anec-dotal. Exemplary are such popular titles as "A Slice of Life in My Virtual Community" [19] and "A Declaration of the Independence of Cyberspace" [20].

Being primordial, digital rhetoric is also tentative and malleable. Within the context of privatisation, accounts of CMC can be made coherent though various visions of frontierism, independence and efficiency. In turn, these characterisa-tions can be used to promote the retreat and non-interference of government in digital operation. Currently, such ef-forts have targeted the largest CMC system, the Internet.

As in the analog world, digital privatisation occurs as a combination of ideology and practicality. In terms of ideology, normative content as well as empirical judgements are present to provide a rationale for the action. Paul Starr desig-nates three fundamental, often overlapping positions which support privatisation: "communitarian", "economic" and "governmental overload." Each will be examined here within the framework of current CMC issues.

1. <u>Communitarian Model</u>

A glance at almost any magazine rack or bookstore's computing section will reveal what is perhaps the most popular public depiction of networked communication. Articles, documentaries and personal accounts of the digital communi-ties abound. The advertisements of major online service providers promote the dynamics of their electronic neighbour-hoods. Although some serious scholarship has begun to focus upon user-based social systems [21], the epicentre of networked communitarian visions lies in the techno-political-legal commentary of such authors as Esther Dyson and John Perry Barlow and in the pages of such techno-savvy journals as *Wired* [22].

The empowerment of community institutions as primary governing structures has gained renewed attention in the analog world. Peter Berger and Richard John Neuhaus celebrate such small scale entities as mediators between the impersonal, megastructures of modern liberalism and the individual. A return of power to the community will, in their opinion, allow the nurturing and development of values - a process which has been denied by current state institutions [23].

While there is much to admire in the emphasis of human values over impersonal structures, the theory is subject to criticism. In the physical world, evidence suggests that the faith in solo private institutions is placed at the expense of historical experience. In reality, both private organisations and governmental entities have, for reasons which include economics, problem-scope and effectiveness, entered into highly successful service partnerships. Moreover, as noted by Starr, currently burgeoning, for-profit, community-based institutions demonstrate that size and control do not guar-anty a greater sensitivity to individual needs or values.

Similar criticisms follow communitarian visions into the digital environment. As with its physical counterpart, the belief in an essential superiority of small-scale networked groups is more an article of faith rather than established fact. In digital form, anything resembling the traditional construct of community is far from established. The more sceptical participants in the inquiry voice their doubt that an authentic social system has every been an element or an achievement of electronic communication [24].

Despite these zones of ambiguity, the theory of online community has been imported into American law and politics to fill the gap left by the recent constitutional failure of the Computer Decency Act (CDA). In *Reno v. ACLU* [25], the Court digested substantial amounts of technical education to conclude that means less restrictive than the CDA could achieve the goal of keeping children away from pornography. Reacting to this decision, industry, public interest groups and legislators have shifted the focus from the formal statutory approach to an architectural response.

The replacement for the CDA is known as "filtration" or "blocking." Its design is relatively simple. When activated within a computer or network, gate-keeping applications manage access to Web sites based upon a master list of al-lowable or prohibited locations. The most popular of these methods is known as the *Platform for Internet Content Se-lection Rules* (PICS). Currently, a number of commercial and non-commercial versions are available. Its use has been endorsed by such Internet luminaries as the World-Wide Web Consortium as well as in principle, by more conven-tional policy-makers such as the Vice-President Gore [26]. Foremost in their rationale is the contention that PICS technology will provide a "private" alternative to state enforcement and will allow the local generation and preserva-tion of values.

The appeal of these initiatives can be found in its easy conflation of technical process with the normally unrelated realm of public (or more exactly, community) decision-making. It does so by offering the vision of a user-friendly in-terface, that is, one which can be easily accessed by parents and other in *loco parentis* figures, and equating with this ease, a wholesome transparency of purpose. In reality, the PICS-type software is a product of programmers who are in turn, dependent upon the directions of their employers - who are, it is turning out - large service providers, special interest groups and other substantial institutions.

The notion that technology is innately neutral repeats through the PICS debate like a mantra. Interest in how

the routing of web sites will be accomplished seems to be lost upon proponents who, dazzled by the ease of use, have for-gotten that within any data manipulation lies an algorithm and within that coding is contained a programmed norma-tive statement. The decision of what sites are allowable is not simply a choice made by software. That is only its final stage. The ultimate choice of *how* the switch is thrown becomes one of public policy and not of technology.

That this situation is largely ignored by the PICS proponents is perhaps not so indicative of issue avoidance as it is of issue-masking. It is also symptomatic of how the rhetoric of digital technology can add layers of inevitably distracting, but at first seemingly important considerations to questions which, while capable of complicated answers, are them-selves relatively straightforward.

2. Government Overload Model

A second popular model of privatisation aims to address problems of government operation. In this scenario, the out-put of the state has been seriously strained in order to deliver goods and services which could be better managed by the private sector [5, 27]. The proffered benefits of a shift from state to private control include the reduction of publicly subsidised employment, encouragement of entrepreneurial efficiency and the provision of choice in service selection.

Conventional criticisms of the government overload model stress the importance of preserving traditional government functions. Smith [7, p. 639] states that the most critical factor in the decision to spin-off state resources is the percep-tion of whether the subject is one which must be provided and produced by the government. In the digital environ-ment, the very identification of traditional governmental functions are often critically blurred in ways similar to those found in the communitarian model.

In 1996, the Governor of Connecticut received the results of a commissioned study [28] of the state computing system. The results pointed to problems existing within the state's decentralised computing infrastructure, characterising it as an outdated collection of 20,000 machines across 300 internal networks and 60 agencies [29]. In response, the Gover-nor established the Department of Information Technology (DOIT) with the purpose of privatising all state computer processes, from purchasing, to programming and database linking. As a further result, legislation was introduced with the objective of hiring a private entity to achieve these purposes and, in the process, to realise an estimated US$50 million savings.

The proposal, which has been provisionally approved by the Connecticut General Assembly [30] has encountered strong resistance by public employees, legislators and civil rights groups. A significant amount of protest is aimed at negative employment implications for state workers [31]. However, a substantial degree of criticism focuses upon the legal aspects of private control of public data.

The thrust of the proponent's arguments centre upon the obsolescence and inefficiency of Connecticut's current hard-ware infrastructure. Proponent statements regarding the integrity and privacy of citizens' data have almost exclusively been made as reactions to the voicing of public concern. Chief among proponent responses has been the claim that contractual provisions will allow the state to maintain control over data with the contractor only acting in a "custodial" capacity with no ability to sell the information [32].

This brief description of an ongoing debate illustrates two general issues affecting privatisation of computer resources. The first involves the previously-discussed masking of functions. In this instance, the mechanical aspects of economy and technical necessity are highlighted to the degree that policy concerns such as privacy are assimilated into the technological descriptions. This is apparent in the characterisation of private systems administrators as "custodians" rather than as controllers of data. What is left out of this description is that within digital systems, custody over data is nearly always equivalent to policy-making power.

Management of data flow as well as transfer, combination and organisation of digital files are not simply custodial tasks, but implicate serious questions, including that of delegation of sovereign functions. Issues such as the implica-tions of data transfer across state agencies, capabilities for linking data to create individual profiles, and even the locus of responsibility for mistakes or misuse are questions ignored and hence, unresolved.

A similar problem associated with the present proposal involves the problem of unintended effects. Those familiar with digital technology are aware that its systems behave in non-static ways, often producing results

which are unique to computing. Currently, the proponents of privatisation maintain that present laws will assure the integrity of data [32]. Such a stance ignores the ways in which interacting systems cause their own distinct problems and in so doing, demonstrate that computing is a dynamic process rather than a unitary event. Currently and problematically, the only statutory protection against the privatisation's computer-specific risks is the legislature's reservation of a right to ap-prove the selection of a private contractor.

A second area of concern revolves upon the implication that the realm of data management is not a traditional gov-ernmental function. This is expressed in two ways. First, it appears in the suggestion that the state is not in the best position to manage computing. Such a proposition takes advantage of a largely media-generated atmosphere in which private corporations are celebrated to be on, or rather to be the cutting edge of the future. To borrow from a favourite phrase of Wired magazine, "government is tired, private industry is wired." That facts tend to show otherwise - for example, the United State's government's funding of approximately 40% of computer-related research, or the Internet itself - is largely ignored.

Flowing from this largely mythical supposition is the equivocation of technical expertise with public expertise. Ap-peals to technological sophistication take full advantage of masking effects to produce the message that aside from appreciating that things are operating "smarter" (as defined by technology) and faster (as measured by baud rate or similar instrument), the public need be unconcerned and get about their life. Such a statement may have understand-able appeal to the majority of citizens who would not care to know the difference between a semi-conductor and a mo-dem, but only when it is couched in terms of the purely technical. Otherwise, it accomplishes an effective, but danger-ous transposition of issues which achieves ultimate success when it is accepted by public officials.

3. Economic Model

This approach to privatisation clearly expresses in its various forms, what the prior models infer - that the market is in the best position to regulate. It does so by offering the view that incentives based upon property ownership provide the most efficient and durable source of motivation. Economic models emphasise the individualistic nature of human ac-tion and often identify modes of behaviour with the presence of economic opportunity. The obvious corollary to this notion is that government action which restricts incentives, also restricts individualism (morally wrong) and generally reduces progress (pragmatically undesirable) [5].

Within the digital environment, the economic model surfaces at nearly every turn. In addition of employing the rhetoric common to the *communitarian* and *overload* paradigms, the economic model draws heavily upon the individualis-tic nature of the "electronic frontier." The writings of John Perry Barlow, George Gilder, and the ubiquitous Wired Magazine routinely push the notion that in "cyberspace," the rules are what one makes them to be and the limits of opportunity are as vast as the electronic expanses of its do-main [12].

The belief that individual action unfettered by governmental involvement represents the best course for the Internet and its progeny is gaining in popularity, and has captivated some in the world of legal scholarship [33]. The need to "protect the exploding global commercial potential of the Internet," was a featured component of President Clinton's recent State of the Union address [34]. Significantly, the statement was made within the context of the Supreme Court's striking down of governmental regulation in the form of the Computer Decency Act.

Margaret Chon notes, that beyond the modernised subject matter, digital adherents to economic thinking are quite reliant upon the traditional school of libertarianism. "Many of the 'new' legal paradigms being bandied about for the Internet are in fact reformulations of liber-contractarian models" [35]. An author known by her pseudonym, "humdog," goes a step further by linking the economic model to Utopian forms of communitarianism: "[E]lectronic community is a commercial enterprise that dovetails nicely with the increasing trend toward dehumanisation in our society: it wants to commodify human interaction, enjoy the spectacle regardless of human cost. [24, p. 443].

Examples of the economic model pervade the literature, the media and nearly every sector of CMC discourse. One particularly poignant area of discord involves the use of the law to characterise information as essentially public or private.

In Europe and the United States, various efforts are being made to design laws which confer special protection to the content of databases [36]. The justification for sui generis shelter is predominantly economic. It is also predominantly ideological in the sense that no legislation has been suggested pursuant to any

empirical investigation [37]. Rather, advocates maintain that such measures are necessary incentives to the production of electronic information which will in turn, presumably, benefit society as a whole.

The European version of the sui generis initiative is arguably generated from a direct policy to commercialise govern-mental data [37, p. 73, fn 99] and more explicitly, a comprehensive plan to market the information of the European Union, including some gathered by its governments [38]. The final E.C. Directive on Databases reflects its strategic origins. Under it, creators of databases gain sole right to prohibit, "extraction and/or reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database" [36, art. 7(1)]. Protec-tion is conferred without any showing of creativity or uniqueness, but on the basis of substantial investment, either in the procurement of material or in its presentation or alteration [36, art. 7(1)].

Counterparts to the E.U. provision have been proffered in the United States. One outstanding example is H. R. 3531, entitled, "Database Investment and Intellectual Antipiracy Act of 1996" [39]. This bill, like the Directive, would have provided exclusive control to the database owner of the content on the basis of financial investment. It additionally provided the database owner with exclusive rights to control the uses of the content, including use which is adverse to the real and potential market for the database [39, Section 4(a)(i)]. Inevitably, the bill was defeated, but it is reason-able to assume that similar proposals will be forthcoming.

An in-depth analysis of the E.U. and U.S. provisions are beyond the scope of this paper, but criticisms of their motivat-ing philosophies cannot be avoided within any consideration of privatisation. Legislation such as these shatter what-ever credibility that the well-worn statement, "information wants to be free" has managed to gather. Indeed, as Jesse Drew has stated, this statement is itself a fallacy and information, "is very much a social product, reflecting the social conditions under which it is produced" [40].

It is testimony to the rhetorical power of the economic model that sponsors of the Directive and of bills like H.R. 3531 are able to claim for their submissions positive social effects. While evidence for this is, apart from the economic model's creed of incentive, empirically baseless, the creed is accepted and proceeds to work by denying public access. The Directive, among other things, effectively locks down database content of nearly every type to the control of the owner. The degree of this control is so tight as to lead one set of commentators to declare that within its borders, the Directive, "harbors no working conception of a public domain whatsoever" [37, p. 90]. The one exception to this ban, the ability to extract "for [noncommercial] purposes of illustration for teaching or scientific research" [36, art. 9(b)] has been characterised as "thin" [37, p. 92] and will only be applicable where member states adopt its terms [37, arts 9, 9(b)].

Efforts to restrict, defeat or redefine the American information flow are also underway within the legislatures by re-consideration of the doctrine of Fair Use and through treaty negotiations with the World Intellectual Property Rights Organization (WIPO). In the latter instance, representatives of the U.S. government were nearly prepared to sign sui generis provisions until halted by an "unprecedented" protest of scientists concerned with its implications for freedom of scientific research and education [41]. Significantly, the protest nearly failed to occur due to a lack of government consultation. In the end and in response to condemnations such as the National Research Council's statement that the provisions were, "antithetical to the principle of full and open exchange of data," the treaty's signing was delayed.

III. Whose Prpblem is it?

As suggested by the WIPO vignette, one of privatisation's' major effects is upon the types and quality of dialogues which we are capable of conducting as a society. Joseph Raz claims that of all the human institutions, law is primary because it provides a framework within which social life takes place [1, p.120]. There are many aspects to this process, however, foremost is law's ability to enter into the society when conflicts arise and ask, whose problem is it? Law is, in this respect a dialogical process which depends upon the availability of public discussion for its existence.

Jonathan Rauch reminds us that "it is not easy to love a system which never finally ended an argument" [42]. The in-stant debate suggests a similar lesson. Within the rhetoric of both privatisation and cyber-utopianism are elements which intrinsically operate to close down discussion in favour of efficacy. Privatisation is about removing the government. Although other grounds for its advocacy may be offered, this value remains constant. It is about the elevation of the private and the diminishment of the public. That it does so in a zero-sum fashion is debatable, but there is much evidence to accept this as true. Privatisation concerns boundaries, and more specifically, their erection. Once in place, private zones by definition are no longer

places of public exchange or of public decision-making. They are, at best, places where the public are welcomed as guests.

In addition to being protected from the often unpleasant process of public debate, privatised places are also less sus-ceptible to public scrutiny and accountability. Such normal public requirements as disclosure, fairness and equity do not remain fixed across public and private borders. When they do, most often it is because some arrangement will be mandated by contract or other formal, static agreement. The result will not be of the same character that as achieved in public places.

As discussed in the prior sections, privatisation is packed with normative claims. Professor Chon notes that no private market exists in the absence of rules [35, p. 137]. Standards such as efficiency, profit and return are native to this sphere as are the qualities of dialogue, openness and representation to the modern liberal public forum. That these sets of values are not interchangeable would appear to be self-evident if it were not for the fact that they are commonly represented to be completely consistent.

Among privatisation's extensive repertoire, one constant which stands out is its unequivocal answer to law's question of "whose problem is it." The ultimate response, communicated through variations upon the above-noted themes is that problems are best solved outside of the public forum. Significantly, much of privatisation's dynamics involve the transfer of ostensibly-public issues to private decision-makers. Within the digital context, the reframing of issues from public to private is done by varied means. The examples ap-pearing in this presentation demonstrate how public questions are often masked through the selective emphasis upon hardware, software or other "expert" dimensions. Advocates of privatisation easily integrate currently popular and vague notions of "cyber-community" to justify the placement of network management in the hands of "local" users. That the power and delete switches of these "communities" fall under an increasingly centralised corporate control [40, p. 193] is lost within the narrative. Through these and other methods, the shift from public to private often occurs in the earliest stages of debate, closing it off and causing many to join the director of the National Science Foundation in wondering why consultation on matters with such large ramifications is absent [41, p. 65].

Even after privatisation has occurred, powerful elements within its rhetoric allow many to believe that they are practis-ing conventional forms of participation within "virtual" reality. Notable is Esther Dyson's statement that, "[a]though I havent yet voted formally, I feel that through the Net I have a meaningful stake in what our government does. I'm a far more active citizen than before" [43].

Like privatisation, popular digital theory is socially constituted and despite attempts to portray an ethos of pure scien-tific or engineering certainty, it is as susceptible to myth as any other construct. Apart from the obviously-social char-acterisations of "cyberspace," there are other factors which can make digital theory immensely inimical to liberal the-ory [35, p. 147]. They can be found in the very operating protocols of computer systems which emphasise quantitative precision, definite categories and unambiguous decision-making. Like privatisation's preference for closed systems, computing engenders a culture of expertise, allowing only those initiated in its workings complete access.

The closed architectures of the digital world as well as the myths surrounding it make it difficult to analogise its func-tions to the dynamics of the conventional world. The culture of expertise erects further obstacles by warning off judges, legislators and other laity, including the public. These characteristics meld well with the messages of privati-sation and provide further justification for its imposition.

IV. Conclusion: Lochner Revisites?

Despite the current deference accorded to the "Information Revolution" by scholars, politicians and the segment of the public that is interested, public law has seen something of this before. In the early 1900's, the United States Supreme Court delivered an opinion in *Lochner v. New York* and struck down state efforts to improve working conditions by imposing a maximum number of hours which could be worked by bakers [44]. The popular scholarly appraisal of this case vilifies it as representative of that Court's willingness to actively enforce laissez-faire economic theory and pre-vent the government from intervening in the private market for reasons of health and safety.

Another, more recent explanation of *Lochner* does not quarrel with the negative consequences of the decision, but places blame for its holding upon a flawed, but popular legal assumption that markets were essentially amicable to liberty and that the American frontier would always provide an escape from problems

of economic inequity [45]. The fault was not that such a situation might have been true in the early days of the nation, but that it was no longer so in the industrial age. Lochner, in this sense, represents a troubling triumph of theory over reality.

The equally theory-laden world of digital privatisation offers the possibilities of similar legal mistakes. Rhetoric about new frontiers and open, albeit virtual spaces abound and as in the beginning of this century, invite legislators and courts to premise decisions upon illusions rather than upon facts. One cure for Lochner came with the ascension of legal realism and the adoption of what Roscoe Pound termed, "sociological jurisprudence" over "mechanical jurispru-dence" [46]. It is precisely this same cure which many within the legal, legislative and political communities must consider as we continue to interpret the implications of digital privatisation and decide whether private or public ju-risdiction will apply to its spaces.

Acknowledgments

Notes

[1] J. Raz, The Authority of Law. Oxford: Clarendon Press, 1997, p. 192.

[2] G. Gilmore, The Ages of American Law. New Haven: Yale University Press, 1978, p.65.

[3] L. Sproull, S. Kiesler & D. Zubrow, "Encountering an alien culture," Journal of Social Issues, vol. 40, no. 3, 1984.

[4] P. Lyman, "What is a digital library?" Daedalus, vol. 125, no. 4, 1996.

[5] P. Starr, "The meaning of privatization," Yale Law and Policy Review, vol. 6, 1988.

[6] P. Starr, "The new life of the liberal state: privatization and the restructuring of state-society relations," in Public Enterprise and Privatization, J. Waterbury & E. Suleimann, Eds. Boulder, CO: Westview Press, 1990.

[7] C. Smith, "Private tax collection," Case Western Reserve Law Review, vol. 47, 1997, p. 637-8.

[8] L. Vecoli, "The politics of privatization," Hamline J. of Public Law and Policy, vol. 15, 1995, p. 243.

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