

# THE COMMON LAW IN CYBERSPACE

Tom W. Bell\*

LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM. By *Peter Huber*. New York: Oxford University Press. 1997. Pp. xv, 265. \$30.

## INTRODUCTION

“Wrong in interesting ways,” counts for high praise among academics. Peter Huber’s<sup>1</sup> stirring new book, *Law and Disorder in Cyberspace*, certainly merits acclaim by that standard. The very subtitle of the book, *Abolish the FCC and Let Common Law Rule the Telecosm*, announces the daring arguments to follow. A book so bold could hardly fail to make some stimulating errors, the most provocative of which this review discusses. Thanks to his willingness to challenge musty doctrines of telecommunications law and policy, moreover, Huber gets a great deal right.

*Law and Disorder in Cyberspace* argues at length that the Federal Communications Commission (FCC) has warped telecommunications markets, hindered technological advances, and violated constitutional rights.<sup>2</sup> Huber blames the inherent nature of “commission law,” which he likens to Communist command-and-control economics: “rigid, slow, and — despite all the earnest expertise of bureaucrats — ignorant” (p. 8). Reforming the FCC is thus not an option; rather, it “should shut its doors, once and for all, and never darken American liberty again” (p. 7).

What would replace the FCC? Market processes and common law courts. Rather than licensing access to the electromagnetic spectrum, Huber would sell it, dezone it, and leave private parties to determine its best uses (pp. 71-76). He regards price regulation

---

\* Assistant Professor, Chapman University School of Law. B.A. 1987, University of Kansas; M.A. (Philosophy) 1989, Southern Cal.; J.D. 1993, Chicago. — Ed. © 1999 Tom W. Bell. All rights reserved. The author thanks: Solveig Singleton, John Hasnas, Bruce Benson, Donna Matias, Marcus Cole, Eugene Volokh, Max More, and members of the telecomreg <cybertelecom-l@listserv.aol.com> and Cyberia-L <cyberia-l@listserv.aol.com> email lists for discussing with the author some of the points raised here; Jennifer DePalma, Greg Schnippel, and Richard Bonenfant for research assistance; and Chapman University School of Law for supporting his work with a summer research stipend. The author, however, assumes sole responsibility for this work as submitted for publication.

1. Senior Fellow, Manhattan Institute for Policy Research; Partner — Kellogg, Huber, Hansen, Todd & Evans; Chair, Telecom Policy and Analysis: a Kellogg Huber Consulting Group.

2. Although Huber focuses on the FCC, he intends his analysis to apply to its local, state, and international analogs. Pp. 32-34.

of telecommunications services as inevitably and thankfully doomed by protean technologies and increasing competition (pp. 117-29). In place of the universal service subsidy, Huber counts on market forces to provide cheap basic access just as they already provide cheap fast food (pp. 130-41). The FCC sets technical standards quickly but incorrectly; “[c]ompetition delivers real standards more slowly but far more robustly” (p. 161). The telecommunications industry will deliver these and other triumphs, claims Huber, once it escapes from “commission-law.”

To maintain order in the telecosm requires not FCC regulation, Huber argues, but merely the case-by-case determinations of common law courts. He would, of course, have judges enforce time-tested and general principles of property, contract, and tort law.<sup>3</sup> Huber likewise invokes particular common law rules that seem to suit telecommunications particularly well, such as those relating to common carriage,<sup>4</sup> defamation (pp. 173-77), and privacy.<sup>5</sup> More controversially, he embraces even rules that originated relatively recently and through legislatures, such as those of antitrust,<sup>6</sup> copyright,<sup>7</sup> and First Amendment law (pp. 165-77, 203). These win good standing in Huber’s view because he emphasizes the process of common law over its substance, demanding merely a law that “evolves out of rulings handed down by many different judges in many different courtrooms” (p. 8).

Huber’s failure to treat common law as a whole, process and substance together, opens a rift in the foundation of his text.<sup>8</sup> Because Huber need only show that common law — as he understands it — will improve on commission law, this theoretical flaw does not in itself disprove his thesis. But through the fault line creep a number of troubling errors. Huber accords antitrust law, abandoned by many of his fellow travelers and inconsistent with common law proper, inexplicable deference.<sup>9</sup> In an analysis aggravated by gravely suspect factual claims, Huber promotes mandatory

---

3. Huber makes this point throughout *Law and Disorder in Cyberspace* but especially at pp. 4-9, 205-06.

4. Pp. 142-54, 203-04. See *infra* notes 63-68 and accompanying text for discussion of Huber’s treatment of common carriage.

5. Pp. 195-98, 204-05. Huber admits, however, that privacy *per se* has only very shallow roots in the common law. P. 196. For an argument that the invention of privacy rights by common law judges and legislatures threatens the more deeply rooted principles of free speech, property, and contract, see Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, Cato Inst. Policy Analysis No. 295 (Jan. 22, 1998).

6. Pp. 6-7, 88-102, 201-02. See *infra* Part III for discussion of Huber’s treatment of antitrust.

7. Pp. 178-88, 204-05. See *infra* Part V for discussion of Huber’s treatment of copyright.

8. See *infra* Part II.

9. See *infra* Part III.

interconnection at the expense of property and contract rights.<sup>10</sup> His support of copyright law likewise threatens to contradict common law. By contrast, Huber's over-eager application of property rules to the electromagnetic spectrum overlooks the far better fit offered by common law trademark principles.<sup>11</sup> One might argue that a future version of the common law, one upgraded and uploaded to the telecosm, will work so well as to correct these substantive errors.<sup>12</sup> One might, but Huber does not.

Tracing the lines of these various faults will illuminate not only *Law and Disorder in Cyberspace* *qua* book, but law and disorder in cyberspace *qua* the recurring policy puzzle of our day. Huber's text thus presents not merely interesting errors, but enlightening ones. Perceiving that a miasma of incivility hangs over the book, however, some readers may fail to fully appreciate its charms. The next Part aims at dispelling that somewhat unfair impression.

## I. THE MADNESS IN HUBER'S METHOD

To the credit of Huber's brisk and clever writing, *Law and Disorder in Cyberspace* remains interesting even when obviously right. Few people would describe broadcast television in its heyday as a bastion of intellectualism. Huber's jibe: "It kept your eyes warm while you slept" (p. 133). Especially now that the Supreme Court has struck parts of it down, no one can doubt that the Communications Decency Act skirted constitutional limits. Huber, opining prior to *Reno v. American Civil Liberties Union*,<sup>13</sup> dryly observed that an Internet researcher who "types 'Show Panties' can hardly be heard to complain about the shock to his sensibilities that follows" (p. 172). *Law and Disorder in Cyberspace* fairly bristles with such witticisms.

Huber's sharp tongue arguably serves *Law and Disorder in Cyberspace* less well, however, when he moves from the current consensus to the fringe of the ongoing debate over the law and policy of telecommunications. Arguing that the Federal Communications Commission (FCC) is "unconstitutional, Title to Title, top to bottom," for example, Huber blames its continued survival on "all the little constitutional issues that swarm out of the commission like maggots" and distract its critics (p. 200). Huber portrays the FCC as a shadow from the "night of totalitarian government" (p. 5) that descended across Europe in the early 1900s and places the current FCC in "an Alice-in-Wonderland sort of

---

10. Pp. 142-54. See *infra* at Part IV.

11. See *infra* Part V.

12. See *infra* Part VI.

13. 521 U.S. 844 (1997).

world, in which the less reason the Queen has to exist at all, the more corpulent and powerful she becomes" (p. 5).

Most academics regard this sort of talk as shockingly frank or nearly libelous, but at any rate as too raw for comfort.<sup>14</sup> Huber does not provide a supporting reference for his claim that "the FCC's different pronouncements on [children's television] should have been accompanied by a cone-shaped hat, a star-studded cloak, and the sounding of a Chinese gong" (p. 167). Nor does Huber footnote his cite to "fairness gnomes at the FCC" (p. 147). Though ample notes do back up his serious claims, figures, and quotes, Huber apparently did not write *Law and Disorder in Cyberspace* with academic tastes foremost in mind.

Instead, *Law and Disorder in Cyberspace* aims primarily at policymakers, mass media commentators, and educated lay people. That influential audience will find the book both entertaining and largely convincing. With works like *Orwell's Revenge*<sup>15</sup> and *Junk Science*,<sup>16</sup> Huber has already demonstrated his power to shape popular opinion. For that reason alone academics should take care to understand the arguments in *Law and Disorder in Cyberspace*.

Huber's ample qualifications also suggest that we take *Law and Disorder in Cyberspace* seriously. After earning a Ph.D in engineering from MIT, Huber graduated from Harvard Law School and clerked for the U.S. Supreme Court.<sup>17</sup> He ascended to policy wonk stardom in the mid-1980s by creating for the Department of Justice an exhaustively documented report on the telecommunications industry, heavily influencing the efforts of the Department and the federal courts to break up AT&T under the aegis of antitrust law.<sup>18</sup>

---

14. See, e.g., Philip V. Permut, *Dogma in Cyberspace*, 50 FED. COMM. L.J. 775, 777 (1998) (reviewing *Law and Disorder in Cyberspace*) ("Instead of presenting a balanced discussion of the issues, Huber presents limited and one-sided arguments . . ."); Stewart Baker, *Why We're All Connected*, WALL ST. J., Nov. 3, 1997, at A20 (reviewing *Law and Disorder in Cyberspace*) ("Huber . . . allows hyperbole to detract from what is otherwise a fascinating story of politics and technological change.").

15. PETER W. HUBER, *ORWELL'S REVENGE: THE 1984 PALIMPSEST* (1984).

16. PETER W. HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1993).

17. See Milo Geyelin, *Tort Bar's Scourge: Star of Legal Reform Kindles Controversy But Collects Critics*, WALL ST. J., Oct. 16, 1992, at A1.

18. PETER W. HUBER, *THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY* (1987) [hereinafter *THE GEODESIC NETWORK*]. As described by the court in *United States v. Western Elec. Co.*, 673 F. Supp. 525, 528 n.1 (D.D.C. 1987), modified, 900 F.2d 283 (D.C. Cir. 1990), the Department hired Huber to prepare the report for its triennial review of the line of business restrictions included in the modified final judgment of the antitrust case that broke up AT&T. The same court later noted that the Department had relied on *The Geodesic Network* as "the principal factual basis for its position . . . on the decree restrictions." *United States v. Western Elec. Co.*, 714 F. Supp. 1, 5 n.12 (D.D.C. 1988). See also Richard A. Hindman, Comment, *The Diversity Principle and the MFJ Information Services Restriction: Applying Time-Worn First Amendment Assumptions to New Technologies*, 38 CATH. U. L. REV. 471, 502-504 (1989) (describing the influence of *The Geodesic Network*).

Huber coauthored the first full treatise on federal telecommunications law in 1992<sup>19</sup> and has since then coauthored texts on federal broadband law<sup>20</sup> and the Telecommunications Act of 1996.<sup>21</sup> On the basis of such credentials and achievements, Huber has become a leading figure in telecommunications law and policy.

Most importantly, academics should heed *Law and Disorder in Cyberspace* for the substantive ideas that shine through Huber's occasionally sharp rhetoric. Even though Huber's tone may wrongly suggest that he cannot be wrong, his comprehensive critique of telecommunications law and policy does, after all, get a great deal right. At any rate, we should decently expect outrage from someone who unfavorably compares Herbert Hoover, father of the FCC, to Joseph J. Goebbels (p. xiv). That such polemic grates on academics' ears does not prove Huber wrong; it merely proves him spirited.

## II. TAKING THE COMMON LAW SERIOUSLY

*Law and Disorder in Cyberspace* rightly criticizes the FCC for slowing technological progress and infringing on fundamental rights. Congress shares the blame, both for delegating overbroad powers to the FCC and for giving it specific and unwise orders. As Huber explains, however, the FCC's susceptibility to public choice pressures and its slothful, top-down, and baroque regulatory process cannot help but render it unfit to make law for the telecosm (pp. 4-9, 24-62, 95-99, 120-23, 133-36, 146-54, 166-68, 199-206). That the FCC has thrived even under the allegedly deregulatory Telecommunications Act of 1996<sup>22</sup> demonstrates that it will hardly wither before Huber's call for the Commission's abolition. Still, to judge from the Civil Aeronautics Board and the Interstate Commerce Commission, federal agencies that regulate networks appear uniquely vulnerable to fatal reforms.

Granted, the FCC does a poor job of regulating telecommunications and that it may someday face termination. But can common law courts do any better? Huber convincingly argues that they can. "The telecosm is too large, too heterogeneous, too turbulent, too creatively chaotic to be governed wholesale, from the top down," he explains (p. 206). "In a place like that, nothing except common law can keep up" (p. 8). Huber is not alone in touting the common

---

19. See MICHAEL K. KELLOGG, JOHN THORNE & PETER HUBER, *FEDERAL TELECOMMUNICATIONS LAW* (1992). The authors published an updated version in 1995.

20. See JOHN THORNE, PETER HUBER & MICHAEL K. KELLOGG, *FEDERAL BROADBAND LAW* (1995).

21. See PETER W. HUBER ET AL., *THE TELECOMMUNICATIONS ACT OF 1996: SPECIAL REPORT* (1996).

22. For a descriptive and quantitative assessment of the FCC under the Act, see REGULATORS' REVENGE: *THE FUTURE OF TELECOMMUNICATIONS DEREGULATION* 1-4 (Tom W. Bell & Solveig Singleton eds., 1998).

law's unique ability to grapple with cutting-edge legal issues.<sup>23</sup> He does, however, evince an unusual appreciation of the common law as a spontaneous order.<sup>24</sup>

Huber understands that common law originates not in the holdings of any court or courts, but rather in the actual practices of those who have to live with the law. "Rules evolve spontaneously in the marketplace and are mostly accepted by common consent. Common-law courts just keep things tidy at the edges" (p. 8). Even when practical rules face litigation, the common law continues to grow and develop "out of rulings handed down by many different judges in many different courtrooms."<sup>25</sup> Looping back to the real world, judicial rules then once more face the acid test of experience. "The good rules gain acceptance by the community at large, as people conform their conduct to rulings that make practical sense" (p. 8). Like the telecosm itself, the common law represents a complex, decentralized, and interlinked spontaneous order.

By attributing only modest powers to courts, Huber's account contrasts with that of Lawrence Lessig, another prominent advocate of applying judicial procedures to new and puzzling legal issues. Lessig claims of the Internet "that we are, vis-à-vis the laws of nature in this new space, gods; and that the problem with being gods is that we must choose. These choices . . . will be made, by a Court . . . ."<sup>26</sup> To the contrary, like the market place, the English

---

23. See, e.g., Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 216 (1996) ("[M]ake rules clear; create property rights where now there are none; and facilitate the formation of bargaining institutions. Then let the world of cyberspace evolve as it will, and enjoy the benefits."); I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace"*, 55 U. PITT. L. REV. 993, 1054 (1994) (comparing various means of regulating the Internet and concluding that "the most flexible, least intrusive rule-making process is best because communications technology is changing so rapidly."); Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752 (1995) (proposing that until we achieve a better understanding of the Internet "we follow the meandering development of the common law.").

24. For compatible but more complete analyses of the common law as a spontaneous order, see RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 114-127 (1998); 1 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 72-123 (1973); and BRUNO LEONI, *FREEDOM AND THE LAW* 20-23, 135-55 (1961). For descriptions of spontaneous orders generally, see BARNETT, *supra*, at 44-62 and HAYEK, *supra*, at 35-54.

25. P. 8. See also pp. 4-5 ("The common law evolves from the bottom up. Private action comes first. Rules follow, when private conflicts arise and are brought to court.").

26. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 875 (1996). Note that Lessig advocates common law processes as merely a temporary expedient in the face of our current ignorance over how best to regulate the telecosm. See Lessig, *supra* note 23, at 1744 (advocating the common law because "what the system of cyberspace regulation will need is a way to pace any process of regulation — a way to let the experience catch up with the technology . . ."); Lawrence Lessig, *Sign It and Weep*, THE INDUSTRY STANDARD, Nov. 20, 1998 (visited Dec. 23, 1998) <<http://www.thestandard.com/articles/display/0,1449,2583,00.html?01>> (arguing against passage of the proposed new Article 2B of the Uniform Commercial Code, regulating sales on information products, on grounds that "[t]he best thing is to go slowly — to let parties write the contracts they want and let courts test them. A practice should develop before laws are passed.").

language, or the common law, the Internet arose out of human *action* but not human *design*. No one person or institution can create or predict such spontaneous orders. Lessig's claim that officers of the court<sup>27</sup> enjoy god-like power over the Internet thus smacks of hubris. Huber's account of the modest powers of common law courts at least avoids that tragedy.

*Law and Disorder in Cyberspace* errs, however, in overstressing the process of common law to the detriment of its substantive rules. While Huber evinces appreciation of contract and property rights, his paeans to the common law focus on how it works; it "evolves from the bottom up" (p. 4), "is developed and enforced largely by private litigants" (p. 5), and "can keep up" with technological change (p. 8). This emphasis on the procedural aspects of common law leads Huber to embrace legislative inventions that "provide, at most, a broad, general mandate to develop the law by adjudication . . . like the Bill of Rights or the Sherman Act" (p. 8). Huber thus claims that "[f]or all practical purposes, antitrust law is common law" (p. 6) and — incredibly — credits courts for "doing all the real crafting of the law of intellectual property" (p. 180).

Common law cannot swallow every rule that Huber would throw into it, however, and still remain healthy and whole. In the first place, even the wonders of case-by-case adjudication will not save some legislation. Consider statutes demanding simply, "prices shall be fair," or "citizens shall be polite." That courts might over time develop rules interpreting those broad mandates would not suffice to render them palatable. So, too, the Sherman Act continues to cast a pall of uncertainty over commerce and to clog courts with interminable litigation, notwithstanding strenuous judicial efforts to give the act an exact, equitable, and efficient meaning.<sup>28</sup>

In the second place, the core principles of common law, its time-tested rules of property, contract, and tort law, can stand only so much legislative boring before they lose all meaning and collapse in a mass of contradictions. The multiplication of rules such as anti-trust, copyright, and mandatory interconnection — all of which Huber supports — thus threatens to leave the common law a hollow shell. Huber's underappreciation of common law's substance shows even in his plan to create new property rights in the spectrum, for these new property rights would contravene existing ones.<sup>29</sup> In extraordinary cases, of course, common law may sacri-

---

27. Including, until quite recently, Lessig himself. See Rajiv Chandrasekaran, *A Return Court Role for Ejected Advisor?*, WASH. POST, Sept. 25, 1998, at F1 (describing Lessig's appointment and removal as a special master in the ongoing Microsoft antitrust litigation).

28. See *infra* Part III.

29. See *infra* text accompanying notes 90-104.

fice its core principals for pressing practical reasons.<sup>30</sup> As argued below, however, necessity does not excuse the exceptions that Huber demands.

### III. UNDUE TRUST IN ANTITRUST

*Law and Disorder in Cyberspace* expresses conflicting views of antitrust law. Huber cannot deny that antitrust lawsuits tend to run out of control (pp. 91-92, 95-102). After excoriating the FCC, he admits that "[t]he best of antitrust law degrades into the worst of commission" (p. 98). Sometimes Huber even seems to think that we could do without antitrust law. He dismisses fears of "new robber barons" monopolizing the telecosm as "utterly implausible" (p. 6) and argues that "[g]iven half a chance, competition has confounded natural-monopoly pessimists every time" (p. 103). Yet for all that, Huber ultimately — and somewhat inexplicably — embraces antitrust law.

U.S. antitrust statutes have little or no claim to codifying settled common law rules.<sup>31</sup> This hardly troubles Huber, who accords antitrust honorary common law status on grounds that courts have done the hard work of defining its scope. "The [Sherman] Act operates only as an enabling statute for economic common law. Antitrust rules have been developed almost exclusively by judges and juries, over the course of a century of antitrust litigation" (p. 89). Few disagree that antitrust law owes a great deal to case-by-case

---

30. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 112-27 (1995) (describing how common law treats special problems arising out of bilateral monopolies, as in cases of necessity).

31. Commentators continue to debate the degree to which common law inspired the Sherman Act. Compare E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 32 (2d ed. 1989) (relating development of common law prior to enactment of the Sherman Act in 1890 and concluding that "state common-law precedents . . . were not necessarily uniform and . . . [e]nforcement against restraints was weak") with Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266, 280-84 (1986) (arguing that the Sherman Act reflected the majority rule under U.S. common law barring agreements in restraint of trade). Arthur admits, however, that toward the end of the nineteenth century a divergent trend, enforcing agreements establishing trusts, had begun to emerge. *Id.* at 283. Enactment of the Sherman Act of course put an end to the common law's evolution in that direction.

Regardless of whether the Sherman Act drew on common law precedents, most commentators agree that it reached beyond the common law by criminalizing agreements in restraint of trade and allowing for recovery of treble damages. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 52 (1965); W.W. THORNTON, *A TREATISE ON THE SHERMAN ANTI-TRUST ACT* 87-88 (1913); John E. Lopatka, *The Case for Legal Enforcement of Price Fixing Agreements*, 38 EMORY L.J. 1, 5 (1989). But see John C. Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CAL. L. REV. 297, 305 n.27 (1940) (claiming that prior to 1800, price-fixing contracts could be prosecuted and punished as common law crimes and that private treble damages might also have been available).



adjudication.<sup>32</sup> Many disagree, however, that antitrust law therefore merits the same respect as common law proper.

The same procedures that work so well with common law's traditional principles have not redeemed antitrust's vague statutes.<sup>33</sup> Uncertainty about what constitutes an antitrust violation continues to undermine the rule of law and expose commerce to undue legal risks.<sup>34</sup> Furthermore, and in contrast to common law, the statutory origins of antitrust raise grave doubt about the constitutionality of delegating broad lawmaking power from the legislative to the judicial branch.<sup>35</sup> Mere case-by-case adjudication will not save antitrust law. Although Huber defends it as "decentralized, adaptable, and resilient" (pp. 6-7), one might say the same of terrorism. Such superficial procedural traits do not alone explain the triumph of common law. Common law also relies on core sub-

---

32. See, e.g., *United States v. United States Gypsum Co. et al.*, 438 U.S. 422, 439 (1978) (noting that the Sherman Act "has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" (quoting *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933))); Phillip Areeda, *Monopolization, Mergers, And Markets: A Century Past And the Future*, 75 CAL. L. REV. 959, 959 (1987) ("The statutes on which it rests are so general that antitrust law shares a great deal with the common law and is no more to be judged in gross than the law of contracts."); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEXAS L. REV. 705, 706 (1982) ("The Sherman and Clayton Acts authorized the Supreme Court to invent and enforce a law of restraint of trade . . ." (footnotes omitted)). But see Arthur, *supra* note 31, at 267 ("All the contending antitrust schools agree on one critical point: that the Sherman Act cannot, and should not, be given a settled meaning derived from traditional statutory sources. They are all wrong." (footnote omitted)).

33. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 53 (1978) (observing of the processes that have shaped antitrust that "the law of torts was not built through a process as unconfined as that").

34. See Arthur, *supra* note 31, at 268 ("Antitrust litigation remains notoriously costly and unpredictable, despite repeated efforts to simplify both the doctrine and the litigation process." (footnote omitted)); Alan Greenspan, *Antitrust*, in AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* 63, 70 (1967) ("[T]he very existence of those undefinable statutes and contradictory case law inhibits businessmen from undertaking what would otherwise be sound productive ventures.").

Commentators do not even agree on whether common law processes have at least improved antitrust law. Compare Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1705 (1986) (correspondence) (arguing that because "[t]he Sherman Act set up a common law system in antitrust," judges have given its broad mandate an increasingly efficient interpretation) and Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 488 n.64 (1993) (same) with Arthur, *supra* note 31, at 270 (arguing that giving courts free rein to interpret the Sherman Act "has produced neither settled law nor desirable social policy") and William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEXAS L. REV. 661, 671 (1982) (noting that even "[a]fter close to a century of antitrust jurisprudence, a vigorous debate continues over the proper means of furthering the original congressional goals of competition and free enterprise," with the necessary result that "uncertainty remains over the measures against which the social desirability (and hence legality) of various types of business conduct should be tested" (footnotes omitted)).

35. See BORK, *supra* note 33, at 83 ("Congress cannot delegate to the judiciary the basic political decisions of the society."); Arthur, *supra* note 31, at 268 ("The standardless delegation of lawmaking power to unelected judges does not square with traditional conceptions of the separation of powers required by the Constitution.").

stantive principles, ones with which the principles of antitrust law, such as they are, necessarily conflict.<sup>36</sup>

It thus remains puzzling that Huber does not repudiate antitrust entirely. He would certainly find himself in respectable — and for one of his views, sympathetic — company. Richard Epstein has called for “repeal of the basic statutory framework” of antitrust law.<sup>37</sup> Alan Greenspan jeered, “the entire structure of antitrust statutes in this country is a jumble of economic irrationality and ignorance.”<sup>38</sup> Friedrich A. Hayek likewise weighed in against antitrust legislation, describing its aims as something that “cannot be achieved without conferring a discretionary and arbitrary power on some authority, and which therefore must give way to the higher consideration that no authority should be given such power.”<sup>39</sup>

Contrary to misrepresentations by antitrust’s supporters, even the venerable Adam Smith argued against antitrust law. True, he famously observed that, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>40</sup> Antitrust advocates all too often quote that passage in isolation,<sup>41</sup> failing to quote what Smith says immediately thereafter: “It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty

36. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-164 (1974) (arguing that scale does not affect the justice of social patterns — they are justified so long as they result through just transfers from just holdings); Rudolph J. Peritz, *Frontiers of Legal Thought I: A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263 (discussing the conflict between common law rights and antitrust law).

37. EPSTEIN, *supra* note 30, at 126. Epstein does, however, offer some favorable comments on what he takes to be the “classical” common law rule barring enforcement of horizontal agreements in restraint of trade. See *id.* at 125.

38. Greenspan, *supra* note 34, at 70.

39. 3 F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 86 (1979). See also *id.* at 85-88 (applying similar analysis to the Sherman Act in particular and denouncing antitrust penalties and administrative enforcement). But see *id.* 86-87 (supporting a civil rule much like the one that EPSTEIN, *supra* note 30, at 125, ascribes to classical common law).

40. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 128 (Edwin Cannan ed., 1937).

41. See, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980) (quoting the first but not the second passage in reversing summary judgment for defendant accused of an illegal agreement in restraint of trade); Walter Adams & James Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 274 (1995) (same); Walter Adams & James W. Brock, *The “New Learning” and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515, 1540 (1986) (quoting the first but not the second passage as part of an extended argument for more vigorous enforcement of antitrust laws); Alexander J. Black, *European Law and Public Utility Open Access*, 10 FLA. J. INTL. L. 117, 176 (1995) (quoting the first passage, eliding the second, and then continuing to quote from Smith’s text in defense of a European Commission ban on cartels); Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 137, 140 (1995) (quoting the first but not second passage as proof that “legal restrictions on cooperation are necessary”).

and justice.”<sup>42</sup> Incredibly, they sometimes even excise the latter quote and claim Smith as one of their own.<sup>43</sup>

Perhaps Huber stubbornly clings to antitrust law out of some feeling of gratitude. He initially came to fame with *The Geodesic Network*, a report that he prepared for the Department of Justice to submit as part of its triennial review of the antitrust decree that broke up AT&T.<sup>44</sup> But even *The Geodesic Network* had scant praise for antitrust.<sup>45</sup> If Robert Bork can so gracelessly leap from *The Antitrust Paradox*<sup>46</sup> to supporting the current suit against Microsoft,<sup>47</sup> surely Huber can drop his tepid support of antitrust. When it comes to antitrust, though, nobody has a monopoly on logic.

42. SMITH, *supra* note 40, at 128.

43. See, e.g., Andrew I. Gavil, *Teaching Antitrust Law in Its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 N.Y.U. L. REV. 189, 220 (1991) (book review) (quoting the first but not the second passage and labeling Smith the “intellectual grandfather” of the Sherman Act); Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679, 1688-89 (1995) (accompanying the elision with the dubious claim that Smith “feared monopoly power far more than he feared unwarranted government intervention in the market mechanism” (footnote omitted)); John H. Shenefield, *Antitrust — The Next One Hundred Years*, 70 ST. JOHN’S L. REV. 189, 192 (1996) (quoting the first but not second passage and concluding that Smith’s writing concerned “the need to safeguard [the market’s] efficacy”).

44. See *United States v. Western Elec. Co.*, 673 F. Supp. 525, 528 n.1 (D.D.C.), *modified*, 900 F.2d 283 (D.C. Cir. 1990). Notwithstanding Huber’s arguments against restrictions preventing the regional Bell operating companies (RBOCs) from engaging in information services, Judge Greene left the restrictions in place. See 673 F. Supp. at 562-67. He did not remove them until 1991, and then only under pressure from the court of appeals. See *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991). For an analysis of the impact of Huber’s work in the AT&T litigation, see also Hindman, *supra* note 18, at 502-04.

45. Huber called some aspects of the breakup decree “almost farcical.” THE GEODESIC NETWORK, *supra* note 18, at 1.27, described the combination of antitrust enforcement and FCC rulings as “a large part of the problem,” *id.* at 1.21, and argued in general that technology played a far more important and effective role than antitrust in shaping the telecommunications industry, *id.* at 1.21-.35.

46. See BORK, *supra* note 33 (offering a comprehensive critique of antitrust law and policy).

47. See Robert H. Bork, *What Antitrust Is All About*, N.Y. TIMES, May 4, 1998, at A19. Bork defended his work for Netscape Corporation in support of the suit against Microsoft by drawing a parallel to *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), a case that in *The Antitrust Paradox* he said “seems entirely correct.” See BORK, *supra* note 33, at 345. Two problems plague Bork’s argument, however. First, Microsoft does not possess a monopoly on access to consumers, a factor crucial to the analysis in *Lorain Journal*. See Holman W. Jenkins Jr., *On Microsoft, Standard Oil and Trustbusters*, WALL ST. J., May 20, 1998, at A15. Second, commentators agree that Bork misinterpreted *Lorain Journal*. See Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 525 n.38 (1985) (arguing that Bork’s support of *Lorain Journal* contradicts his critique of antitrust’s transfer-of-power policy); John E. Lopatka & Andrew N. Kleit, *The Mystery of Lorain Journal and the Quest for Foreclosure in Antitrust*, 73 TEXAS L. REV. 1255, 1261 n.36 (1995) (criticizing Bork’s analysis of *Lorain Journal*’s market share).

#### IV. INTERCONNECTION, COMPETITION, AND COMMON CARRIAGE

Hard problems do not admit easy solutions. That dictum applies to nearly every topic covered by *Law and Disorder in Cyberspace*, but none more so than the relation between interconnection, competition, and the common carrier doctrine. Huber heroically attempts to justify mandatory interconnection<sup>48</sup> as necessary to foster competition between phone companies, and as excused by common law's common carriage doctrine (pp. 142-54). Unfortunately, Huber's account relies on historical inaccuracies that ultimately deprive it of the power to convince.

Huber supports mandatory interconnection with a cautionary tale about the origins of the Bell System. In the early 1900s, he claims, the Bell system crushed its competition and secured its monopoly by refusing to interconnect with independent phone companies.<sup>49</sup> Milton Mueller's detailed analysis of early competition in the telephone industry, however, makes Huber's tale look like nothing more than that: a tale.<sup>50</sup> True, between 1894 and 1901 Bell strictly refused to interconnect with its competitors.<sup>51</sup> But the independents made their most rapid competitive gains precisely during that period. They did so, moreover, *because of*, rather than *in spite of*, Bell's ban on interconnection. "Its noninterconnection policy cut Bell off from the majority of telephone users in undeveloped areas, and guaranteed its competitors exclusive access to every exchange built independently of the Bell System," Mueller explains.<sup>52</sup>

Just as the independent phone companies thrived by the grace of Bell's refusal to interconnect, so they began to wilt when, late in 1901, Bell began to connect independents to its toll lines.<sup>53</sup> This new strategy gave Bell a powerful weapon against its competitors. "It not only provided Bell with connections to small locations, it

---

48. Mandatory interconnection essentially forces a company owning phone lines to provide its competitors with equal and fair access to those lines and related facilities, thus giving customers linked to those lines a choice between phone companies. See PETER W. HUBER ET AL., *supra* note 21, at 7-12.

49. Bell "offered its superior long-distance service only to its own local affiliates. It refused to provide interconnection even to independents that did not directly compete with it. In rapid succession, independent phone companies either merged with Bell or folded." P. 25. See also p. 143.

50. See generally MILTON L. MUELLER, JR., *UNIVERSAL SERVICE* (1997). It perhaps bears noting that Mueller's book probably was issued too late for Huber to weave its history into his text. Of course, any careful researcher might have discovered the same facts independently.

51. See *id.* at 44-46, 76.

52. *Id.* at 76-77.

53. See *id.* at 78.

also removed those exchanges from the independent orbit.”<sup>54</sup> A nascent movement to organize the independents into a network rivaling Bell’s tried to stop its members from interconnecting with the enemy, but to no avail.<sup>55</sup> Due in large part to an antitrust decision barring the independents from collaborating with each other<sup>56</sup> — a fact that should strike Huber as ironic — they could not face Bell with a unified front.<sup>57</sup> Interconnection created the functional equivalent of a single phone system: the Bell System.

Huber thus gives the standard account of how interconnection drives competition, which is to say the wrong account.<sup>58</sup> In fact, “it was the refusal to connect that encouraged robust competition, because it impelled Bell’s rivals to set up lines and exchanges that duplicated or surpassed Bell’s, and thereby allowed for more complete competition for subscribers and traffic.”<sup>59</sup> Current policies reflect a woeful ignorance of this history. Huber, for example, salutes mandatory interconnection, whether imposed by courts wielding antitrust law or by the FCC enforcing the Telecommunications Act of 1996, as absolutely vital to creating competition (pp. 150-54). Mueller’s account demonstrates that facilities-based competition — the only sort of competition that really works, that endures, and that improves our telecommunications infrastructure — will thrive absent interconnection.

More recent history demonstrates, moreover, that mandatory interconnection does more to promote red tape and lawsuits than it does competition. The FCC has already generated over 800 pages of bureaucratese in its attempt to define the terms of mandatory interconnection.<sup>60</sup> While this effort has generated ample litigation,<sup>61</sup> it has failed to open local residential markets to competi-

---

54. *Id.*

55. *See id.* at 78-79.

56. *See United States Tel. Co. v. Central Union Tel. Co.*, 171 F. 130 (N.D. Ohio 1909), *affd.*, 202 F. 66 (6th Cir. 1913).

57. *See* MUELLER, *supra* note 50, at 116-17.

58. “Conventional histories present Bell’s refusal to connect with the independents as a harsh and powerful competitive tactic.” *Id.* at 76.

59. *Id.* at 46.

60. The FCC first devoted 754 pages to *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996). Following this came the Order on Reconsideration, 11 F.C.C.R. 13042 (1996), at eleven pages, and the Second Order on Reconsideration, 11 F.C.C.R. 19738 (1996), at eight pages. After the Eighth Circuit overturned portions of the First Report and Order, the FCC issued a forty-three page Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 F.C.C.R. 12460 (1997).

61. *See, e.g., California v. FCC*, 124 F.3d 934 (8th Cir. 1997), *revd. in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 597, 607 (8th Cir. 1998) (affirming the FCC’s Third Order on Reconsideration and denying petitions to review it); and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793-94 (8th Cir. 1997) (overturning several provisions of the First Report and Order on grounds that the FCC exceeded its juris-

tion.<sup>62</sup> This will not surprise anyone who takes common law rights seriously. By interfering with phone companies' rights to their property and forcing them to serve their competitors, mandatory interconnection raises transaction costs, legal claims, and hackles.

Huber excuses mandatory interconnection as consistent with common law's common carrier doctrine. Again, however, he relies on suspect history. Among other duties they incur in return for winning government franchises, common carriers may not discriminate among their customers. As Huber tells it, the common law never settled whether this duty extends to other carriers. "Several rulings recognized a general obligation for phone companies to serve as 'carriers' carriers'; several others didn't" (p. 143). Although regulatory intervention "completely anesthetized" (p. 144) the common law's deliberations, the AT&T breakup "resurrected" common carriage "under the rubric of antitrust" (p. 151) and, says Huber, wisely determined that telephone companies must interconnect with their competitors. Here as elsewhere, though, antitrust law contradicts common law processes and principles.

Common law courts had already decisively determined that telephone common carriers have no general obligation to carry the traffic of their competitors. By mustering only a single case that so holds, Huber paints a false portrait of "mixed" holdings.<sup>63</sup> At least ten other courts, from ten other jurisdictions, concur in making this the majority rule.<sup>64</sup> Huber cites one case to the contrary — but

---

diction in attempting to regulate the price of local telephone service), *modified sub nom.* AT&T v. Iowa Utils. Bd., 119 S. Ct. 721 (1999).

62. See Peter Huber, *Local Exchange Competition Under the 1996 Telecom Act: Red-Lining the Local Residential Customer* (1997) (last modified Nov. 4, 1997) <<http://www.cais.com/huber/redline/files.htm>>; Jerry Lucas, *Why OSS Interconnection Isn't Happening?*, BILLING WORLD, NOV. 1998, at 12; Andrew Kupfer, *The Next Big War In Telecom*, FORTUNE, NOV. 23, 1998, at 260; Bloomberg News, *Telcos Waver on Residential Service*, (visited Dec. 28, 1998) <<http://www.news.com/News/Item/0,4,30288,00.html>>.

63. P. 242 (citing *Pacific Tel. & Tel. Co. v. Anderson*, 196 F. 699 (E.D. Wash. 1912)). The court there stated, in relevant part:

All the authorities agree that at common law each telephone company is independent of all other telephone companies . . . and hence that it is not bound to accord to any such outside organization or its patrons connections with its switchboard on an equality with its own patrons; that such connection is a privilege to be accorded only as the result of private contract or in obedience to some constitutional or statutory provision.

*Pacific Tel. & Tel. Co.*, 196 F. at 703.

64. See *Western Buse Tel. Co. v. Northwestern Bell Tel. Co.*, 248 N.W. 220, 223 (Minn. 1933), ("[P]hysical connection between telephone companies cannot be compelled at common law."); *State ex rel. Fletcher v. Northwestern Bell Tel. Co.*, 240 N.W. 252, 255 (Iowa 1932); *Oklahoma-Arkansas Tel. Co. v. Southwestern Bell Tel. Co.*, 45 F.2d 995, 997 (8th Cir. 1930) ("[A]t common law, a telephone company owes no duty to make physical connections with other telephone companies."); *Blackledge v. Farmers' Indep. Tel. Co.*, 181 N.W. 709, 710 (Neb. 1921) (same); *Clay County Coop. Tel. Assn. v. Southwestern Bell Tel. Co.*, 190 P. 747, 753 (Kan. 1920); *Memphis Tel. Co. v. Cumberland Tel. & Tel. Co.*, 231 F. 835, 840 (6th Cir. 1916); *Pacific Tel. & Tel. Co. v. Eshleman*, 137 P. 1119, 1135-37 (Cal. 1913); *Home Tel. Co. v. Sarcoux Light & Tel. Co.*, 139 S.W. 108, 111-12 (Mo. 1911); *Home Tel. Co. v. People's Tel. &*

admits that it was overruled.<sup>65</sup> Summing up a line of jurisprudence by then long settled, a federal court in 1978 concluded, "At common law, there was no duty to interconnect facilities between carriers."<sup>66</sup> The court added, moreover, that Congress had "in recognition of this fact" resorted to legislatively overturning the common law rule in order to force telephone companies to interconnect.<sup>67</sup> In short, the common carrier doctrine does not ratify mandatory interconnection. Absent that exception to the property rights that telephone companies presumably enjoy in their lines, it

---

Tel. Co., 141 S.W. 845, 848 (Tenn. 1911); *State ex rel. Goodwine v. Cadwallader*, 87 N.E. 644, 650-52 (Ind. 1909).

Courts have also described the common law default rule by contrasting it to contrary mandates. See *State ex rel. Public Serv. Commn. v. Skagit River Tel. & Tel. Co.*, 147 P. 885, 890-91 (Wash. 1915) (*quoting* *Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co.*, 155 F. 207, 212 (C.C.D. Mont. 1907)) (noting that a telephone company "probably could not be compelled to accept or allow" interconnection with its competitors absent constitutional or statutory law to the contrary); see also *Total Telecomm. Servs., Inc. v. AT&T*, 919 F. Supp. 472, 479 (D.D.C. 1996) ("[I]nterconnection is required only when the FCC so directs it . . . ."); *Southern Pac. Communications Co. v. AT&T*, 556 F. Supp. 825, 975 (D.D.C. 1983) (same), *affd.*, 740 F.2d 980 (D.C. Cir. 1984); *Woodlands Telecomm. Corp. v. AT&T*, 447 F. Supp. 1261, 1265-66 (S.D. Tex. 1978) (same).

65. P. 242 (citing *Home Tel. Co. v. Granby & Neosho Tel. Co.*, 126 S.W. 773 (Mo. 1910)), *overruled by* *Home Tel. Co. v. Sarcoxie Light & Tel. Co.*, 139 S.W. 108 (Mo. 1911).

Huber does not cite the somewhat embarrassing case of *United States Tel. Co. v. Central Union Tel. Co.*, 171 F. 130 (N.D. Ohio 1909), *affd.*, 202 F. 66 (6th Cir. 1913). The *United States Telephone* court argued in *dicta* against the majority rule that common law imposes no duty for telephone carriers to interconnect, 171 F. at 140-44, but ultimately based its decision on the narrower claim that a telephone carrier choosing to interconnect with other carriers may not discriminate between them, 171 F. at 140, 144-46. Even this would prove controversial. See *Right and Duty of Telephone Companies to Make Physical Connection of Exchanges or Lines*, 11 A.L.R. 1204, 1208-09 (1921) (discussing conflicting case law).

The *United States Telephone* court's airy discussion of the former, broader proposition rightly remained in the slimmest of minorities. Its unconvincing attempt, 171 F. at 142-43, to distinguish the precedent set in the *Express Cases*, *Iron Mountain & S. Ry. Co. v. Southern Express Co.*, 117 U.S. 1, 24-25 (1885) (holding that railroad common carriers had no common law duty to serve their competitors), grossly oversimplifies the cost and complexity, quite apparent to the present industry, of interconnecting telephone services.

*United States Telephone* bears another black mark; as noted above, *supra* text accompanying notes 56-57, the court's application of the Sherman Act essentially precluded independent phone companies from organizing to compete against the Bell System.

66. *Woodlands Tel. Corp. v. AT&T*, 447 F. Supp. 1261, 1266 (S.D. Tex. 1978); see also *Right and Duty of Telephone Companies to Make Physical Connection of Exchanges or Lines*, *supra* note 65, at 1204 ("The courts are agreed that at common law telephone companies . . . are not subject to control and regulation to the extent of being under the duty of making physical connection with another company, in the absence of any statute requiring such physical connection."); J. Gregory Sidak & Daniel F. Spulber, *Givings, Takings, and the Fallacy of Forward-Looking Costs*, 72 N.Y.U. L. REV. 1068, 1085 (1997) (calling it "clear under the common law of common carriage that a public utility could not be required to sell interconnection to another carrier" (footnote omitted)).

67. See *Woodlands*, 447 F. Supp. at 1266 (referring to 47 U.S.C. § 201(a), which authorizes the FCC to order telephone carriers to interconnect); see also *MCI Communications Corp. v. AT&T*, 462 F. Supp. 1072, 1089 (N.D. Ill. 1978) ("As the legislative history reveals, Section 201(a) was enacted to permit the FCC to modify the common law rule which held that there was no duty to interconnect facilities between carriers.").

looks quite doubtful that Huber can enlist the common law in his campaign for mandatory interconnection.<sup>68</sup>

The problem of introducing competition into local markets remains vexing. How can we solve it if, as the facts indicate, competition thrives without interconnection, making interconnection mandatory imposes crushing inefficiencies, and common law allows phone companies to shun their competitors' traffic? *Law and Disorder in Cyberspace* offers no answer to that question.<sup>69</sup> Huber does, however, offer a revealing apology for mandatory interconnection: "When government itself erects an enormous statue of Lenin on otherwise valuable real estate, a case or two of government explosive at the base may in fact do some good" (p. 153). But rather than excusing mandatory interconnection, Huber's imagery suggests that successful reform, in the telecom as in post-Communist economies, must revive lost property rights. Liberate telephone companies from mandatory interconnection by letting them buy back full rights to their facilities. Call it recompense for regulatory favors received or call it bare extortion; that matters little. It matters more to buy peace with the retiring regime, restore real property rights, and make interconnection pay its own way.

## V. THE WRONG IN COPYRIGHT

*Law and Disorder in Cyberspace* mischaracterizes copyright, and intellectual property generally, as an agreeable child of the common law. In fact, legislators bear primary responsibility for the birth and growth of copyright law. Courts have contributed to its development primarily by maintaining broad, fuzzy lines around fair use. To the extent that copyright represents a response to market failure, it perhaps infringes on common law rights for good reason. But infringe it does. If Huber truly respects common law, he should thus demand that copyright retreat where property and contract suffice to encourage creative expression.

In Huber's topsy-turvy account of how copyright and other intellectual property laws develop, courts innovate and Congress comments. "Courts strike the balance case by case. Sometimes Congress codifies their decisions; occasionally it overturns them. Most of the time it just lets them be" (p. 179). Huber cites as proof what courts have done to shape the fair use defense to copyright infringement (to which the Copyright Act devotes less than one

---

68. See, e.g., *B.F. Ohmes v. General Tel. Co.*, 384 S.W.2d 796, 799-800 (Tex. Civ. App. 1964) (noting that mandatory interconnection would violate telephone company's property rights); *Central N.Y. Tel. & Tel. Co. v. Averill*, 92 N.E. 206, 210 (N.Y. 1910) (upholding contract term forbidding interconnection of telephone systems).

69. But see Solveig Singleton, *Mandatory Interconnection: The Leap of Faith*, in *REGULATORS' REVENGE*, *supra* note 22, at 69 (taking the first two points into account).



percent of its text)<sup>70</sup> and unfair competition *qua* misappropriation (to which a leading intellectual property casebook devotes less than one percent of its pages<sup>71</sup>) before rashly concluding that courts are “doing all the real crafting of intellectual property” (p. 180). Nobody familiar with the voluminous and detailed provisions of the Copyright Act — including whole sections dedicated to architectural works,<sup>72</sup> reproductions for the disabled,<sup>73</sup> and “coin-operated phonorecord players”<sup>74</sup> — or with the likewise eye-glazing statutes on patents,<sup>75</sup> trademarks,<sup>76</sup> bootlegging,<sup>77</sup> semiconductors,<sup>78</sup> and so forth, can take Huber’s claim seriously. Congress largely leads the intellectual property parade, leaving courts to clean up afterward.

Despite exaggerating the overall role that courts play in developing copyright and intellectual property law, Huber does correctly credit their influence over one corner of copyright: the fair use defense. But that is hardly cause for celebration. Courts’ inordinate involvement in fair use reflects a deliberately vague statutory section,<sup>79</sup> meandering case law,<sup>80</sup> and, as a consequence, recurring legal battles over copyright’s uncertain borders. As Judge Learned Hand observed, the fair use doctrine “is the most troublesome in the whole law of copyright.”<sup>81</sup> Case-by-case adjudication has thus

---

70. The text of a standard reproduction of the Copyright Act of 1976, 17 U.S.C.A. §§ 101-810, 1001-1010 (1998), runs about 134 pages. *See, e.g.*, SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT 120-254 (Paul Goldstein et al. eds., 1998). Section 107, which sets forth the fair use defense, takes up about one half-page.

71. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES 87-94 (4th ed. 1997) (covering misappropriation in 7.5 out of 1047 pages).

72. 17 U.S.C.A. § 120.

73. 17 U.S.C.A. § 121.

74. 17 U.S.C.A. § 116.

75. Patent Act, 35 U.S.C.A. §§ 1-376 (1998).

76. Trademark Act of 1946 (“Lanham Act”), 15 U.S.C.A. §§ 1051-1127 (1998).

77. 18 U.S.C.A. §§ 2318-2319A (1998).

78. Semiconductor Chip Protection Act of 1984, 17 U.S.C.A. §§ 901-914 (1998).

79. Section 107 of the Copyright Act of 1976 specifies that courts “shall include” its non-exhaustive list of factors in weighing the fair use defense. *See* 17 U.S.C.A. § 107 (1998). As Congress explained in codifying fair use in § 107, “the endless variety of situations and combinations of circumstances that can rise [sic] in particular cases precludes the formulation of exact rules in the statute.” H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

80. *See* Easterbrook, *supra* note 23, at 209 (describing the “ambulatory” case law on fair use and concluding that it creates “[l]ack of certainty in the property right [making] protection of intellectual property all but impossible.”); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13-154 (1998) (noting that neither the case law nor § 107 “offer[s] any firm guide as to when” the fair use defense applies).

81. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (*per curiam*). Far from an outdated dictum, this quotation appears “in nearly every major treatise, casebook, or law review article on the subject of fair use.” Linda J. Lacey, *Of Bread and Roses and Copyrights*, 1989 DUKE L.J. 1532, 1544 n.58.

hardly done for fair use what it has done for property, contract, and tort law.

Copyright not only lacks the relatively crisp and intuitive boundaries of common law's traditional principles; it contradicts them. Copyright undeniably limits our rights to use our printing presses or voices in echo of others' or to contract toward similar ends.<sup>82</sup> Huber thus too glibly casts it as good grist for the judicial mill (pp. 178-79, 204-05). Merely calling copyright "property" does not suffice to make it congenial company for common law.

Huber admits that copyright had "disreputable origins" (p. 205) as "an instrument of censorship" (p. 204), but praises it for now providing a necessary stimulus to the creation and dissemination of expressive works (pp. 179, 205). He thus adopts the standard view that copyright prevents the market failure that would follow unrestrained copying.<sup>83</sup> Set aside the fact that no one can quantify whether copyright law generally helps more than harms originality<sup>84</sup> and that some doubt it does.<sup>85</sup> Even the copyright faithful admit that technological and licensing tools increasingly protect expressive works better than copyright alone can.<sup>86</sup> To guarantee

---

82. See Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POLY. 817 (1990) (arguing on philosophical grounds that copyrights unjustifiably and unnecessarily violate more fundamental rights); Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261 (1989) (making a similar argument on historical and economic grounds and reaching the same conclusion).

83. See *White-Smith Music Publ. Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring) (explaining that copyright "restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit," namely, copying others' expressions at will); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

84. See Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POLY. 867, 906 (1990) (describing questions about the optimality of copyright as "vacuous"); George Priest, *What Economists Can Tell Lawyers About Intellectual Property: Commentary on Cheung*, in 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS 19, 21 (John Palmer & Richard O. Zerbe, Jr. eds., 1985) ("[E]conomists know almost nothing about the effect on social welfare of . . . systems of intellectual property.").

85. See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (treating skeptically the need for copyright's incentives); Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, *supra* note 82 (arguing on economic grounds against copyright's justification and utility); OFFICE OF TECH. ASSESSMENT, CONGRESS OF THE U.S., *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* (Apr. 1986), (visited Nov. 5, 1997) <[http://www.wws.princeton.edu/~ota/ns20/alpha\\_f.html](http://www.wws.princeton.edu/~ota/ns20/alpha_f.html)> (questioning the copyright paradigm); Negativland, *Fair Use* (visited Mar. 3, 1999) <<http://www.negativland.com/fairuse.html>> (questioning private ownership of mass culture's elements).

86. See, e.g., Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 472 (1998) (noting that digital copyright management systems "will allow content owners to insist on greater protection than copyright law would afford"); Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 513 (1997) ("In the digital future, access to many works may be

that federal copyright law continues to dictate information policy and — especially — that the fair use free ride keeps rolling, they demand special limits on 'property and contract'.<sup>87</sup> Thus exceptions become entitlements. Because he overestimates copyright and underemphasizes common law rights, Huber risks endorsing such a scheme. He does not address the issue, however, leaving hope that when information markets outgrow their weaknesses, Huber will see the need to liberate them from copyright law's smothering embrace.<sup>88</sup>

## VI. SPECTRUM REFORM CONSISTENT WITH COMMON LAW

*Law and Disorder in Cyberspace* correctly diagnoses the collectivist ills afflicting wireless communications policy in the U.S. and prescribes a common law cure that would do much good. But Huber's preferred treatment — ownership in fee simple of the spectrum — contains a dangerously high dose of property rights. Com-

---

available only to people who 'contract' in advance . . . . If these 'licenses' are uniformly enforceable, all of the users' rights of copyright will soon disappear."); Michael J. Madison, "Legal-Ware": *Contract and Copyright in the Digital Age*, 67 *FORDHAM L. REV.* 1025, 1034-76 (1998) (describing current and future uses of shrink-wrap licenses); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 285 (1996) ("[S]uch technological fences would raise the specter of all-consuming copyright owner control."); David A. Rice, *Public Goods, Private Contract and Public Policy: Federal Preemption of Software License Prohibitions Against Reverse Engineering*, 53 *U. PITT. L. REV.* 543, 608 (1992) ("[S]oftware license terms fashion extra-statutory super-copyright."); Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 *MICH. L. REV.* 1570, 1609 (1995) (book review) ("[U]biquitous agreements impose a series of restraints on 'licensees' — who look, act, and feel like buyers — that push the limits of intellectual property policy and sometimes . . . exceed them."); see also Ann Okerson, *Who Owns Digital Works?*, *SCI. AM.*, July 1996, at 80, 82-83 (noting that cash-strapped library and education groups foresee a "nightmare future" where "nothing can be looked at, read, used or copied without permission or payment"); Mark Stefik, *Trusted Systems*, *SCI. AM.*, Mar. 1997, at 78, 78 ("Some legal scholars believe . . . that publishers will be left with too much power, undercutting the rights and needs of consumers and librarians.").

87. See, e.g., Cohen, *supra* note 86, at 558-59 (arguing for preemption of property and contract rules that threaten certain information-sharing practices); Karjala, *supra* note 86, at 528-33 (arguing for preemption of copyright licenses that lack "special relationship" established through "true bargaining"); Madison, *supra* note 86, at 1130 ("[C]ertain forms of license and license terms . . . prevalent in the market . . . should be preempted by the Copyright Act." (footnote omitted)); Netanel, *supra* note 86, at 363 (arguing for a view in which "the limits to copyright's duration and scope represent the outer bounds not only of copyright protection, but also of other forms of private control over publicly disseminated expression"); Rice, *supra* note 86, at 614 (calling for preemption of any contract that limits access to an expressive work "where the effect is to secure rights in that expression which are greater than, equal to, or supplemental of those which Section 106 [of the Copyright Act] secures"); Merges, *supra* note 86, at 1613 (proposing for copyright law "a new policing concept: a prohibition against blanket imposition of a contract term on essentially the entire licensee population." (footnote omitted)).

88. See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 *N.C. L. REV.* 557, 614-18 (1998) (advocating that those who rely on methods subject to preemption have the opportunity to exit from copyright into common law).

mon law offers a better, more gentle solution: treating rights to the spectrum like rights to trademarks.

*Law and Disorder in Cyberspace* ably summarizes the doleful history of wireless communications regulations, from early steps toward establishing a common law right against broadcast interference, to Congress's abrupt nationalization of the spectrum in the 1927 Radio Act, to the FCC's long use of licensing to tightly limit who might broadcast what (pp. 27-30, 40-48). Events have in recent years taken a happy turn towards more liberal access to wireless communications, which Huber credits to technological advances, the government's thirst for revenue from spectrum auctions, and even FCC forbearance (pp. 63-71). Because title to the spectrum remains in the government's name and in the FCC's trust, however, Huber remains dissatisfied. "The federal government must privatize in the 1990s what it nationalized in 1927," he argues (p. 72).

*Law and Disorder in Cyberspace* thus counsels the federal government to first divide the electromagnetic spectrum by frequency and geographic area and then sell it to the highest bidders. "To keep for how long? Forever. Just like land" (p. 73). Largely for practical reasons, incumbent licensees would automatically win title to the spectrum they have been using. Once property rights have been thus assigned, questions about who owns the spectrum and how they use it would be left for the downstream market to determine. Courts would resolve disputes over interference in the same way that they settle disputes over trespass to real property (pp. 73-74). This approach would certainly improve on the current system of allocating rights to the spectrum and it has justifiably found support among those who, like Huber, appreciate the power of free markets and private property.<sup>89</sup>

In their rush to paint the spectrum in the image of real property, however, Huber and his fellow reformers have overlooked the fact that their plan threatens existing property rights. Suppose, for example, that on your land you used, for private wireless communications, a frequency owned by a local radio station. If your use did not interfere with your neighbors' reception of that station, on what grounds could the supposed owner of the frequency object to your use? The example is not as farfetched as one might at first think. Similar facts have already given rise to a dispute under the current

---

89. See, e.g., ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 138-48 (1983); John R. Williams, *Free the Spectrum: Market-Based Spectrum Management*, in *REGULATORS' REVENGE*, *supra* note 22, at 101; Arthur S. DeVany et al., *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 *STAN. L. REV.* 1499 (1969); Evan R. Kwerel & Jora R. Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 *J.L. & ECON.* 221 (1975); Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 *N.Y.U. L. REV.* 990, 1014-15 (1989); Richard W. Stevens, *Anarchy in the Skip Zone: A Proposal for Market Allocation of High Frequency Spectrum*, 41 *FED. COMM. L.J.* 43 (1988).

licensing system, under which the federal government claims title to the airwaves.<sup>90</sup> Households of all sizes increasingly put wireless communications to personal use in garage door openers, cordless phones, baby monitors, and so forth. New open access<sup>91</sup> and spread spectrum<sup>92</sup> technologies can allow one frequency to simultaneously carry many signals without interference, thus largely obviating the justification for granting titles to entire blocks of the spectrum.

Assigning property rights to the spectrum would thus not only conflict with existing property rights, but do so unnecessarily. As Ronald H. Coase observed of a market in spectrum, "what would be sold, is the right to use a piece of equipment to transmit signals in a particular way. Once the question is looked at in this way, it is unnecessary to think in terms of ownership of frequencies or the ether."<sup>93</sup> At radio's birth, legal theorists tried to define the right to transmit in terms of a variety of common law rights other than property.<sup>94</sup> Their brief and tentative discussions,<sup>95</sup> nullified when the federal government nationalized the airwaves and forgotten by reformers fixated on the property model, now merit a revival.

Trademark law offers the most promising model for defining a common law right to use the spectrum. Consider in brief the parallels: a trademark protects not a property right *per se*,<sup>96</sup> but merely the right to prevent others from using in commerce marks likely to cause confusion<sup>97</sup> (like a bar on interfering signals). Trademark users can establish their rights merely by usage (just as one might homestead the airwaves) or by registering their marks with state or federal authorities<sup>98</sup> (as one might register claims to spectrum use).

---

90. See Joe Gardyasz, *Agency Tries to Silence Farmer*, BISMARCK TRIB., May 8, 1998, at A1 (describing FCC efforts to stop Roy Neset, a North Dakota farmer, from making unlicensed broadcasts for his personal use despite its admission that he was not interfering with any existing stations' signals).

91. See Eli M. Noam, *Beyond Auctions: Open Spectrum Access*, in REGULATORS' REVENGE, *supra* note 22, at 113.

92. See David R. Hughes & Dewayne Hendricks, *Spread-Spectrum Radio*, SCI. AM., Apr. 1998, at 94.

93. R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 33 (1959).

94. *Id.* at 31 ("The problem of radio interference was examined by analogy with electric-wire interference, water rights, trade marks, noise nuisances" and even a case concerning the right to frighten wild ducks).

95. See James Patrick Taugher, *The Law of Radio Communication with Particular Reference to a Property Right in a Radio Wave Length*, 12 MARQ. L. REV. 179, 310-12 (1928) (discussing trademark as one of four common law theories that might define the right to broadcast); STEPHEN DAVIES, *THE LAW OF RADIO COMMUNICATION* 123-24 (1927) (treating the same topic even more briefly).

96. See 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.06 (3d ed. & Supp. June 1995).

97. See 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23.01[1] (3d ed. & Supp. June 1995).

98. See 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 16.1-16.4 (3d ed. & Supp. June 1995).

Trademarks last only so long as they remain in use<sup>99</sup> (so, too, should spectrum rights forbid hoarding).

This suggestive argument leaves a good many interesting questions unanswered, of course.<sup>100</sup> It surely stands for something, however, that the only U.S. court to find a common law right to broadcast free of interference<sup>101</sup> analyzed the problem in terms of good will, unfair competition, and trade names<sup>102</sup> — notions peculiarly linked to trademark law — and upheld not a simple property right but rather “a particular right or easement in and to *the use* of said wave length . . . .”<sup>103</sup> Huber, like other property-oriented reformers, cites the case but misconstrues its holding (p. 29). Commentators and courts alike must therefore work harder at finding appropriate common law answers to the question of allocating rights to use the spectrum.<sup>104</sup>

## VII. THE FUTURE OF COMMON LAW

Although *Law and Disorder in Cyberspace* says much about how common law might improve the telecosm, it says nothing about how the telecosm might improve common law. That omission, while perhaps understandable, proves unfortunate for Huber's thesis. As this review has described, several small mistakes follow from the one big mistake of *Law and Disorder in Cyberspace*, that of elevating the process of common law above its substance. But there remains an argument — ignored by Huber and admittedly speculative — that perhaps could have excused the book's bias. The argument concludes that the telecosm might so improve common law processes as to fully correct for any substantive deficiencies. To reach that conclusion in due speed will require us to take, with the reader's pardon, some rather big steps.

Common law processes are not what they used to be. From the apparent virtues of common law's traditional rules, many commentators have surmised that case-by-case adjudication encourages the generation of efficient rules.<sup>105</sup> But exactly how it does so remains

---

99. See *id.* § 17.03.

100. For example, should spectrum rights face the same restrictions on assignment in gross that apply to trademarks? How well would the trademark analogy protect the right to transmit via a CB radio or low power device? Should state and federal authorities share the power to register rights to use the spectrum, as they do the power to register trademarks?

101. See *Tribune Co. v. Oak Leaves Broad. Station* (Cir. Ct., Cook County, Ill. 1926), reprinted in 68 CONG. REC. 216 (1926).

102. See *Tribune*, 68 CONG. REC. at 216-17, 219.

103. *Tribune*, 68 CONG. REC. at 217 (emphasis added).

104. The reviewer has begun to draft his own contribution to the effort, tentatively titled, *Quality Signals: Allocating Rights to the Electromagnetic Spectrum by Analogy to Trademark Law* (unpublished manuscript, on file with author).

105. See, e.g., Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980); John C. Goodman, *An Economic*

subject to great controversy.<sup>106</sup> More importantly, it looks uncertain whether modern judicial processes can preserve common law's core principles, much less generate new rules on a par with the old.<sup>107</sup>

The principles of common law originated in the competition between courts vying for litigants' business. For much of the common law's development, court fees generated more regular<sup>108</sup> and probably greater<sup>109</sup> income for judges than their salaries did. That compensation structure created incentives for the administration of justice quite different from — and arguably better than — those that currently drive the common law. Adam Smith, praising the effect of court fees, described “each judge endeavouring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice.”<sup>110</sup> Judicial competition gave rise to many of common law's core principles, such as, for

---

*Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977); R. Peter Terrebonne, *A Strictly Evolutionary Model of Common Law*, 10 J. LEGAL STUD. 397, 404 (1981).

106. Compare, e.g., Priest, *supra* note 105, at 66-75 (arguing that inefficient rules face the greatest probability of being overturned because they are litigated most often) with Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1690-94 (1996) (arguing that common law tends toward efficiency because courts borrow from outside the legal system social norms that tend toward efficiency), and Landes & Posner, *supra* note 105, at 284 (arguing that commentators have “overstated the tendency of a common law system to produce efficient rules” and concluding that “our finding that the public courts do not automatically generate efficient rules is disappointing, since it leaves unexplained the mechanism by which such rules emerge . . .”).

107. See Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1170-71 (1997) (arguing that common law has for several decades been tending toward inefficiency); see also Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994) (describing how lawyer interest groups cause the modern common law system to generate inefficient rules).

108. Although English judges began earning salaries as early as 1268, these “were by no means regularly paid,” 1 SIR WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 252 (A.L. Goodhart & H.G. Hanbury eds., 1956). Their salaries were often years in arrears, *id.* at 252 n.9, 253, and remained irregular at least until the mid-seventeenth century, *id.* at 252.

109. “Probably in the Middle Ages this source of income was the most valuable,” and seems always to have constituted “a considerable sum.” *Id.* at 254. When in 1826 judges were denied the right to earn income from fees, their salaries were more than doubled, apparently to compensate for the loss. *Id.* at 255.

Court fees indirectly created an additional and even greater source of income for judges, who had the power to sell court offices that derived income from fees while requiring few or no duties. “By the end of the seventeenth century . . . this patronage had actually become more lucrative than all the other sources of income put together.” *Id.* at 255.

110. ADAM SMITH, *supra* note 40, at 679. See also ADAM SMITH, *LECTURES ON JURISPRUDENCE* 423 (R.L. Meek et al. eds., 1978) (“During the improvement of the law of England there arose rivalships among the several courts.”).

example, the contract doctrine allowing suit upon purely executory promises.<sup>111</sup>

Competition between entire court systems likewise drove the development of common law. One can hardly overestimate the extent to which struggles between ecclesiastical and royal courts influenced the Western legal tradition.<sup>112</sup> Similarly, when the jurisdiction of royal courts expanded to swallow local and feudal courts, "a substantial part of property law and tort law which had previously been a matter of local custom became a matter of royal law . . . ."<sup>113</sup> The Law Merchant offers the most relevant example for present purposes, however. Its specialized courts arose during the late eleventh and twelfth centuries to serve the international trade then growing throughout Western Europe.<sup>114</sup> Common law courts eagerly absorbed the sophisticated rules developed by the Law Merchant — as well as the fees of its former clients.<sup>115</sup>

Competition between judges and court systems thus appears to have played a vital role in generating the common law's substantive rules.<sup>116</sup> Huber might well take heart in the notion that good procedures can, at the extreme, remedy poor principles. It remains only to argue that the telecosm, by bringing instant international commerce to our fingertips, will initiate a legal revolution akin to the one that gave rise to the Law Merchant.

Several commentators have already predicted that the private resolution of Internet disputes will generate a unique body of common law.<sup>117</sup> Some have more specifically analogized that process to

---

111. See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 405-11 (1929) (describing how competition between courts gave rise to the action of assumpsit); see also *id.* at 144-45, 248-49 (describing "invention of legal fictions" in "warfare" between courts that lasted from the middle ages through the seventeenth century); *id.* at 382-83 (discussing how rivalry between courts shaped the law of uses and trusts); *id.* at 394 (discussing how competing courts developed law of real property mortgages).

112. See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 165-294 (1983).

113. *Id.* at 456.

114. See *id.* at 333-35; see also BRUCE L. BENSON, *THE ENTERPRISE OF LAW* 30-35 (1990).

115. See BENSON, *supra* note 114, at 60-62.

116. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 910-11 (1992):

Many of [common law's] principles originated with the competitive law merchant that preceded the growth of the common law. Many more were determined in an era when common-law courts competed for legal business with other legal systems and therefore had a far greater incentive than today to be sensitive to the expectations of both parties. With this as its origin, I suggest that the correspondence between common sense and common law is no coincidence.

117. See Alejandro E. Almaguer & Roland W. Baggott III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 721 (1998) (claiming of private adjudication of Internet disputes that "over time it could develop a common law of cyberspace. This cyberspace law would take into account customs of Internet users, and it would have the ability to adapt to new customs as the Internet grows and develops" (footnote omitted)); Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Ap-*



the Law Merchant.<sup>118</sup> None, however, appears to have gone on to argue that the telecosm will, by encouraging the rise of new and specialized courts, create judicial competition akin to that originally responsible for common law's core principles. *Law and Disorder in Cyberspace* does not make the argument, at any rate, leaving its treatment of common law split between process and substance.

### CONCLUSION

*Law and Disorder in Cyberspace* presents a thesis revolutionary in the truest sense of the word: it argues for overthrowing the existing corrupt order by returning to earlier, better, more fundamental values. So defiant a book naturally reads, to quote its dust jacket, as a "polemic." Yet *Law and Disorder in Cyberspace* merits serious attention from scholars and policy wonks. Huber makes a strong case for abolishing the FCC and relying on common law to rule the telecosm. The flaws of *Law and Disorder in Cyberspace* make it not irrelevant, but all the more interesting.

Most of the problems with *Law and Disorder in Cyberspace* flow from its relative disregard for the substance of common law. Huber forcefully argues that case-by-case adjudication cannot fail to improve on the FCC's slothful, politicized, top-down regulation. But he too readily embraces a variety of rules that would both clog common law processes and contradict common law principles. Huber promotes antitrust for no apparent reason and mandatory interconnection for plainly wrong ones. He overrates the limited and none too praiseworthy role that courts have played in shaping intellectual property law and glosses over copyright's uneasy relationship with common law proper. In contrast, Huber rashly extends property rights to the electromagnetic spectrum allocation, ignoring a better fit modeled on trademark rights. Perhaps Huber could overcome such criticisms by claiming that the telecosm will so improve common law processes as to ensure that they correct substantive errors. *Law and Disorder in Cyberspace* does not explore that defense, however, leaving time alone to test its truth.

---

proach — *Potential, Problems, and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175, 205 (1998); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance In Cyberspace*, 6 CORNELL J.L. & PUB. POLY. 475, 544 (1997); David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1387-91 (1996).

118. See I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1019-21 (1994) (describing suggestive parallels between conditions giving rise to the Law Merchant and those obtaining in cyberspace); Johnson & Post, *supra* note 117, at 1389 ("Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant . . .").