BOOK REVIEW

Adam Thierer and Clyde Wayne Crews, Jr., editors, *Who Rules the Net? Internet Governance and Jurisdiction* (CATO Institute, 2003).

Vint Cert can be legitimately described as one of the fathers of the Internet. In his foreword to *Who Rules the Net?*, he challenges the implication in the title that it can be "ruled." In the technology-agnostic, international realm of the Internet, all entities and interests must coexist. Ultimately, Cert concludes that all users may, in fact, own the Internet to some degree.

Ownership may have many connotations: the ability to use, alter, regulate, establish standards, or preclude others from doing so. The authors of the chapters in this book present compelling arguments of the constituencies having an interest in exerting some measure of control over the Internet without necessarily resolving them. The subtitle of the work is *Internet Governance and Jurisdiction.* The traditional notion of jurisdiction is the ability to exert control over a geographically-defined area. But the Internet is not bound by geography except by the terrestrial location of its component parts. Users can go virtually (i.e. not physically) to any point in the world and complete a commercial transaction, deliver or receive information, or initiate electronic or other activity (e.g. control dams or transportation nodes). Some would say that the Internet is thus not amenable to "control" in the traditional sense, while others assert that it should be treated no differently than existing rules for ordering physical society.

Should the Internet be akin to the "common heritage of mankind", to be shared equally by all without regulation; or has the world become so dependent upon it that it is essential that some minimum world order prevail? And, should the order be imposed by market forces, governments, international advisory bodies, or some combination thereof? The attempt to control on the part of national governments, international organizations, and private entities has already begun. Should control of the Internet, or portions thereof, be left to chance; or should there be some attempt at a rational distribution of authority?

The book is organized into two sections. The first contains essays that discuss some of the central themes of the competing philosophies of Internet governance. Most of the articles are written by legal scholars and educators, or practicing attorneys. In the first chapter, former US Congressman Christopher Cox (now Chairman of the Securities and Exchange Commission) sees the power of the Internet not in economic terms, but in its ability to introduce freedom of thought and democratic ideals into otherwise closed societies. As a member of the House Commerce Committee, Cox had been heavily oriented toward a free market, anti-regulation approach to the Internet and had resisted any expansion of the Federal Communications Commission's authority into new information technologies and services. Other

commentators in the first section focus on the choice of law (i.e. where the event and its effects take place, or the intended "target" audience), extraterritorial jurisdiction, and effective enforcement issues that arise in the cyberspace realm but are also regularly applied now in similar situations.

The second section highlights recent events, many of which will be familiar to a reader, to demonstrate how the broad questions presented above have been addressed in practice. The first such event is a case brought in a French court against Yahoo!® for advertising or selling Nazi memorabilia. While this may be offensive to local sensitivities, it is seen in the United States as an improper curb on First Amendment free speech. Arguments were presented on both sides as to the balance of national preferences as well as the purely technological difficulty of complying with and enforcing the French Court's edict. Recently, both Microsoft® and Yahoo!® have been forced to impose restrictions on their users by the People's Republic of China in order to continue providing Internet access in that country. Other specific issues discussed by commentators in this section include taxation of Internet commerce, enforcement of antitrust rules, and protection of private information.

The second-to-last chapter focuses on the Internet Corporation for Assigned Names and Numbers (ICANN) as an attempt to privatize and stabilize control of the Internet. The idea was to gradually move control of the principal nodes of the network (the Domain Name Server system) from the United States government into the private sector and to replace the voluntary coordination structure with contracts having clear delineations of authority and responsibility. The author concludes that, by trying to satisfy both the government regulatory and the private free market models, ICANN did not satisfy either effectively.

In fact, ICANN's future has figured prominently in international fora recently. The United Nations Working Group on Internet Governance released a report in August of this year in preparation for the second meeting of the World Summit on the Information Society in Tunis in November. Not surprisingly, the report recommended that an international body affiliated with the UN should exercise governance over the Internet to include functions now performed by ICANN. Congress responded to this trend by passing a concurrent resolution of both Houses stating that the current mechanism governing the Internet (i.e. ICANN) should continue, thereby providing the predictability required by the free market. An 11th hour deal at the Tunis summit left the United States in charge, but established multilateral talks to enhance international cooperation.

These recent events demonstrate the utility of *Who Rules The Net?* as a primer on the technical, policy and legal considerations attendant to the Internet. Its authors provide the background for, and form the debate on, questions that will likely go unresolved for many years. Ultimately, some form of "ownership" will be necessary to allow reliable use of a medium which has transformed the world in a very short period of time.

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BOOK REVIEW

Daniel J. Solove, *The Digital person: Technology and Privacy in the Information Age*. (New York University Press, November 2004).

In 1945 F.A. Hayek characterized the market economy as a process of transmitting knowledge between individuals. His insight has been used to explain the functionality of the market system over centrally-planned systems. Through the mechanism of prices, information about individuals' tastes and preferences (as they relate to the quantities and qualities of goods, services, capital, and labor) are communicated across apparently insurmountable obstacles. Knowledge, or lack thereof, in addition to physical scarcity, stand as problems which inhibit individuals from completing their plans and satisfying their wants. Markets, armed with functioning price systems, serve as solutions to this knowledge problem. Since 1945, the role which Hayek placed upon knowledge in society has been a beneficial one; the literature which has developed out of his scholarship has been successful at defeating notions that centrally-planned (socialist) economies can overcome such knowledge problems by intense calculations.[1]

Computer technology has had an interesting part in this socialist calculation debate. Originally, planners made the claim that technology would solve the knowledge problem by providing planners with supercomputers capable of computing the long and intricate calculations of where, when, to whom, and how much goods and services to make and ship.[2] With regard to the application of computer technology in solving the calculation problems of a planned economy, the planners' hopes fell short. Further theoretical claims have been explained to present socialism as completely infeasible; with regard to the computational capacity of technology, the planners' prophecy was more accurate. We have seen the benefits of computers to facilitate the calculation and communication process. This streamlining has opened doors to the potential of trade and wealth creation, diligently noted throughout *The Digital Person*.[3] In summary, telecommunications, as

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1 F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Review 519 (Sept. 1945).

2 Wassily Leonteif, *Input-Output Analysis*, 212 Sci. Am. 25 (Apr. 1965).

3 Solove writes:

These innovations made targeted marketing—or "database marketing" as it is often referred to today—the hottest form of marketing, growing at twice the rate of America's gross national product. In 2001, direct marketing resulted in almost $2 trillion in sales. On average, over 500 pieces of unsolicited advertisements, catalogs, and marketing mailings arrive every year at each household. Due to targeting, direct mail yields $10 in sales for every $1 in cost – a ratio double that for a television advertisement – and forecasters predict catalog sales will grow faster than retail sales. Telemarketing is a $662 billion a year industry. In a 1996 Gallup poll, 77 percent of U.S. companies used some form of direct mail, targeted email or telemarketing (Solove, 2004, p 19).

applied to marketing, production, and distribution, works—allowing companies to attain higher levels of production and profitability.

Listing all of the intricately surveyed information in *The Digital Person* would be redundant if not impossible. It has received numerous rave reviews and rightly so. It is without question that Solove is a thorough scholar and well-versed in the topics of privacy law. This work possesses a unique creativity of metaphor that helps bring the reader through what otherwise would be a tedious journey of technical language and legal precedent.

The knowledge which can be gained from the study of this text is found in the place that Solove's topic has within the broader debate surrounding the role of knowledge in society. Solove's points chime in right around the time we recognize that computers have great potential for advancing the spread and use of productive information. Computers provide tools capable of tapping into dispersed knowledge; but, we must simultaneously recognize that they are not miracle cures to be implemented from central positions of authority. The knowledge which they coordinate is valuable only in so far that it is dispersed and subjective.[4] The hazardous notions of knowledge, in the Hayekian sense, would be those which claim to be more complete and universally applicable than they actually are. When based upon such false notions of knowledge, actions stand to be erroneous, misinformed, and the cause of unintended consequences.

Solove's point is slightly different; he seems to recognize the dynamic nature of information and knowledge[5], but he stresses the unstoppable and inescapable characteristics of such a dynamic process. Solove tries his best to draw attention to the problems associated with the unhampered spread of information resulting from the Internet revolution without distinguishing between central planning and dispersed authority. By emphasizing the importance of privacy Solove plays up the sordid reality of the transmission of knowledge. Attributing the dispersion of knowledge throughout society to malevolence rather than Hayekian productivity has serious implications on the characteristics that responsive policy will take. Such policy stands capable of unintentionally limiting economic growth by stagnating information technology markets and the industries which subsequently rely on them. Thus the insight from Solove's book, placed within the context of

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[4] This is what Hayek refers to as tacit knowledge. For more on tacit knowledge, see F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM (W.W. Bartley, III, ed., University of Chicago Press 1989).

[5] Solove writes:

> By its nature, tort law looks to isolated acts, to particular infringements and wrongs. The problem with databases doe not stem from any specific act, but is a systemic issue of power caused by the combination of relatively small actions, each of which when viewed in isolation would appear quite innocuous. Many modern privacy problems are the product of information flows, which occur between a variety of different entities. There is often no single wrongdoers; responsibility is spread among a multitude of actors, with a vast array of motives and aims, each doing different things at different times (Solove, 2004, p 61 – 62).

classical liberal constitutional political economy, is of the utmost importance.

Solove's political stance on the issue is clear. Resting upon the description of negative consequences stemming from the transmission of knowledge, Solove seeks a regulatory system akin to our financial and environmental markets in the name of protecting privacy.[6] Forming such imagery is dependent upon the application of successful metaphors. Solove uses metaphors from common literature to express the hazards associated with unhampered collection and distribution of digital data.

At this point, we could argue on the particulars of Solove's assertions, the bulk of which rest upon the notion that we hold a positive right to privacy. It is clear that Solove's interpretation of constitutional appropriateness is ideologically and methodologically different from that of the classical liberal tradition. He views the restriction on government from inhibiting individuals from free association as a spawning ground to support the claim that individuals have a right to privacy. More specifically, governments are particularly restrained from collecting membership rosters of churches and similar groups.[7] If Solove successfully makes the claim that companies or private institutions succeed in diminishing individual privacy in no distinctively different way from states, then he implies that restricting private institutions' ability to collect information in the same fashion that constitutions were used to restrain the state is justified. Thus, we see Solove's constitutional interpretation as recognizing a binding characteristic in line with classical liberal thought, but he wants to spread such binding characteristics into the realm of private companies and institutions. Solove's tendency to lump governments and businesses under the same general category stems from his desire to attribute the problems of bureaucracy to both equally. This stands as yet another point of contention which I would rather not delve into deeply; however, I make reference to the Public Choice School as successfully demonstrating that voting processes and elections contain unique paradoxes which give no epistemological explanation for why the outcomes of such processes should be considered good.

I would claim that this notion of a positive right to privacy stems from the state's monopolization of the production of legislation. Competition drives the process of product improvement. Without competition in the interpretation of legislation or, simply put, the market for judges or courts,

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[6] Publishers Weekly, Book Review, *at* http://www.amazon.com/ (search "The Digital Person", then follow "The Digital Person" hyperlink, then see "Editorial Reviews").

[7] Solove writes:

> In addition to protecting free speech, the First Amendment safeguards the right of people to associate with one another. Freedom of association restricts the government's ability to demand organizations to disclose the names and addresses of their members to compel people to list the organizations to which they belong. As the Supreme Court reasoned, privacy is essential to the freedom to associate, for it enables people to join together without having to fear loss of employment, community shunning, and other social reprisals (Solove, 2004, p 62 - 63).

we have no certainty with which to judge the legitimacy of judicially proclaimed rights to privacy. What are the costs associated with enforcing a positive right to privacy? Given such costs, would we expect to see firms providing for the enforcement of such privacy, or would enforcement be most prevalent in the competitive market for courts and/or judges? Most likely, we may see individuals take precautions to lower their costs of enforcement; precautions like high fencing, window tinting, and less promiscuous behavior in general. Solove wants to claim this adaptive behavior is a coercive abuse of power, but I am unwilling to make such a normative imputation. Solove concedes the point that marketers are not out to "get us," except to "get us" to buy something; or if anything, to make us aware of the benefits of their products over their competitors' in meeting our needs. The process of competing sellers bidding for consumer dollars opens the potential for individuals to satisfy more complicated demands and live at what they themselves would deem conditions of higher standards of quality.

But the purpose of this review is not to refute Solove's assertion point by point, I doubt there will be many converts either from Solove's camp to classical liberalism or vice versa. I would rather attempt to learn from his position on the margin so as to recognize new applications for the constitutional political economy which has grown from insights such as the opening description of Hayek and other classical liberal positions.

We can concede that the notion of privacy is a concern and take Solove's presentation as playing the role of devil's advocate, being particularly paranoid about the negative effects of insufficient attention paid to privacy. We are still left with the question of which structural system, centrally-planned or market-based, better alleviates such paranoia? I think the market presents a degree of structural compatibility with the technological environment. Solove describes the dynamics of new technologies and the inability of legal torts to keep up.[8] Hayek's knowledge problem rings true again. How can we expect any notion of centrally-planned legislation to keep pace with the momentously changing information technology market? If we cede the point that they cannot, but that we must try anyway, do we not seal our fate to a system of costly enforcement and greater need for state investigation? How could this be? Solove's desired regulatory policy is aimed at inhibiting the breach of privacy, and yet, I assert that such a policy will increase the state's investigations into our private lives. If we recognize the incentives of profiting off of knowledge as momentous, unstoppable, or omnipresent, then the costs of enforcing the prohibition of gathering such information becomes nearly infinite.

Finally, we could respond, on empirical grounds, to assure that such paranoia is rare or even unfounded. Solove's claims that information shar-

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[8] *See* Solove, *supra* at note 3.

ing has profound effects on the economy are described and elaborated through symbolic metaphor and explained by legal history. But how profound is profound, how big is big? Other than his subjective preference for privacy, is there any notion of economic progress or growth which is dependent upon privacy? I would concede that some markets are intrinsically related to privacy. Any of Solove's examples such as medical prescriptions, personal lifestyles, or credit histories would suffice to show that the structure of society and institutions is influenced by, and in some circumstances, dependent upon, privacy. But is that structure self-reinforcing or completely liable to information breach via technology's advancement? Just as George Mason University's Critical Infrastructure Protection Project (CIPP) papers show that markets won't come screeching to a halt from the marginal effects of cybercrime, the same can be said of the depletion of privacy. It is this link between the notion of cybercrime, information technology, and privacy that makes including a review of *The Digital Person* with the publication of the CIPP papers logical.

Solove offers a neo-Marxist commentary on the state of information technology in society. It is an interesting point, and there is something of value to be learned from it. But, his conclusions are directly dependent upon his subjective attribution of malevolence to the transmission of knowledge. Knowledge is only scary in the sense that we must recognize just how much we do not know. When forced to accept this point, entrepreneurship is encouraged and driven by its placement in a do-or-die scenario. Entrepreneurs are constantly striving to maximize the productive and profitable potential of the knowledge they have and, more specifically, the knowledge they know they have, and have correctly. We see this ring true in database marketing as Solove places the metaphor that information is the "perspiration" of technology. It is a by-product inevitably left over from an existing process but a productive resource in and of itself, which we have not fully mined.

But how do we keep the state in check? Is the answer some form of constitution? Constitutions restrict governments; if we impute a dependency upon the restriction for our own rights, then we require the active production of the restriction. If we give in to the point that governments and corporations are equal, in the sense that they are merely collectives of people and interests, we miss the real point of constitutionalism, allowing it to mutate into intervention by regulation and subjecting ourselves to quite probably a greater loss of privacy.

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