The Coming Jurisprudence of the Information Age: Examinations of Three Past Socio-Economic Ages Suggest the Future

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THE COMING JURISPRUDENCE OF THE
INFORMATION AGE:
EXAMINATIONS OF THREE PAST SOCIO-
ECONOMIC AGES SUGGEST THE FUTURE

This Comment looks to the past and future and attempts to speculate upon the likely course of jurisprudential evolution. It notes that humankind has recently moved from one great socio-economic epoch, the Industrial Age, into a new Information Age. Yet there has not been a corresponding jurisprudential shift which would reflect the socio-economic changes. This “time-lag” phenomenon is consistent with past jurisprudential shifts which followed the changes from past socio-economic eras. The Comment examines the jurisprudential evolutions inspired by the Feudal Age (property law), the Commercial Age (contract law), and the Industrial Age (labor relations law). The Comment then speculates on the probable evolution the shift to the Information Age will inspire.

INTRODUCTION

Cable television operators complain publicly that people, who otherwise would not steal or shoplift, apparently are not troubled when taking cable signals.1 CBS threatens legal action against NBC because the latter allegedly “stole” news footage from a shared satellite.2 Elizabeth Taylor sues ABC network3 to enjoin the creation and broadcast of a video biography of her life. And so it goes.

It is the early 1980’s and mankind, particularly the western industrial world, has entered a new socio-economic “age.” This new age has been variously labeled the post-industrial society,4 the “Third

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2. The problem occurred twice within two weeks in 1983 concerning news footage being fed out of Lebanon. The first such incident occurred Oct. 24 involving footage of the terrorist attack on the U.S. Marine compound in Beirut. The second occurred Nov. 4 involving a similar attack against Israeli soldiers in Tyre. NBC formally apologized.
3. USA Today, Nov. 8, 1983, at D-2, col. 3.
4. Miss Taylor sued the potential program’s producer as well as the network. Taylor v. American Broadcasting Co., No. 82 Civ. 6977 (S.D.N.Y. Oct. 18, 1982).

Wave" or the Information Age. Each label implies a somewhat different approach to and description of that which all acknowledge is the same phenomenon. They describe a society in which the basis of wealth, or the "strategic resource," is not land (as in the Feudal Age), or goods for trade (as in the Commercial Age) or manufacturing and laboring capacity (as in the Industrial Age) but is information.

Each of those earlier socio-economic ages had a substantial effect on the formulation of the common law. Many property law concepts were created during the Feudal Age. Contract law emerged from the Commercial Age. Much, if not most, of the modern evolution of the law arose from concerns about the changes to an industrial society, including (but not exclusively) the areas of product liability, labor relations, and negligence by agency.

It would follow that the emergence of the Information Age would likely create changes in the law at least as profound as those of previous socio-economic ages. These changes are apt to create a system of legal entitlements to the age's central resource similarly as entitlements were created relative to the central resources of the past ages.

But changes in the law occur slowly. The evolution of feudal property law, that age's system of entitlements, took centuries and was not a complex, integrated system until late in the feudal period. The evolution of contract law, a system of recognition of commercial entitlements and expectations, took more than a century. And most of the doctrinal concepts arising out of the Industrial Age took decades to formulate and disseminate among jurisdictions.

As socio-economic change has accelerated and communications have improved, the time required for legal change and evolution has shortened as well. However, due to its tradition-bound nature and its precedential approach, the judiciary has often trailed the general

7. Id. at 15.

1078
public and the legislature in adapting new socio-economic values. This tendency was true in the distant and the recent past. More recently, commentators have observed that contemporary societal change is greatly accelerating. Futurist Alvin Toffler observes in his book The Third Wave,

The First Wave of change—the agricultural revolution—took thousands of years to play itself out. The Second Wave—the rise of industrial civilization—took a mere three hundred years. Today history is even more accelerative, and it is likely that the Third Wave will sweep across history and complete itself in a few decades. We, who happen to share the planet at this explosive moment, will therefore feel the full impact of the Third Wave in our lifetimes.

If such assertions of accelerating social change are true, then the inherent judicial tendency to follow the past would obviously become more problematical.

The gravity of social change is only perceivable if considered as a whole, rather than as isolated incidents and problems. For example, in 1982, more than 60 percent of American jobs were information-handling jobs compared to only 13 percent manufacturing jobs. Yet no major legal doctrines have developed to reflect the significant societal changes represented by the shift to an information base. Further, existing doctrine has been applied perfunctorily, blithely, and with no apparent consciousness that such a changed socio-eco-

11. For example, during the New Deal era, the general population, victims of the Great Depression, changed their socio-economic attitudes first as manifested in the wholesale liberal Democrat shift for the 1932 election. Thereafter, those shifts of attitudes were reflected in legislation of the New Deal. It was not however, until the late 1930’s that the judiciary, as symbolized by the Supreme Court, changed its perspective. Compare generally Carter v. Carter Coal Co., 298 U.S. 238 (1936) with a case 5 years later, United States v. Darby, 312 U.S. 100 (1941). See also G. Gunther, Cases and Materials on Constitutional Law 150-52 (1980) (discussing Roosevelt’s “court-packing” plan, a reaction to Supreme Court intransigence).


13. Id. at 19-35.

14. The reader is reminded that “the Third Wave” is Toffler’s term for the present era (see supra note 5 and accompanying text). Toffler acknowledges the Information Age as an alternative description but goes on to assert that he prefers his term, “the Third Wave,” as it is more inclusive. A. Toffler, supra note 5, at 9. This Comment will use Information Age as its focus is on the more narrow question of the legal handling of information.

15. Id. at 10.

16. J. Naisbitt, Megatrends 14 (1982). Naisbitt remarks that in determining the beginning of the Information Age, the year 1956 (more than a quarter-century ago) is looked to as an important demarcation point. It is the first year wherein white-collar workers, people in technical, managerial and clerical positions (many in information-handling positions), outnumbered blue-collar workers (manual laborers and industrial workers). Id. at 12.
nomic base should create jurisprudential changes.\footnote{As examples of summary dismissals of Information Age causes of action see Data Cash System, Inc. v. J.S. & A. Group Inc., 480 F. Supp. 1063 (N.D. Ill. 1979), 
aff’d on other grounds, 628 F.2d 1038 (7th Cir. 1980) (ruling that computer object codes are “mechanical device[s]” and not “expressions of ideas” and hence a suit based on their copyrightability should be dismissed summarily) and Frosch v. Grossett & Dunlap, 4 Media L. Rep. 2307 (N.Y. Sup. Ct. 1979) (suit by heirs of famous actress Marilyn Monroe to control and be compensated for an unauthorized biography was summarily dismissed).}

As discussed earlier, in an information society the control and manipulation of information is an important—the most important—basis of wealth. Information, unlike land and machines, is most often ephemeral, intangible and intellectual. Understandably, such interests may be undervalued by a legal system more familiar with handling tangible property. Inevitably however, the legal system will eventually create legal mechanisms and doctrines that underlie a system of entitlements to this new central resource. An elemental thesis of this Comment is that such legal system undervaluing of a central resource often occurs near the beginning of a new socio-economic age. An examination of the past will show that legal theory eventually “catches up” with social reality. But there is a time gap. However, this historical pattern of jurisprudential catching up is obviously more troublesome during the contemporary era of constantly accelerating social change than in the more socially static past.

The legal system will inevitably reform to more strongly value informational interests and to thereby create systems of entitlements surrounding those interests. That reform process will be assisted and accelerated if legal theoreticians and practitioners begin to perceive information interests as a unity.

This Comment intends to assist in that process of conceptual unification. Conceptual unification will be aided in several ways. First, unity with similar points in history. This Comment will briefly examine the three previous broad socio-economic eras: the Feudal Age, the Commercial Age, and the Industrial Age, and how the legal system eventually created a system of entitlements around each age's central resource. Secondly, unity with past conceptual unification efforts. The Comment will examine a similar effort to urge holistic perception of entitlements where previously the entitlements had been perceived as separate: the “new property” concept of various governmental entitlements. Thirdly, the Comment will examine elements of the Information Age and how the legal system has shifted to adapt to it\footnote{This Comment will concentrate on the right of publicity as an example of the legal system recently recognizing an entitlement to informational interests. It will illustrate how the right, in consistently being construed narrowly, is an example of the undervaluing of informational interests.} and the legal conflicts its very nature must generate. Lastly, the Comment will speculate about possible jurisprudential
shifts the Information Age may inspire and how one element of the
system of entitlements it has already inspired (compulsory licensing
under the Copyright Act of 197619), may serve as a model for ame-
liorating otherwise inescapable doctrinal conflict.

BASIS OF A SOCIETY'S WEALTH HISTORICALLY PROTECTED AND
REFLECTED BY ITS LEGAL ENTITLEMENTS

As asserted in the introduction, whenever the major basis of socie-
tal wealth changes, society eventually creates legal doctrines and
mechanisms providing entitlements that recognize and protect
wealth. A brief review20 of how this process has worked in other
socio-economic eras will assist a prediction of how the current transi-
tion to an information-based society is apt to change the jurispru-
dence. The Comment will review the Feudal Age, the Commercial
Age and the Industrial Age.

The Feudal Age: Land-based Economy and Real Property-
dominated Jurisprudence

Feudal society should be recognized as the final portion of a
broader socio-economic epoch—the agricultural revolution.21 Ap-
proximately ten millenia ago, man first began to settle more perma-
nently and cultivate crops; hunters and gatherers became farmers.22
Thus land became the primary measure of wealth and the most
"strategic resource"23 in the agriculturally based society.

The most complex system of social and legal regulation arising
from an agricultural society was the feudal system.24 Virtually all

the system of compulsory licensing are sections 111 and 115.
20. The focus of this Comment will be present and future jurisprudence. Past
socio-economic eras have been reviewed merely to deduce patterns of social and legal
changes which can, presumably, be applied to the present and the future. This Comment
does not, therefore, given its purpose, purport to include a detailed or extensive review of
the feudal, commercial or industrial eras. Those eras have been written about extensively
elsewhere.
21. The agricultural revolution began approximately ten thousand years ago and is
considered as lasting until the beginning of the Industrial Revolution (mid-eighteenth or
early-nineteenth centuries). See supra note 15 and accompanying text.
22. Ironically, this primitive period of man's existence, the period of the hunter
and gatherer, was by a wide margin the longest. It lasted, by some estimates, one million
years. The approximately ten thousand years since the beginning of agriculture is much
shorter. See, e.g., S. CLOUGH & R. RAPP, EUROPEAN ECONOMIC HISTORY 16-17 (3d ed.
1975).
24. The classical civil law system of Greece and Rome and other early systems
legal commentators trace the origins of the Anglo-American common law to this feudal period.\textsuperscript{25}

As with all socio-economic ages, the personal needs to be satisfied by the Feudal Age were created by the previous age.\textsuperscript{28} Feudalism was designed to provide all parties mutual security which was necessitated by the chaos of the Dark Ages.\textsuperscript{27} During the Dark Ages, land was the resource that allowed people to acquire the minimum essentials of life. European society\textsuperscript{28} evolved into a complex organization intended to provide both mutual physical protection and cultivation of crops—feudalism.

One man, the vassal, commends himself to another man, whom he chooses as his master and who accepts this deliberate “commendation.” The vassal owes his master fealty, counsel, military and material assistance. The master—the lord—owes his vassal fealty, protection and the means of subsistence. This last can be provided in various ways, usually by conceding to the vassal a piece of land known as a “benefice” or “fief.” Thus the hierarchy among individuals was very soon accompanied by a hierarchy of rights over land, due to an “extreme parcelling out of property rights.”\textsuperscript{29}

The crops raised on the land were shared, in stipulated amounts, between master and vassal.\textsuperscript{30} Both parties to the feudal bond had

\begin{itemize}
\item such as the Babylonian code of Hammurabi were at times complex, but far less obviously centered around real property as medieval feudalism. See generally G. Archer, History of the Law 19-69 (1928).
\item John Stuart Mill, as one example, asserted, “The basis of English Law was, and still is, the feudal system.” Quoted in J. Dillon, The Laws and Jurisprudence in England and America 302 (1894).
\item This tendency for one age to lay the groundwork for the next is observable throughout history. The chaos of the Dark Ages created the need for security which was a major inspiration of the interlocking relationships that formed the basis of feudalism; late feudalism’s collection of people in cities and creation of strong monarchies provided the finances, communications and safety necessary for the trade of the Mercantile Age and financed the Industrial Revolution; and the giant corporations created by the industrial society created the financial resources required for research and development and the vast need for communications over long distances and for data storage and retrieval which inspired the Information Age.
\item The period from the final collapse of the Roman Empire in Europe to approximately the tenth century was a period of almost unimaginable social disorganization. During the Dark Ages, the world suffered fundamental disintegration of an ordered society.
\item Even the habit of, or feeling for, a stable society gradually disappeared. It became once again, as in the dawn of history, a world of disorganized individuals who looked to their own might for the minimum essentials of life. J. Cribbet, supra note 8, at 27.
\item For a description focusing more on the French and German feudal experience see G. Fourquin, Lordship and Feudalism in the Middle Ages (1976).
\item Id. at 11.
\item In early feudal times, stress apparently was laid on the sharing of the crops, which the low-status vassal, serf or tiller of the soil, had allocated to him. G. Archer, History of the Law 82-83 (1928). As time went by, greater stress was applied, according to custom, on the serf to pledge agricultural service (as well as potential military service) in the fields of the manor the lord had set aside for his own sustenance (the demesne). Often a serf would work half of the six-day work week for the manor. Even then at least a token of the output of the serf’s land was still due to the lord as part of the feudal agreement. S. Clough & R. Rapp, supra note 22, at 49-50.
\end{itemize}
pledged to militarily assist the other. Land was the basis of these interlocking relationships. An increasingly formal jurisprudential system was created which recognized these relationships through rights and claims appurtenant to the society’s essential resource—land.

Although William the Conqueror and his immediate Norman successors created the general framework of feudal administration, later generations of kings, barons, churchmen and judges created the complexity of land-related jurisprudence. In fact, Professor Cribbet has asserted, “Our law of property was born in feudalism and came to maturity as feudalism was dying.” The eventual system forms much of modern real property law, both in its theory and its terminology.

The feudal system recognized relative real property rights and allowed participants to convert access to the primary resource (land) into means of satisfying fundamental needs, i.e., food (sharing of crops and livestock between master and vassal), labor (pledges of the vassal to work for the master part of the time), and physical protection (mutual pledges of military support).

The examination of feudal life thus far provides a model for legal system evolution. The model demonstrates how a socio-economic system may depend upon a central resource, inspiring an administrative/jurisprudential system which defines and protects the relative accesses which individuals have to that resource. Further, the legal/administrative system provides a means by which an individual’s ac-

31. See generally, e.g., M. Radin, supra note 9, at 120-23.
32. It is generally conceded that “[E]nglish land law begins, for all practical purposes, with 1066 and the Battle of Hastings.” J. Cribbet, supra note 8, at 29.
33. Further, the early Normans set the basic structure of British feudalism. William the Conqueror’s Domesday Book, his registry of landholdings, was “the most searching and valuable survey ever made of a nation in medieval times.” G. Archer, History of the Law 154 (1928).

Archer further asserted that the early Norman action marked British feudalism as unique because clearly all land was held of the King and no land stood outside of this central relation. Id. at 155.
34. M. Radin, supra note 9, at 88-101.
35. J. Cribbet, supra note 8, at 27 (emphasis added).
36. For example, “The land which the vassal now held was called his ‘fief’ and has become the ‘fee’ of our modern law.” Id. at 28.
37. Archer uses the term “productive agency” similarly as Naisbitt uses “strategic resource.” J. Naisbitt, supra note 16, at 15. This Comment uses “central resource,” as the fundamental resource around which the period’s socio-economic system is constructed. Archer wrote, for example, “The Feudal System, as we have seen, was based entirely upon the idea of agricultural labor as the productive agency of society.” G. Archer, supra note 33, at 90.
cess to the primary resource can be converted to meet the individual's fundamental needs.

The Commercial Age: Multi-faceted Changes in the Common Law Support Trade

The end of the fifteenth century and beginning of the sixteenth century is generally viewed as the end of feudalism and the beginning of modern times. During this time of transition, cities began to grow around seaports and sometimes around the courts of the great kings. Whereas the model for feudal life was the self-sufficient manor, in cities, guilds, built by men who shared a craft or occupation, created classes of people whose livelihoods were based on specialization and trading for other products. A small class of merchants and traders arose to serve the needs of the urban specialists. The use of money became popular. The cities began to ship goods for trade, thus fostering the creation of a specialist group of sailors. Self-sufficiency

38. Whenever one is examining broad socio-economic movements across centuries it is, of course, impossible to fix exact beginning and ending dates for the eras. Further these broad eras overlap and elements of the previous eras survive into more recent ones. Economic historians Clough and Rapp observed:

Although Europeans who awoke on the morning of January 1, 1500, certainly noticed no great difference from December 31, 1499, and were totally unaware of arising in a new historical era, changes took place in the course of European history within the designated time span which were important enough to justify historians in their seemingly arbitrary periodization. These changes were 1) the development of humanism, 2) the growth of science as a method of attaining knowledge, 3) the Protestant Revolt, 4) forward steps in the rise of national states and of nationalism, 5) geographical discovering overseas, 6) the beginning of the economic exploitation by Europe of newly found lands, and 7) concomitantly in staples which was crucial in Western culture's attaining a position of economic hegemony in the world. Each of these changes had an effect on economic growth in Western culture.

S. Clough & R. Rapp, supra note 22. This Comment will concentrate on considerations of points four through seven, particularly six and seven.

40. This solidification around great monarchs along with the subinfeudation of nobles representing territories having a common culture and language caused people, during the late feudal period, to conceive of themselves as living within nations. Subinfeudation, coincidentally, was the method of creating the feudal hierarchy. A chain was created beginning with the king on top and working down to the actual serf who physically worked the land. Cribbet has published a model for the subinfeudation structure: King Tenant-in-chief (in capite), Mense Lords (both lord and vassal), and Tenant in demesne (the vassal in actual possession of the land). J. Cribbet, supra note 8, at 28.

41. All goods and services necessary for the sustaining of life, from the lord's lifestyle down to the most common serf, were supposed to be created within the manor by its inhabitants. Trade was unnecessary in such a situation and the use of money was rare. For a description of the structure of the great manors, see S. Clough & R. Rapp, supra note 22, at 46-50.

42. Y. Brenner, Looking Into the Seeds of Time 84-86 (1979).

43. S. Clough & R. Rapp, supra note 22, at 97-106.

44. Id. at 76, 121-24. The variety and importance of the overseas exploration is
was no longer the goal of the city dweller/specialist. Urban social/commercial interactions were the fertile ground for potential changes in the law. The rapidity of the trade expansion was phenomenal. Leading economic historians estimate that the totality of European trade more than doubled in the first century of the Commercial Age.  

Commerce soon became the center around which countries ordered their affairs and the factor which determined their status and power. European states, consistent with the prevalent economic philosophy of mercantilism, regulated economies hoping to inspire more trade and economic growth.

The government regulation of the countries’ economies eventually pervaded virtually every element of those countries’ economic lives. As with most forms of government regulation, the mercantilist economic regulation assisted some groups operating in those economies and injured others.

Amongst those new interest groups whose affairs were injured by mercantilist rules “were private entrepreneurs, whose collective power was increasing over this time. As time went by, the vast trading expeditions became more often financed by large trading companies which sold shares in the enterprise” rather than by the crown.

The Commercial Age inspired multitudinous and varied changes well known. In the decades immediately after Columbus’ 1492 voyage, there rapidly followed other explorations too numerous to be listed in their entirety. Within 30 years, these major explorations followed: DeGama had sailed from Europe around Africa to India and back; Cabral had discovered South America; Amerigo Vespucci, on a trip to Brazil, successfully concluded that the crew was not in the Far East, but a new world; and Magellan’s crew had circumnavigated the globe. (Magellan himself was killed during the voyage in the Philippines. Magellan, though Portuguese, settled for the Spanish Crown and had claimed the islands for Spain before his death.)

45. S. CLOUGH & R. RAPP, supra note 22, at 147. For example, in 30 years, 1588-1618, the total size of the British merchant marine doubled. At the height of Portugal’s expansion in the 1540’s, Lisbon “literally choked with ships” and Antwerp’s port had five hundred ships a day pass through it.

46. Id.

47. Id. at 204.

48. The trading companies were thus the original source of the modern corporate form and thereby of corporation law. The companies typically limited liability, in case of loss, to that which the shareholders had invested in the enterprise, a fundamental element of the corporate form.

Further, the trading companies were the first wide-spread users of insurance—insurance against loss at sea. Records of the English East India Company, for example, suggested that about one out of four ships were lost during the early period of wide-spread trade.

49. Besides the origins of corporation and insurance law discussed, supra note 48, this period saw a growth of codification of statutes; the more frequent publishing of judi-
in the common law, particularly the emergence of contract law. Agreements related to trade, other than the basic feudal land-related pledges, had not been viewed with great importance by medieval society. So undervalued were trade agreements that, in his contemporary treatise, Glanvil wrote “royal courts could not be troubled with a breach of ‘private convention.’” Traders themselves were similarly held in low esteem by feudal society.

Examples of restrictions with which medieval policy surrounded merchant’s activities included those restrictions in acts, such as the Statute of Laborers (1349), which ordered able-bodied persons to work at reasonable rates and forbade the refusal of service to anyone wishing it.

50. In the two centuries that followed the Norman Conquest, land was the basis of social organization, government and private rights . . . the strength of the feudal organization produced a profound effect on all branches of the law. Practically all personal services of every sort took the form of land tenure. In place of contracts for work and labor of the modern law, we find land held by tenure of rendering services for the overlord.


51. Obviously, there had been agreements between parties during feudalism. Indeed, the basic land-based agreement between vassal and lord would today be considered a contract. But the feudal mindset was different. The society was based on real property and structured around the status relationships derived through grants to use real property (the tenure system). These grants were life-long or longer than life-long (inheritable). And the status derived from these land grants defined the party’s role in society more broadly. Hence, a failure to fulfill the basic feudal pledges of fealty were perceived more as a severing of an ongoing status relationship than as a failure to fulfill an agreement or “contract.” For example, Cribbet asserts “the tenurial relationship was a highly personal one” (not at all like our modern “arms length” view relative to contract law). J. Cribbet, supra note 8, at 32. A further example of the difference of the feudal mind: the tenant could be stripped of his tenancy if he was convicted of a felony regardless of whether the particular crime had anything directly to do with his ability to fulfill his tenurial obligations. The feudal view was his blood had been tainted by the felony, i.e., he no longer deserved the status the tenure relationship brought to him.


53. The merchant pure and simple, though convenient to the Crown, for whom he collected taxes and provided loans, and to great establishments such as monasteries, whose wool he bought in bulk, enjoyed the double unpopularity of an alien and a parasite. The best practical commentary on the tepid indulgence extended by theorists to the trader is the network of restrictions with which medieval policy surrounded his activities.


54. Statute of Labourers, 1349, 23 Edw. 3.

55. Refusal of services that caused damage to a potential customer could create a cause of action against the tradesman.

For example, a feudal judge wrote in 1443:

If I’m riding on the highway and I come to a village in which a smithy lives, who has sufficient stuff to shoe my horse, if my horse has lost a shoe and I request him to shoe him at proper time, and I offer him sufficient for his labor, and he refuses, and if my horse is lost for want of shoes, and by his default, I
The feudal world was a status-based world—a world where status, rather than private agreements, determined society members' activities. Further, the status of the trader, in the land-based economy, was a low status. Therefore, the common law, as exemplified by the King's Bench, evolved basically around the law of property, the source of feudal status and structure, not the law of agreement (or contract).56

As society moved into the Commercial Age57 however, promissory liability began to expand. Traders in the early sixteenth century exchanged bonds to secure their transactions. Therefore, common law actions upon a failed bargain were usually brought as debt.58 The cumbersomeness of such a practice was soon obvious and the common law, by the end of the century, began to recognize that action would lay for the breach of a mere exchange of promises. For example, in the 1588 case, Stangborough v. Warner,59 the court observed "a promise against a promise will maintain an action upon the case, as in consideration that you do give me ten pounds on such a day, I propose to give you ten pounds such a day after."60

However, the early law of contract was viewed merely as a means of setting the point of transfer of title for goods.61 Titles became transferable upon mutual promises rather than upon the later phys-
The first English treatise on contract limited remedies for failure to deliver goods on an executory contract to specific performance.

Yet, the law needed to recognize contracts not merely as means to secure title but as a source of entitlements to reasonably fix future expectations. Having such entitlements is required by a market economy. Cases recognizing such expectancy interests are apparent in the records toward the end of the eighteenth and beginning of the nineteenth century.

Summation: Examinations of Feudal and Commercial Ages Reveal Model for Jurisprudential Changes

This Comment has examined, again broadly, a great socio-economic era. The Comment has asserted that the western world changed drastically from approximately the turn of the sixteenth century to the early nineteenth century. Market economies evolved from an agrarian-based feudal system. Whereas the central resource of the feudal economy was land, the central resource of the market economy became goods of trade.

The common law changed drastically over these years to reflect these societal changes. Although the law changed in many areas, this Comment has concentrated on the emergence of the law of contract as that body of law which most obviously responds to the needs of traders.

Again, a socio-economic system changed, thus altering the jurisprudential system to legitimize the relative individual accesses to the central resource. The change of individual social and economic expectations from expectations based on social status to those based on bargains formed by the individual required the recognition of entitlements that flowed from individual agreements.

As with the Feudal Age, the changes in the legal system provided a means by which an individual's entitlements to the primary re-

63. Id. at 232-33.
65. See, e.g., Davis v. Richardson, 1 S.C.L. (1 Bay) 307 (1790) (state government stocks); Shepherd v. Hampton, 16 U.S. 200 (1818) (commodity futures—specifically cotton); Shepherd v. Johnson, 2 East. 211, 102 Eng. Rep. 349 (1802) (leading British case—also involving stock delivery).
66. Admittedly "goods of trade" is not strictly or conventionally considered a single "resource." But if viewed as a "collective resource," it is obvious that trade occupied a position of centrality to the socio-economic system in the Commercial Age as land did in the Feudal Age and as industrial capacity (or its necessary converse, labor capacity) did in the Industrial Age and information does in the Information Age. The analysis that is the core of the Comment requires the reader to approach the term "resource" in a slightly unconventional, but nevertheless analytically valid, way.
source could be converted to meet the individual's fundamental needs, i.e., food and shelter. In the Feudal Age, the central resource, land, was used directly (farming) and indirectly (the system of tenure) to meet fundamental needs. In the Commercial Age, the profits traders derived from their bargains could be used to purchase the other goods and services which would meet their fundamental needs.

The Industrial Age: New Era Requires Development of New Types of Entitlements

Historians generally place the start of the "industrial revolution" in earnest as the early nineteenth century in Britain (after the War of 1812)\textsuperscript{67} and the middle-to-late nineteenth century in the United States\textsuperscript{68} (after the Civil War).\textsuperscript{69}

The coming of the Industrial Revolution coincided with other nineteenth century changes which would logically facilitate more rapid change in the common law.\textsuperscript{70} Various substantial changes did occur: great changes in property doctrine designed to stimulate, rather than stifle, economic development;\textsuperscript{71} modification or elimination of usury laws to create greater investment capital;\textsuperscript{72} stronger differentiation between obligations owed due to agreement (contract)

\textsuperscript{68} Id. at 45, 61-66.
\textsuperscript{69} As in other cases, the precise beginnings of the industrial revolution cannot be placed with any great precision. Major inventions which were to be a fundamental source of industrialism came into being in the late eighteenth or near the turn of the nineteenth century. Major inventions would include Watt's steam engine patented in 1769, Watt's double-acting engine in 1782, Whitney's cotton gin in 1794, the rotary printing press in 1790, and Fulton's steam ship in 1807. See, e.g., the charts at 200-21 in G. Cole, supra note 67. There was some industry even as early as feudal times.

\textsuperscript{70} The Industrial Age changes that facilitated change in the common law included a vast expansion of the formal reporting of case results and statutory codification which meant that different jurisdictions would more rapidly become aware of legal evolution elsewhere. For a discussion of the expansion of formal case reporting, see generally J. Dillon, supra note 25, at 264-92. For a discussion of the expansion of statutory codification, see, e.g., F. Aumann, The Changing American Legal System, Some Selected Phases 207-11 (1940). Further, other changes and inventions, particularly in telecommunications and transportation affected communication among lawyers and jurists. Importantly, the telegraph was invented in the mid-nineteenth century (1844) and gradually its use was expanded. And similarly, the telephone was invented in the late-nineteenth century (1876) and found even greater use. Rapid communication was expanded not just by electrical impulse but on land and water with the growth of railroads and canal building in the mid- and early nineteenth century, respectively. For notes on canal expansion, see G. Cole, supra note 67, at 50. For a chronology of important inventions, see the charts in G. Cole, supra note 67, at 200-206.

\textsuperscript{71} M. Horwitz, supra note 64, at 31-42.
\textsuperscript{72} Id. at 237-45.
and those owed due to general concepts of duty (tort); changes in civil procedure; increased sophistication in areas such as insurance, banking and finance; and Bill of Rights guarantees against state governments under the 14th amendment.

Industrialization: Laissez-Faire and Social Welfare Doctrines Urged

The central resource in an industrialized society is manufacturing capacity and its necessary converse, laboring capacity. Obviously, as we move from age to age, the central resource of the previous age retains value and its corresponding jurisprudence remains useful. Many scholars, however, assert that nineteenth century common law development was primarily used as a means to assist the fledgling industrial base. Scholars have often described the early Industrial Age legal changes as being a “subsidization of economic growth.”

The industrial revolution began and progressed in Great Britain just as a sophisticated law of contract was emerging. Therefore, the jurisprudence of the early Industrial Age was formulated within a philosophical context where large government interference was associated with old regimes and a law of agreement, free from government interference, was becoming dominant. Philosophical and legal writings reinforced this dominance. Sir Henry Maine wrote in 1864, “the movement of the progressive societies has . . . been a movement from status to contract.”

Early law relating to labor contract negotiation, as exemplified by the famous Supreme Court case of *Lochner v. New York*, similarly

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73. *Id.* at 201-10.
75. U.S. CONST. amend. X (1868).
76. Industrial plants were placed on real property, and some elements of the law of real property were carried forward from feudal times. Similarly, the end results of most industrial processes were goods to be traded (or component parts to be made into goods to be traded) and the law of the Commercial Age, particularly contract law, formed the legal basis under which such industrial-related trade took place. Despite the overlap, it is undeniable that the focus of each age changes as its central resource changes.
77. M. HORWITZ, *supra* note 64, at 63-108.
78. *Id.*
79. For a comparison of dates compare notes 64 and 65 and accompanying text (establishment of a sophisticated law of contract) with note 67 and accompanying text (beginning of Industrial Age in Great Britain).
80. For example, Britain's Herbert Spencer was very influential as a formulator and advocate of laissez-faire ideology. Spencer's 1850 book, *Social Statics*, had great influence in Britain and in America.
81. H. MAINE, *ANCIENT LAW* 165 (1864). In a similar vein, Adam Smith had written earlier, “society is far advanced before a contract can sustain action or the breach of it be redressed.” A. SMITH, *LECTURES ON JUSTICE, POLICY, REVENUE AND ARMS* quoted in F. KESSLER & G. GILMORE, *supra* note 52, at 19.
82. 198 U.S. 45 (1905).
took a pro-freedom of contract, and therefore, pro-industrialization approach. In *Lochner*, the Court found a New York statute, limiting the hours that bakers could work, was an unconstitutional intrusion into the bakery employee's liberty guaranteed by the 14th amendment. *Lochner* was, of course, one in a series of cases invalidating government attempts to interfere with the freedom of contract between employers and employees. Such an approach ignored the great differentiation in bargaining strengths between employers and employees, and, in actuality, again assisted industrialization.

However, some commentators assert that the *Lochner* decision

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83. Tort law is also a frequent focus of the protection of industrialization orientation of nineteenth-century jurisprudence. Particular attention, in this regard, is paid to theories concerning personal and property damage resulting from industrial accidents. From an earlier eighteenth-century concept of strict liability for direct injury, the early nineteenth-century common law adopted the concept that negligence should determine liability for injuries. The law then gradually adopted rules of duty which virtually insulated industry from liability by drastically narrowing the circumstances under which negligence could be found. Later commentators viewed these duty rules as primarily an attempt to assist industrialization. See generally L. Friedman, *A History of American Law* 409-27 (1973); M. Horwitz, *supra* note 64, at 67-108; Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); Ursin, *Judicial Creativity in Tort Law*, 49 Geo. Wash. L. Rev. 229 (1981). But see Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation* 90 Yale L.J. 1717 (1981) (asserting that a complete review of all California and New Hampshire nineteenth-century tort decisions disputes the conventional view that the judiciary insulated industry to injured plaintiffs' detriment).

84. Specifically, the liberty being restricted, according to the Court's majority, was the liberty for the bakery employee to contract to work more than the statutorily prescribed 10 hours a day.

The employee may desire to earn the extra money, which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it. The statute necessarily interferes with the right of contract between the employer and employees. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment. . . . [Allgeyer.] . . . The right to purchase or to sell labor is part of the liberty protected by this amendment.

198 U.S. at 52-53.


86. For a later contrary acknowledgement by the Court that groups of employees often possess an unequally weak bargaining position relative to employers, see West Coast Hotel v. Parrish, 300 U.S. 379 (1937). For a general discussion of unequal bargaining strengths between employees and employers see F. Kessler & G. Gilmore, *supra* note 52, at 7-10.

protected constitutionally mandated economic liberties.\textsuperscript{88} State courts had adopted a similar \textit{Lochner-like} laissez-faire approach.\textsuperscript{89} And earlier Supreme Court decisions\textsuperscript{80} and dissents\textsuperscript{91} had adopted a laissez-faire approach to government interference, in contract as well as other areas of economic planning.\textsuperscript{92} \textit{Lochner} stated the laissez-faire approach these earlier decisions and dissents advocated was not merely beneficial, but indeed was constitutionally mandated.\textsuperscript{83} Justice Holmes, in his \textit{Lochner} dissent, complained bitterly that "[t]he 14th amendment does not enact Mr. Herbert Spencer's\textsuperscript{94} social statistics [and the] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire."\textsuperscript{95} Despite Holmes' protests, the majority of the Court continued to adopt a laissez-faire orientation and subsequent decisions continued to prevent government from interfering with employment contract negotiation. The two leading cases were \textit{Adair v. United States}\textsuperscript{86} and \textit{Coppage v. Kansas}.\textsuperscript{97}

It is difficult to reconcile the Courts' actions in the \textit{Lochner-Adair-...
Coppage pro-freedom of contract cases with other cases from the same era which allowed government interference. Examples of the latter group include state laws limiting the hours for underground miners, women or factory workers. The Court upheld these statutes between 1898 and 1917, the same general eras as Lochner-Adair-Coppage.

One explanation for the apparent inconsistency in Court holdings may be the Court's reluctance to adopt a status-based approach to legal disputes. A status-based source of entitlements, was, as Sir Henry Maine had asserted, representative of the old regimes—considered either too ancient (feudal) or too anti-development (early mercantilism) compared to the newer law of agreement. Moreover, Maine attributed American prosperity in the late

employment).
In Adair, Justice Harlan wrote

[The] right of a person to sell his labor upon such terms as he deems proper [is]
the same as the right of the purchaser of labor to prescribe the conditions. [The]
employer and the employee have equality of right, and any legislation that dis-
turbs that equality is an arbitrary interference with the liberty of contract.
208 U.S. at 174-75.

In Coppage, Justice Pitney asserted,

Included in the right of personal liberty and the right of private property [is] the
right to make contracts. [An] interference with this liberty so serious as that
now under consideration, and so disturbing of equality of right, must be deemed
to be arbitrary . . . . No doubt, wherever the right of private property exists,
there must and will be inequalities of fortune; and thus it naturally happens that
parties negotiating about a contract are not equally unhampered by circum-
stances. This applies to all contracts, and not merely to that between employer
and employee. [I]t is from the nature of things impossible to uphold freedom of
contract and the right of private property without at the same time recognizing
as legitimate those inequalities of fortune that are the necessary result of the
exercise of those rights. But the [14th Amendment] recognizes "Liberty" and
"property" as co-existent human rights, and debars the States from any unwar-
ranted interference with either.

236 U.S. at 17.

98. Holden v. Hardy, 169 U.S. 366 (1898) (limited miners' work day to eight hours).
100. Bunting v. Oregon, 243 U.S. 426 (1917) (limited factory employees' work
day to ten hours).
101. See supra note 81 and accompanying text.
102. Dean Pound commented on the formation of these attitudes: "In the nine-
teenth century the feudal contribution to the common law was in disfavor . . . the nine-
teenth century deduction of law from a metaphysical principle of individual liberty . . . combined to make jurists and lawyers think ill of anything that had the look of the archaic institution of status." R. POUND, THE SPIRIT OF THE COMMON LAW 27-28
eighteenth century to its jurisprudence, “[a]ll this beneficent prosperity reposes on the sacredness of contract and the stability of private property; the first the implement, and the last the reward, of success in the universal competition.”

However, the prosperity Maine acknowledges was apparently not universal. The living conditions of the industrial working class pointed out the need for relief. The lower classes of other socio-economic eras may or may not have been economically better off than the proletariat of the Industrial Age, but their plight was certainly more diffuse and less starkly visible. The urbanization that came with industrialization caused the working class to be more visibly massed in cities, creating pressure for social welfare reform. Much social welfare legislation was passed to help the working class, as a class, or sub-classes such as working women, bakers or underground miners.

But more fundamentally, the working class required a system of entitlements that gave greater value to the resource they possessed. This section of the Comment began by stating that the Industrial Age created a dual central resource—manufacturing capacity and its necessary converse, laboring capacity. Industrialization came to

(1906).

105. Id. at 74-80.
106. Id. at 92.
107. S. Clough & R. Rapp, supra note 22, at 379. Actually the United States was late in constructing social welfare programs to combat Industrial Age social problems. See, e.g., G. Cole, supra note 67, at 5-6.
108. Oregon statute limiting the maximum hours of work for women held constitutional in Muller v. Oregon, 208 U.S. 412 (1908).
110. Utah statute limiting the maximum hours of work for underground miners held constitutional in Holden v. Hardy, 169 U.S. 366 (1898).
111. This Comment has stated the central resource for the Industrial Age was manufacturing capacity and its necessary converse, laboring capacity. This is the first example of a dual-element central resource. But that characterization of the resource is due to the unique nature of it.

Under feudalism, all benefited, the king to the serf, from the central resource, land. Trade, on the other hand, was conceived of as more individualistic—the result of ad hoc relationships between entrepreneurs and merchants. Hence, during the Commercial Age the central resource, which, while it determined the identity of the age, was not conceived of as benefitting the mass of society that remained agrarian.

Industrialization created a circumstance unlike feudalism, wherein all members of society could benefit from the same central resource (land), or the Commercial Age, wherein only a minority benefited directly from the central resource, goods for trade. The manufacturing done under industrialization could benefit the mass of society but only if that mass aided in the industrial process by selling its laboring capacity. That laboring capacity, likewise, was needed by the industrial concerns. Hence, both components of the central resource were necessary for the resource to exist and function and for it to provide the society members a means to obtain the necessities of life.
dominate all aspects of society and was expected to provide a means of livelihood to the mass of society. But the masses could not directly benefit from the resource of manufacturing capacity. They needed to sell the resource they possessed—laboring capacity. And they believed their bargaining position was stronger when they were dealt with as a group. Those desiring the improvement of living conditions for the working class urged, therefore, a group or status orientation to society's resource entitlement system. Indeed, industrialization-inspired jurisprudence can primarily be viewed as combining a status configuration of the working class, similar to vassals of the Feudal Age, and a massive contracting paradigm, originated by manufacturers in the Commercial Age. The changes in the common law, in the area of labor contract, can be seen as a tug-of-war between the laissez-faire/freedom of contract ideology from the recently completed Commercial Age and a status paradigm, similar to feudalism. This tug-of-war between contract and status was manifested in the apparent inconsistent lines of the Supreme Court decisions over the "Lochner era."  

New Deal Resolves the Conflict

The conflict of whether workers should be treated as a class in labor contracting was, in a sense, resolved by the great depression. The grand industrial system broke down, casting doubt on the assertions of the defenders of its laissez-faire underpinnings. The economic hardships visited on the American working class, as a class, caused a vast majority to vote for candidates who were clearly social welfarists. The Roosevelt Administration and a liberal democratic Congress came to power in 1933 prepared to assist massive classes of people, as classes.  


113. One example, away from the the labor-management area, where the Roosevelt advocates were prepared to view and treat people as a class was the traditionally more individualistic area of agriculture.

It was the severe misfunction of the market mechanism in agriculture. The problem, we will remember, arose in large part from two causes: the nature of the inelastic demand for farm products, and the highly competitive, "atomistic" structure of the agricultural market itself. The New Deal could not alter the first cause, the inelasticity of demand . . . . But it could change the condition of supply which hurled itself, self-destructively, against an unyielding demand. Hence, one of the earliest pieces of New Deal legislation—the Agricultural Adjustment Act—sought to establish machinery by which farmers as a group, could accomplish what they could not as competitive individuals: curtailment of output.
Perhaps chief amongst the classes of people to be assisted were industrial workers in their efforts of urging a jurisprudence more valuing their side of the central resource—laboring capacity. That resource was their most valuable "property" and it was necessary that the evolving system of industrialization-inspired entitlements give greater value to their primary property in order for them to better meet their fundamental needs. The route to achieve these goals was to deal with broad social problems and immediate workplace problems as a group. Social legislation must be passed, they urged, to assist the working class, as a class, and to insure the right to negotiate labor contracts as a group. Major attempts to set minimum wage and maximum hours limitations were included in the National Industrial Recovery Act (NIRA) of 1933 and in legislation enabled by the National Labor Relations Act (Wagner Act) passed in 1935. The U.S. Supreme Court invalidated the wage and hours provisions of these statutes as violating the Commerce Clause.

Such decisions resisting the New Deal infuriated Roosevelt and he responded with his famous "court-packing" plan—a threat to expand the court to potentially 15 members. Whether responding to the court-packing challenge or not, Justice Roberts changed his position within a year on two subsequent key decisions with similar subject matter. In National Labor Relations Board v. Jones & R. Heilbroner, supra note 104, at 142 (emphasis added).}

118. U.S. Const. art. I, § 8, cl. 3. In the Lochner line of cases (see supra note 84), the Court utilized the Due Process Clause of the 14th Amendment, U.S. Const. amend XIV, § 1, cl. 3, to invalidate government interference with labor contracts. With Schechter and Carter Coal (see supra note 117), the Court utilized the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Although these decisions are based on interpretations of different clauses of the constitution and are 20 to 30 years apart, they can be interpreted as consistent examples of the Court's continuing reluctance to allow massive government interference with labor contracts.

During the Schechter and Carter Coal period, the Court turned yet again to the 14th Amendment to find the means to invalidate a minimum wage law (for women) in Morehead v. New York ex rel. Tipold, 298 U.S. 587 (1936).
119. The Roosevelt "court-packing" plan called for appointing an additional justice to the Court for every one that did not resign within six months after his 70th birthday. It limited, however, the total potential membership of the court to a maximum of 15.
120. For a discussion of Roberts' seemingly incompatible votes see G. Gunther, supra note 11, at 152.
Laughlin Steel Corp., the Court upheld the constitutionality of the National Labor Relations Act of 1935. And in West Coast Hotel Co. v. Parrish the Court held constitutional a Washington State statute setting minimum wages for women.

The West Coast decision specifically rejected absolute freedom of contract regardless of the social consequences. Chief Justice Hughes wrote,

[T]he violation [of due process] alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does recognize an absolute and uncontrollable liberty. . . . [T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular.

Thus the dual strains of decisions continued, i.e., those favoring the individual/absolute freedom of contract approach to social entitlements and those acknowledging a group/status approach.

Summation of Industrial Age Jurisprudence: a dual central resource inspires a dual-faceted approach to socio-economic entitlements

This Comment has again examined legal evolution during a socio-economic era. Since the early nineteenth century, common law countries had drastically changed, socially, economically and legally. From a basically agrarian society linked by individual traders (or

121. 301 U.S. 1 (1935).
123. 300 U.S. 379 (1937).
124. Id. at 391-92. The West Coast Hotel decision, upholding a state statute setting minimum wage laws for women, was handed down within a month of Morehead v. New York ex rel. Tipold, 298 U.S. 587 (1936) (see supra note 118), invalidating a similar statute. Such a switch in results was similar to the switch in results found by comparing the Carter Coal and Jones & Laughlin decisions (see supra text accompanying notes 115-21).
small companies of traders), industrialization caused huge proportions of people to move into crowded cities and work on and with machines.

The examinations of the two previous socio-economic eras yielded two different approaches to the society's allocation of socio-economic entitlements based on relation to the age's central resource. The Feudal Age's central resource was land and the medieval system of entitlements was based on status. The Commercial Age's central resource was goods for trade and contract law, which evolved as a response to the Commercial Age, and awarded entitlements based on bargains agreed to by individuals.

The Industrial Age featured a dual-faceted central resource, i.e., manufacturing capacity and its converse, laboring capacity. The jurisprudential battle the age witnessed and the system of entitlements it eventually evolved recognized the value of both resources. Two strains of judicial opinions and jurisprudential theories existed simultaneously. The first strain articulated an approach to socio-economic entitlements which were individualistic/contract-oriented and applied theories which were carryovers from the Commercial Age. The second articulated a group/status/social welfare orientation (as did the feudal jurisprudence). That the two approaches to socio-economic entitlements would exist during the Industrial Age is consistent with its dual-faceted central resource and with the jurisprudential history through which the common law had passed (feudalism and the Commercial Age).

THE INFORMATION AGE AND ITS JURISPRUDENCE EXAMINED

The Information Age is here and its effects are pervasive. As early as 1967, a U.S. government study\textsuperscript{127} found that a quarter of the country's gross national product (GNP) was produced in the "primary information sector" i.e., "that part of the economy that produces, processes, and distributes information goods and services. Included here are computer manufacturing, telecommunications, printing, mass media, advertising, accounting, and education."\textsuperscript{128} The study also attempted to identify individuals who held information jobs in non-information companies. Adding these "secondary information sector"\textsuperscript{129} people, the total information segment of the economy accounted for 46 percent of the GNP and more than 53 percent of income earned.\textsuperscript{130}

The percentage of the economy produced by information sources

\textsuperscript{128} J. Naisbitt, supra note 6, at 20.
\textsuperscript{129} Id. at 21.
\textsuperscript{130} Id.
has since increased markedly.\textsuperscript{131} By 1976, the percentage of individuals working in information-related occupations passed the 50 percent range.\textsuperscript{132} Projections call for such workers to represent 66 percent of the workforce by the turn of the 21st century.\textsuperscript{133}

However, the law has not changed anywhere close to proportionately. To date there have been no major doctrinal changes in the common law that can be identified as a reaction to the societal changes brought about by the Information Age. It is usual for common law to change slowly.\textsuperscript{134} Indeed, this Comment has observed that each of the major changes in the law which were inspired by a socio-economic age occurred well into or at the end of their age.\textsuperscript{135} But this natural tendency is particularly troublesome in the information area, which emphasizes constant innovation. Furthermore, this Comment has observed that each succeeding major socio-economic age has been increasingly briefer.\textsuperscript{136} Alvin Toffler predicts that the Information Age\textsuperscript{137} should play itself out within the current generation's lifetime.\textsuperscript{138} Given the pace of innovation and the probable brevity of the Information Age, the natural tendency for the common law to change slowly becomes stultifying. A leading Southern California practitioner in the areas of copyright and patent has written,

\begin{quote}
[T]he law is too often ill-adapted to the fast-moving traffic of our ever-changing world. Under our system of jurisprudence, bold innovations are seldom seen. Instead, our courts and legislatures try laboriously to graft new principals upon the old Common Law Stock. The resulting patchwork of case law and statutes forever seems to lag far behind the needs of society.
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item[133.] \textit{Id.}.
\item[135.] For example: the sophisticated real property system that modern thinkers associate with feudalism did not occur until the end of the feudal period; the law of contract did not develop in a sophisticated manner until the eighteenth century whereas the Commercial Age began around 1500; and a sophisticated approach to labor rights was not recognized until after the Great Depression of the 1930's—well after the beginning of the industrial revolution which occurred after the Civil War.
\item[136.] This Comment has asserted previously that evolution of feudal property law took centuries, evolution of contract law took more than one century and most of the doctrinal concepts arising out of the Industrial Age took decades to formulate and spread throughout common law jurisprudence.
\item[137.] A. Toffler, supra note 5. Toffler actually coined his own terminology to refer to the current socio-economic age: The Third Wave. But he acknowledges that the Information Age is synonymous for his Third Wave. \textit{Id.} at 9.
\item[138.] \textit{Id.} at 10.
\end{enumerate}
\end{footnotes}
Holistic Approach Useful: A Model—“New Property”

An important step in jurisprudential correcting for the undervaluing of certain interests, such as information interests, is the perception of a constellation of interests as a unity. Failure to perceive a body of interests holistically leads to undervaluing because each entitlement asserted and each cause of action litigated is viewed singularly, in isolation, and is much easier to reject when thus viewed. A collective undervaluing often is not perceivable under these circumstances because the law views each unsuccessful case as the mere refusal of a cause of action to a given individual plaintiff and each denial of an assertion of an entitlement as the refusal to just one individual or group. Under these circumstances, a gross undervaluing of interests may remain utterly unperceived—a jurisprudential missing of the forest for the trees.

A recent, important attempt to correct a similar misperception occurred in the mid-sixties. Professor Charles Reich perceived that a constellation of interests involving entitlements from the federal government were undervalued. In his article, The New Property,140 Reich examined what he termed the “public interest state.”141 His analysis included not just the grants normally associated with social welfarism, such as public assistance and retirement funds (social security), but the whole range of government entitlements. These examples of “government largess”142 included government jobs, occupational licenses, government franchises, contracts, services, and access to government resources.143 Reich contended that the government’s taxing and regulatory power, and its dispersing of largess, vastly rearranged both wealth and power. “Government is a gigantic siphon. It draws in revenue and power, and pours forth wealth: money, benefits, services. Today’s distribution of largess is on a vast, imperial scale.”144 Reich further asserted these entitlements had been

steadily taking the place of traditional forms of wealth—forms which are held as private property. The wealth of more and more Americans depends upon a relationship to government. Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express “the public interest.”145

139. Charmasson, supra note 134, at 19.
141. Id. at 733, 778.
142. Id. at 733.
143. Id. at 734-37.
144. Id. at 733.
145. Id.
Reich asserted, therefore, that the judiciary must recognize these new forms of wealth as a new property worthy of protection and due process safeguards.

The Reich article was highly influential in inspiring what has been called the “procedural due process revolution.” Justice Brennan cited Reich while writing the cornerstone case for the due process revolution, Goldberg v. Kelly. In Goldberg, the Court majority held welfare benefits could not be terminated without an evidentiary hearing prior to termination.

The Goldberg decision, inspired by Reich’s article urging a holistic approach to government entitlements, inspired “a flood of suits seeking review of administrative procedure that operated adversely to the claimants.” Included in the “flood” of suits were cases with such disparate subject matters as the termination of social security disability benefits, the suspension of driver’s licenses, the firing of policemen without a hearing for cause, and the reasonableness of gas service termination notices from a municipally owned utility.

A similar holistic approach to informational entitlements would be valuable in countering their undervaluing as Reich’s approach to government entitlements. Presently, the law stands similarly positioned as to informational interests as it did in 1964 before the publishing of the “New Property.” As examples, cases regarding entitlements such as design of computer software, intercepted data during telecommunications transfer, the right of celebrities to control the telling of their own biographies over the airwaves, and access to government information were approached in an isolated manner.

To make clearer the potential benefits of a holistic approach to informational entitlements, this Comment will first briefly review how the law has dealt with two informational interests and then discuss a specific potentially beneficial regime to be derived from a holistic approach.

146. G. GUNTHER, supra note 11, at 647-48.
148. 397 U.S. at 261.
149. B. SIEGAN, supra note 88, at 245.
154. Reich, supra note 140.
Right of Publicity—Early Attempt to Protect an Information-Type Interest

An early attempt to protect an information interest involved the recognition of the right of publicity. The history of the right of publicity can be viewed as typical of new entitlements which evolve to correspond to interests which arise near the beginning of a new socio-economic age. First, a socio-economic or technical change creates a new interest. Efforts to protect entitlements arising in relation to that new interest are attempted under existing common law doctrine. If that proves unsatisfactory, a new entitlement is recognized, but its entitlements are construed narrowly. A full exploitation of the entitlement is not therefore likely until recognition of a new doctrinal base for the entitlement and possibly an accompanying new procedural mechanism for its award.

The right of publicity has been defined as “the pecuniary value which attaches to the names and pictures of public figures, particularly athletes and entertainers, and the right of such people to this financial benefit.”

Such entitlements are often closely associated with the privacy-related tort of appropriation. Appropriation was one of four types of privacy interests which Dean Prosser listed as deserving of protection. The tort is defined as “appropriation of one's name or likeness for another's benefit.”

However, the interest which celebrities normally wish protected is not “to be let alone” (the interest most often cited as being protected by privacy) rather, it is to be compensated for exploitation of their fame. Nevertheless, these celebrities brought many causes based upon the violation of their privacy rights in an attempt to compel such compensation. The suits were often unsuccessful be-

156. The four types of privacy interests isolated by Prosser are (1) intrusion upon physical solitude, (2) public disclosure of private facts, (3) publicity that places someone in a false light and (4) appropriation of one's name or likeness for another's benefit. It is the fourth interest upon which this Comment focuses. Prosser, Privacy, 48 CALIF. L. REV. 383, 389 (1960).
157. Id. Prosser's scheme for division of privacy interests was carried forward by the RESTATEMENT OF Torts (SECOND) § 652A-E.
158. The phrase right “to be let alone” originates with Judge Cooley in T. COOLEY, LAW OF TORTS (2d ed. 1888). Judge Cooley's phrase was cited by Samuel Warren and Louis Brandeis as describing the interests protected by privacy in their seminal article, Warren & Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890). The Warren and Brandeis article is generally credited with originating the recognition of privacy as a protectable interest. See M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 190 (2d ed. 1982).
cause courts held plaintiffs had "waived" their right of privacy by their public performance.\textsuperscript{160}

One such unsuccessful suit occurred less than a year before the recognition of the right of publicity. In \textit{Gautier v. Pro-Football Inc.},\textsuperscript{161} an animal trainer had contracted to perform his act at the half-time of a football game. Besides being viewed by the live audience, the act was telecast. Plaintiff sued to be compensated by the television station and was denied relief. A concurring opinion, however, stressed the inadequacy of privacy rights to protect the plaintiff's interest in such situations. "Privacy is the one thing he (plaintiff) did not want or need in his occupation. His real complaint, and perhaps a justified one, but one we cannot redress in this suit brought under the New York Right of Privacy statutes, is that he was not paid for the telecasting of his show."\textsuperscript{162}

Shortly after \textit{Gautier}, Judge Jerome Frank of the Second Circuit wrote an opinion recognizing the right of publicity.\textsuperscript{163} Shortly thereafter, Professor Melville Nimmer wrote a "seminal"\textsuperscript{164} article\textsuperscript{165} compellingly justifying the right of publicity and explaining why alternative theories had been unable to adequately protect such interests.\textsuperscript{166}

The right of publicity is an early example of an Information Age-type interest. The right was recognized near the period of the first widespread use of television\textsuperscript{167} and was recognized with awareness of the explosion of mass communication. "With the tremendous strides in communications, advertising, and entertainment techniques, the


\textsuperscript{161} 304 N.Y. 354, 107 N.E.2d 485 (1952).

\textsuperscript{162} Id. at 361, 107 N.E.2d at 489-90.

\textsuperscript{163} Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), cert. denied, 346 U.S. 816 (1953).

\textsuperscript{164} Nimmer's article was cited as seminal in Hoffman, \textit{Limitations on the Right of Publicity}, 28 BUL. COPYRIGHT SOC'Y OF THE U.S.A. 111 (1980).


\textsuperscript{166} Nimmer cites other theories besides privacy as being inadequate also: Offensive use of False Light, Unfair Competition, Contract Theory, Defamation, and Trade Libel.

\textsuperscript{167} The late 1940's-early 1950's time period, immediately preceding when the article was written (1953), marked the first widespread use of television. For example, in 1948 less than an estimated one million (977,000) television sets were in use. By 1951, the use had risen to more than 15 million (15,637,000) and by 1952, more than 21 million (21,782,000). TV BOOK (J. Freman ed. 1977) quoting \textit{TELEVISION FACTBOOK} (1977).
public personality has found that the use of his name, photograph, and likeness has taken on a pecuniary value undreamed of at the turn of the century.\textsuperscript{168} In the intervening 30 years since the right of publicity was recognized, successful causes of action brought under it are rare. Although it is often described as a “property right,”\textsuperscript{169} few cases have recognized it as descendible, an often-cited quality of property.\textsuperscript{170} The right is vulnerable to virtually any First Amendment challenge, including one involving the facetious “campaign for president” by a television comedian.\textsuperscript{171}

One case in which a first amendment defense was not successful was \textit{Zacchini v. Scripps-Howard Broadcasting Co.},\textsuperscript{172} the first case in which the Supreme Court recognized the right to publicity.\textsuperscript{173} In \textit{Zacchini}, a news organization broadcast a circus-type act\textsuperscript{174} despite the performer’s specific requests not to broadcast the act. Justice White said the first amendment does not require that a news organization be allowed to expropriate a performer’s “entire act.”\textsuperscript{175}

The Supreme Court’s recognition of the right of publicity does not seem to have increased the chances of recovery.\textsuperscript{176} The right remains narrowly construed, particularly against First Amendment challenges.\textsuperscript{177}

\begin{footnotesize}
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\item \textsuperscript{168} Nimmer, \textit{supra} note 165, at 204.
\item \textsuperscript{171} Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (protection afforded to makers of posters of a comedian who, as part of his act, made facetious “speeches” as part of a satirical presidential “campaign”).
\item \textsuperscript{172} 433 U.S. 562 (1977).
\item \textsuperscript{173} \textit{Id.} at 564.
\item \textsuperscript{174} The act was that of a human cannonball.
\item \textsuperscript{175} 433 U.S. at 564.
\item \textsuperscript{177} \textit{See, e.g.,} Frosch v. Grossett & Dunlap, 4 Media L. Rep. 2307, 2308 (N.Y. Sup. Ct. 1979) (suit by heirs of famous actress Marilyn Monroe to recover damages for invasion of right of publicity rejected summarily by Court due to First Amendment defense).
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This Comment’s examination of the history of the right of publicity can help illustrate how the entitlement evolution model, mentioned at the beginning of this subsection, functions. A socio-economic or technical change (the popularization of electronic mass media, particularly television) created an interest (the possible commercial exploitation of fame over the airwaves). Initially, efforts are made to protect the new interest under existing common law doctrines; in this case, appropriation and the right of privacy were utilized. If that process proves unsatisfactory, and celebrity plaintiffs such as Gautier found that the process was, then a new entitlement, such as the right of publicity, is recognized. The new entitlement, however, is construed narrowly. This Comment will next discuss a possible new doctrinal base and procedural mechanism for information-related entitlements.

Computer Software: Litigating within the cracks of traditional statutory protection

Attempts to protect innovative computer software presented a difficult problem due to the traditional demands of the two most used statutory methods for protection of intellectual property—copyright and patent. The nature of computer software suggested it was destined to fall within the cracks of traditional protections.

The Patent Act demands three tests be met. A discovery, to be patented, must be “useful,” “novel,” and not “obvious to a person having ordinary skill in the technical field related to the discovery.” Patents may be granted for a new and useful “process, machine, manufacture, composition of matter and other invention.” But no patent will be granted for “methods of doing business, newly discovered laws of nature or for purely mental processes.”

The Copyright Act protects “original works of authorship fixed in any tangible medium of expression.” The act provides that in no case does the protection extend to “any idea, procedure, process,
system, method of operation, concept, principle, or discovery." 187

"Accordingly, copyright does not extend to something utilitarian. Protection for a process, a method, or a utilitarian article must be sought under patent law." 188

With respect to computer software, under which of these pre-existing statutory schemes would this important information-related potential entitlement be protected? The software would seem to possess elements that would both qualify and disqualify it from both statutory regimes.

The subjects of computer software programs are often useful, novel, and non-obvious. However, the "machine" or "composition of matter" involved—the computer itself, the hardware—remains the same from task to task—non-novel, and outside the Patent Act, non-statutory. The software program, however, could be construed as a non-statutory, "purely mental process." Further, a program will inevitably involve mathematical formulae which could be construed as "newly discovered laws of nature," 189 also outside the statute.

Conversely, copyright also presents problems. Although computer programs are arguably "original works of authorship fixed in a tangible medium," 190 the traditional copyright exclusion of utilitarian objects mitigates against their protection under copyright.

The results of early litigation in the area were consistent with computer software's apparent statutory ill-fit. Early attempts to find such software patentable were unsuccessful. Gottschalk v. Benson 182 and Parker v. Flook 183 are the leading early cases concerning computer software patentability. In Benson, the Supreme Court held a program to convert binary-coded decimal numerals into pure binary was merely a mathematic calculation, not a patentable process. In Flook, the Court held a program designed to recalculate alarm limits during the catalytic conversion process of oil refining was not patentable. The only novel feature of the process was the mathematical formula and, consistent with Benson, a mathematical formula is not patentable.

The Court did not finally find a program patentable until 1981 in Diamond v. Diehr. 194 The program in Diehr was used similarly to that in Flook. Diehr involved a program to aid in the process of curing synthetic rubber. Temperatures were measured inside the mold and the computer would recalculate the cure time for the rub-

188. Charmasson, supra note 134, at 19.
ber and ultimately would signal a device to open the press at the correct moment.

Apparently, this last step distinguished *Diehr* from *Flook*. Indeed, commentators asserted, "*Flook* cannot be reconciled with *Diehr* on any but superficial grounds."195

Similar to the patentability confusion, the area of copyrightability of computer programs also shows conflict and confusion as various courts have held for and against copyrightability.196 Similar conflict and confusion exists as to copyrightability of video games.197

Unity of Informational Interests: The Public Access/Exclusive Rights Dilemma Described and Possibly Solved

The confusion and flux around the protectability of computer software is not surprising. Such confusion will always be the likely result of trying to fit new technological forms into places within the pre-existing law. Further, both the conflicts involving computer program protectability and the narrow construction of the right of publicity are manifestations of the tension as information entitlements emerge from the existing jurisprudence.

The tensions are likely to inspire new forms of entitlements. A commentator recently asserted:

The needs of software writers to be secure in their intellectual property; the needs of developing technology to reward invention and to reap the benefits of creativity operating under incentive; and the needs of society to avoid rigid and lengthy monopolies summon a fresh approach.

A new form of license for computer software, of brief duration, procured through adversarial procedure, armed with a presumption of validity, and

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subject to liberal disclosure and royalty provisions, awaits Congressional action.\textsuperscript{198}

The writer mentions three values, the balancing of which have concerned legal theoreticians continually in the field of intellectual property. Those concerns are (1) rewarding the creator for innovation; (2) benefiting society by inspiring innovation; and (3) allowing access of the public to the creative work. The Copyright Clause of the Constitution\textsuperscript{199} itself contains reference to these three values.

If balancing these three values has always been problematical, the importance of such balancing in a period where information is the central resource will logically be much greater. In the Information Age, access to the central resource will, as with all past age's central resources, be of critical importance, but likewise, entitlements to information, particularly those producing compensation that can help the participant meet his fundamental needs, will also be critically important. The jurisprudence of the Information Age, therefore, is apt to continually bring into conflict this society's ongoing values of free access to information and our notions of the sanctity of private property, specifically as those notions relate to intellectual property. These conflicts may have existed, in some form, for a long time as a relatively minor subunit of Anglo-American jurisprudence, but they will take primacy in the Information Age.

The importance of such inevitable conflicts between long held values is only perceivable when information interests are perceived holistically.\textsuperscript{200} A holistic approach to the conflicts often also produces a solution which, with modifications, can serve as a model for resolution of various components of the multi-faceted conflict.

This paradigm was basically true for the "new property"\textsuperscript{201} holistic approach. The guarantees of procedural appeals from the termination of government entitlements derived from the holistic approach, were apparently perceived as valuable rights by holders of the "new property" in many various contexts.

And so it may well be with informational entitlements. A possible solution to the conflict between the free access/private property values is systems of compulsory licensing to accompany the systems of entitlements. Such systems are already in place for some informational entitlements. Systems are already provided for under the Cop-

\textsuperscript{198} Reznick, Synercom Tecnology, Inc. v. University Computing Co.: Copyright Protection for Computer Formats and the Ideal Expression Dichotomy, 8 J. COMPUTER TECH. & L. 65, 84 (1980).

\textsuperscript{199} U.S. Const. Art. I, § 8, cl. 8 ("The Congress shall have power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

\textsuperscript{200} See supra notes 150-153 and accompanying text.

\textsuperscript{201} See supra notes 140-145 and accompanying text.
right Act\textsuperscript{202} for “non-dramatic musical works”\textsuperscript{203} and for retransmission of copyrighted material by cable television systems.\textsuperscript{204} Under a compulsory licensing system, when a creator arranges for an entitlement (copyright, patent or some yet-to-be-devised system of entitlement), she will receive the right to use the entitlement herself and the right to receive compensation whenever anyone else uses it. The creator will not receive exclusive rights. Therefore, the rest of the world will have access to that information while the creator is nevertheless rewarded. Thus both this society’s free access to information value and its respect for private property will be satisfied.

Professor Reich\textsuperscript{205} perceived that procedural safeguards against arbitrary or malicious interference with recipient’s rights to government largess were often ignored or non-existent. The “due process revolution”\textsuperscript{206} that followed was largely a result of judicial reaction to the “new property” perspective. That revolution applied in many new situations a legal operation that society had already found useful previously in a small number of situations.

A similar pattern may follow for intellectual entitlements. The conflict between the free access and private property values is readily perceived as pervading throughout information entitlement disputes. As with the widespread solution that the implementation of due process procedures represented to the multi-faceted “new property” problems, compulsory licensing schemes, which are in place in some informational entitlement contexts,\textsuperscript{207} may serve as a widely-used model. As a holistic new property perspective inspired a procedural due process revolution, a holistic approach to Information Age entitlements may inspire a compulsory licensing revolution.

CONCLUSION

From the study of past broad socio-economic ages, a model emerged. A given socio-economic age functions around a central resource. For the Feudal Age that central resource was land. For the Commercial Age that resource was goods to trade and for the Industrial Age, the central resource was the interlocking dual resources of manufacturing and laboring capacity. For the present-day Informa-

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\item Reich, supra note 140.
\item See supra notes 146-148 and accompanying text.
\item See supra notes 202-04 and accompanying text.
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tion Age, that central resource is information.

The model further demonstrated that society will create or modify the jurisprudential system in order to legitimatize the entitlements which individuals have to the central resource. The feudal society created a land-based legal system that legitimatized the feudal hierarchical system and reinforced the relative access each class of people had to the resource. The Commercial Age society eventually developed a law of contract which legitimatized the varying entitlements resulting from individual bargaining.

The Industrial Age had a dual-faceted central resource. Manufacturing capacity could not be utilized without laborers to run the machines and labor capacity could not work without machines to operate. The dual nature of the central resource produced a doctrinal tug-of-war as the jurisprudence of the age struggled between an individualistic/bargaining approach and a class/status approach. The individualistic thrust grew out of an emphasis on industrial development arising from the first aspect of the central resource and tended to be favored by industrial interests. Meanwhile, the working class, those possessing the second aspect of the central resource, wished to be dealt with as a group.

This Comment has observed that as history moves from one socioeconomic age to another, there is often a jurisprudence lag. Manifestations of this include the fact that the jurisprudential changes that best exemplified each age occurred toward the end of it.²⁰⁸

²⁰⁸ As discussed throughout this Comment, a sophisticated law of real property did not occur until the late stages of feudalism. The development of contract law did not occur until the eighteenth or nineteenth century, whereas the Commercial Age that inspired its creation began around the turn of the sixteenth century. Full rights to organize the industrial laboring classes did not occur until the Wagner Act was passed in 1937 though the Industrial Revolution began in earnest after the Civil War about 70 years earlier.

Looking into the future is difficult. To assist, it is wise to look to the past. Such a search for assistance from the past has been the approach of this Comment. No one knows exactly of what the jurisprudence of the Information Age will consist. But, if history teaches anything, change in the common law to accommodate the switch in
socio-economic ages will be as multi-faceted and profound as it is inevitable.

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