

The Reach of Patent Law and Institutional Competence

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TWO PHENOMENA COINCIDE IN TIME. Through the enactment of the *Bayh-Dole Act*, United States policy-makers focused on privatization of university innovation and technology transfer as central pillars in United States federal research policy.¹ At nearly the same time, the United States Supreme Court dramatically altered its previous attitude toward patent law, ruling that henceforth it would take a lead role in determining the limits of that body of law.² While some have credited these two phenomena for having sparked a biotechnology boom in the 1980s³—a highly dubious proposition factually⁴—I argue in this paper that they both result from a more fundamental change: the ascendancy of a libertarian ideology within patent law.⁵ The ascension of libertarianism as a normative base for

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1. Pub. L. No. 96-517, (1980), 35 U.S.C.A. §§ 200-212 (1984), <<http://www4.law.cornell.edu/uscode/35/200.html>> [*Bayh-Dole Act*].
 2. *Diamond v. Chakrabarty*, 447 U.S. 303, 100 S. Ct. 2204 (1980), <<http://supct.law.cornell.edu/supct/cases/447us303.htm>> [*Chakrabarty*] (holding that a genetically-modified bacterium was patentable).
 3. Stacey Berg et al., "PTO Biotechnology Patent Protection Hearing" (1994) 6:11 J. Proprietary Rts. 33 ("The patent system has played a crucial role in fueling a growing biotech industry since the Supreme Court's decision in *Diamond v. Chakrabarty*..."); Eyal Press & Jennifer Washburn, "The Kept University" *The Atlantic Monthly* (March 2000) 39 at 47 ("Walter Powell, a sociologist at the University of Arizona who has tracked the growth of the biotech industry worldwide, believes that the close links between universities and industry [due in part to the *Bayh-Dole Act*] are the principal reasons why U.S. firms now dominate the biotech market—a lesson America's competitors are taking to heart.").
 4. Eyal Press & Jennifer Washburn, *ibid.* at 54 (quoting from Paul Berg, the Nobel Prize-winning biochemist who laid the groundwork for DNA splicing, who said, "The biotech revolution itself would not have happened had the whole thing been left up to industry.... Venture-capital people steered clear of anything that didn't have obvious commercial value or short-term impact. They didn't fund the basic research that made biotechnology possible").
 5. Peter Drahos explains these developments in terms of the rise of "proprietaryism," which he describes as "a creed and an attitude which inclines its holders towards a property fundamentalism." Peter Drahos, *A Philosophy of Intellectual Property* (Aldershot, U.K.: Dartmouth, 1996) at 201. According to Drahos, proprietaryism can arise under a variety of normative theories including certain branches of libertarianism and utilitarianism. Proprietaryism consists of three beliefs: "a belief in the moral priority of property rights over other rights and interests, a belief in the first connection thesis [the person with the first connection with a good ought to have a property right in it] and the existence of a negative commons" (*ibid.* at 202). My point here is simpler: that a libertarian ideology has come to replace an approach based on "balance" formed under utilitarian theories.

patent law has brought with it subtle changes over questions such as the institutional competence of courts and the way arguments are put forward to justify the expansion of proprietary regimes to such informational goods as indigenous knowledge and genetic resources.⁶

While these changes are interesting in their own right, so is the manner in which libertarianism has entered into the discourse: through the back door. The commonly accepted justification for patent regimes—and to a large extent other intellectual property regimes—is a utilitarian one: that patents encourage would-be inventors to take the risk of investing in invention and in publishing the results of their research.⁷ Essentially, the social good—here the creation and dissemination of inventions—justifies the award of exclusive rights to inventors. In other words, we do not grant the rights because of the effort of the inventor or his or her characteristics or worth; we grant these rights as a means of manipulating the inventor to help us attain the social good.⁸

Libertarianism, on the other hand, is not premised on attaining the “social good” but on protecting an individual’s natural right to appropriate goods, including those of an intellectual variety.⁹ We ought to protect property rights, on this view, without regard to what policy-makers view as the overall public good. A libertarian view of patents is that they ought to be awarded simply because the inventor, through thought and labour, created the invention, regardless of whether the invention is socially beneficial.¹⁰

While utilitarianism and libertarianism will often lead to the same result—an inventor of a new Christmas tree stand ought to be awarded a patent right under either justification—they sometimes differ in result, such as when the public good is best attained by withholding patent rights.¹¹ At this point of conflict, legislatures and courts must make a choice between the social good and the ‘natural’ right.

In this paper I argue that instead of confronting the choice between utilitarianism and libertarianism directly, courts have been dressing their libertarianism in utilitarianism: something I call “stealth libertarianism.” Whether purposefully or unwittingly, these courts consistently fail to examine what the

6. *Ibid.* See, for example, *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79 (entered into force 29 December 1993), <<http://www.biodiv.org/convention/articles.asp?lg=O&a=cbd-08>>, article 8(j) of which reads as follows: Each Contracting Party shall, as far as possible and as appropriate:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

7. Friedrich-Karl Beier & Joseph Straus, “The Patent System and its Informational Function—Yesterday and Today” (1977) 8 *Int’l Rev. Ind. Prop. & C’right L.* 387, who conclude that patent systems are justified in terms of their encouragement of the creation, disclosure, exchange and dissemination of new technical knowledge [“The Patent System”].
8. Certain branches of utilitarianism do, as Drahos correctly points out, support a form of proprietarianism in which property rights are absolute. Drahos, *supra* note 5 at 201.
9. Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (New York: Oxford University Press, 2002) at 110–116.
10. This is not to deny, however, that certain branches of libertarianism would resist the award of patent rights on the basis that they involve government interference with the market. In fact, Locke himself may have been of this view. See Drahos, *supra* note 5 at 202.
11. See, for example, Michael A. Heller & Rebecca S. Eisenberg, “Can Patents Deter Innovation? The Anticommons in Biomedical Research” (1 May 1998) 280 *Science* 698.

social good is that the patent system ought to seek to attain. Or, more accurately, the courts assume that the social good is attained by expanding patent rights to all domains, thus ensuring that the answers provided by both a utilitarian and libertarian analysis always coincide.¹² Instead of clearly stating that they are adopting a libertarian analysis of patents, the courts can pretend that they are actually employing a utilitarian analysis.

This lack of transparency over justificatory theory is not without negative effects. As we continue to move towards a knowledge-driven economy, judges, legislators and international bodies face increasing debate and controversy over the very foundations of that economy: the control over and use of new knowledge and technologies. In distributing decision-making power over new knowledge and technologies, patent rights lie at the core of these debates. Given the importance of patent rights and the distributions they entail, one would hope that courts would provide a clear justificatory basis for their decisions. Unfortunately, this is not the case. By examining judicial determinations of the appropriate breadth of patent regimes—what Adelman *et al.* have usefully called the question of patent eligibility¹³—I argue in this paper that courts hide beyond stealth libertarianism to avoid addressing fundamental issues that society faces with respect to knowledge and innovation. In Part 1 of this paper, I outline the argument put forward by (mostly US) courts, tribunals and commentators to justify judicial resolution of questions concerning patent eligibility, and then point out the flaws in that argument. In particular, I point out the ways that current patent discourse assumes away the ethical and distributional effects of patent determinations. In Part 2, I discuss why, despite these flaws, courts continue to take jurisdiction over questions of patent eligibility, although courts had traditionally shied away from making such determinations. I also examine the role that stealth libertarianism has played in this assumption of power. Finally, in Part 3, I draw on the 2002 Supreme Court of Canada decision in *Harvard College*¹⁴ to suggest an alternative route, one based on a return to fundamental patent norms.

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1. JUDICIAL ASSUMPTION OF JURISDICTION

IT IS NOT HARD TO COLLECT judges' and commentators' statements that courts and administrative tribunals are the appropriate bodies to make determinations concerning patent eligibility. As noted by the Canadian Patent Appeal Board in 1982 after reviewing precedents in Germany, the United States and Australia,

12. It is at this point that there is a difference between proprietarianism and stealth libertarianism. While utilitarians falling within the proprietarian creed may believe in the primacy of property rights, the question of which objects fall within property—and by corollary which fall outside—must logically be made on the basis of something other than a belief in strong property rights. That is, some utilitarians may feel that, once a good is subject to property rights, those rights ought to be paramount; it is quite something else to conclude, however, that a particular set of goods ought to be subject to property rights in the first place. A utilitarian would be expected to offer some justification based on a maximization of utilities to argue for extending property rights to new sorts of goods.

13. Martin J. Adelman *et al.*, *Cases and Materials on Patent Law* (St. Paul, Minn.: West Group, 1998) at 83.

14. *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, <<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/harvard.en.html>>, [2002] 4 S.C.R. 45, [*Harvard College*].

Throughout the world various judicial bodies, without changes in legislation, have gradually altered their interpretation of statutory subject-matter to adapt it to new developments on technologies, and current concepts of industrial activity. ... Whether this was proper without legislative amendment may be arguable, but on viewing the foment of uncertainty that has been stirred up, we can no longer be satisfied that at law a patent for a micro-organism or other life forms would not be held allowable by our own Courts.¹⁵

This assumption of jurisdiction was reflected as early as 1970 when the German Federal Supreme Court, in deciding that animals were in principle patent eligible, held that determinations of patent eligibility were properly those of the judiciary even in the absence of legislative change.¹⁶ Similar arguments were implicit in the United States in the famous Supreme Court decisions in *Chakrabarty*¹⁷ and *Diehr*.¹⁸

At its most general, the argument advanced in favour of tribunals assuming jurisdiction over determinations of patent eligibility contends that these determinations are technical in nature, having to do with whether the claimed "invention" fits within the traditionally accepted criteria of novelty, inventive step (non-obviousness) and industrial application (utility).¹⁹ This argument appears straightforward until we unpack the assumptions imbedded within it. When we do, we see that the argument is, in fact, circular and thus untenable.

If we examine the case advanced in favour of the judicial assumption of jurisdiction more closely, we see that it relies on three principal sub-arguments. The first is that the question of patent eligibility is properly one of statutory interpretation. This position is supported by the second sub-argument that claims that determinations of patent eligibility are morally neutral. That is, courts and tribunals are entitled to approach the issue of patent eligibility as a technical one since such decisions implicate no fundamental political or moral principle. The third sub-argument is that courts and tribunals ought generally to support the expansion of patent law, since patent rights are essential to the continued development of technology-based industries. In other words, courts properly start with a presumption of patent eligibility, provided traditional patent criteria are satisfied.

I discuss each of these sub-arguments in the next sections.

1.1. Statutory Interpretation

The most promulgated of the three sub-arguments is the first: that determinations of patent eligibility are essentially questions of statutory interpretation. Ironically, while often stated, the argument is logically flawed in that it presumes what it seeks to prove.

15. *Re Application of Abitibi Co.*, (1982) 62 C.P.R. (2d) 81 at 88 (Pat. App. Bd.).

16. *Rote Taube* ("Red Dove"), 27 March 1969 decision of the Bundesgerichtshof, 52 Bundesgerichtshof in Zivilsachen 74, English version available in (1970) 1 Int'l Rev. Ind. Prop. & C'right L. 136 [Red Dove].

17. *Chakrabarty*, *supra* note 2.

18. *Diamond v. Diehr*, 450 U.S. 175 (1981), <<http://www.oyez.org/oyez/resource/case/1538/>> [Diehr] (holding that a process in which the novel element was the addition of a computer program is patent eligible).

19. E. Freiherr von Pechmann, "National and International Problems Concerning the Protection of Microbiological Inventions" (1972) 3 Int'l Rev. Ind. Prop. & C'right L. 295.

The argument was given its strongest form by the United States Supreme Court in the *Chakrabarty* decision of 1980. The Court advanced the argument that, as patents by their very nature cover the unforeseeable, the mere existence of patent legislation must be taken to mean that everything that could conceivably be covered by a patent falls within the scope of patent legislation. The Court formulated its positions in the following language:

This Court frequently has observed that a statute is not to be confined to the “particular [applications]...contemplated by the legislators.” This is especially true in the field of patent law. A rule that unanticipated inventions are without protection would conflict with the core concept of the patent law that anticipation undermines patentability.²⁰

Other adjudicators have picked up on this thought. In Europe, the Board of Appeal under the *European Patent Convention* followed similar reasoning in holding that the determination of whether genetically-modified animals were patent eligible was a matter of technical statutory interpretation. According to the Board,

the Examining Division did not take duly into account that Article 53(b) EPC is an exception, for certain kinds of inventions, to the general rule under Article 52(1) EPC that European patents ‘shall be’ granted for all inventions which are susceptible of industrial application, which are new and which involve an inventive step. Any such exception must, as repeatedly pointed out by the Boards of Appeal, be narrowly construed. The Examining Division has given no convincing reasons for deviating in this particular case from this principle or interpretation, nor are any such reasons apparent to the Board.²¹

Similarly, the dissenting opinion of Justice Binnie in the Supreme Court of Canada’s decision in the *Harvard College* case followed the same pattern. Justice Binnie wrote:

The proper question is not whether Parliament intended to include “oncomice” or “higher life forms” or biotechnology generally in patent legislation, but whether Parliament intended to protect “inventions” that were *not* anticipated at the time of enactment of the *Patent Act*, or indeed, at any time before the claimed invention.²²

These decisions support the proposition that the determination of patent eligibility is in essence a technical matter of statutory interpretation. Despite the centrality of this claim to the judicial assumption of jurisdiction, a closer examination of its main premises reveals an important logical incongruity. The argument starts by pointing out that patent acts around the world use the word “invention” to delimit their scope. That is, all “inventions” are patent eligible. Accordingly, given that legislatures have provided no specific meaning to the word invention, it becomes a matter of statutory interpretation to determine

20. *Chakrabarty*, *supra* note 2 at 315–316.

21. *Harvard/Onco-Mouse*, [1990] E.P.O.R. 501 (Technical Bd. App.) T 19/90 at para. 4.5 [references omitted].

22. *Harvard College*, *supra* note 14 at para. 10 [emphasis added].

whether particular classes of innovation fall within its meaning. Second, as patent legislation by its very nature applies to innovations that could not have been conceived at the time that legislation was enacted—otherwise the innovation would fail to satisfy the requirement of an inventive step or non-obviousness—courts cannot limit patent eligibility to inventions known at the date that patent statutes were passed. Third, given this, tribunals conclude that there can be no inherent limitation to what constitutes an “invention”—or what is patent eligible—under patent law, unless the legislature specifically states otherwise (as they have, for example, in Europe with respect to computer programs).²³

The flaw in this argument is that while the second proposition is true—conceivable innovations are not inventive—it does not necessarily lead to the third. In taking the step from the second proposition to the third—that there can be no inherent limits to what is patent eligible—tribunals confuse particular innovations with classes of inventions. While it is true that if a particular innovation had been previously conceivable it is not patentable, it is not true that if a class of inventions—say transportation devices—are conceivable, then particular transportation devices (provided that the particular device was not conceivable) cannot be patented. In stating otherwise, we mistakenly apply the characteristic describing the class to particular elements in that class. (Consider, for example, that simply because the group of vegetarian beef producers is small does not mean that an individual vegetarian beef producer is also necessarily small). Thus, while it is true that we cannot read patent statutes as excluding particular patent *claims* that were not conceivable when those statutes were enacted, it is perfectly plausible to read a patent statute as excluding—making patent-ineligible—particular classes of innovation from the scope of the patent statute. Thus, though to be patentable an invention must be “inventive,” it does not follow that all inventive inventions must be patentable. In asserting otherwise, courts and tribunals are committing a logical mistake in applying the form of the premise to the conclusion.²⁴ Once revealed, the general argument advanced by tribunals that we must read legislatures as *necessarily* having concluded that *all* new classes of innovation are patentable falls away. Instead, we must search for a principled way to determine questions of patent eligibility. On a purely logical basis, it is as correct to claim that the legislature intended that new classes of innovation about which it could not conceive ought not to be patent eligible as the reverse. That is, it is impossible to make any definitive statement about the legislature’s real intention concerning what all agree was something that not only did the legislature not think about but about which it could not have thought.

This problem over determining how the legislature would have acted is one that plagues not only patent law, but property law in general. We need only think back to the United States Supreme Court decision in *INS v. AP* to see the difficulties of judicial extensions of exclusive rights to new domains.²⁵ In that

23. *Convention on the Grant of European Patents* (European Patent Convention), 5 October 1973, 13 I.L.M. 271, <<http://www.european-patent-office.org/legal/epc/e/ma1.html>>.

24. This fallacious reasoning is known as “commutation of conditionals.” The error in propositional logic is evident in the following classic example: To be President you must be over 35. I am over 35 therefore I am President.

25. *International News Service v. Associated Press*, 248 U.S. 215 (1918) [*INS*].

case, the Supreme Court was asked to provide exclusive rights to publish news to one news agency, the Associated Press (“AP”) which could be used to prevent a rival news agency, the International News Service, from distributing news to its affiliated papers. The Court agreed to extend these rights to AP on the basis that they had created economic value in the news through its investment of time and effort. In a strong dissent, Justice Brandeis noted that the Court was taking a dangerous step in extending exclusive rights to a new class of goods—news—without a clear mandate from the legislature.²⁶ He stated that only the legislature, and not the courts, had the institutional competence to consider and weigh the various social effects of such an extension.²⁷ Given the important public interest imbedded in the war news, he argued that it was inappropriate for the courts themselves to expand the scope of property rights.²⁸

History suggests that Justice Brandeis, and not the majority of the Supreme Court, was correct. Today, the scope of the *INS* case has been severely limited within the so-called “hot news” doctrine, that sets out important restrictions that the *INS* facts arguably would not have satisfied.²⁹ Courts have come to recognize that the blind extension of exclusive rights to cover new classes of goods over which the public interest was, as noted by Justice Brandeis, “omnipresent” is inappropriate.³⁰

The question then becomes to what extent do decisions as to the patent eligibility of genetically-modified organisms, business methods and other new technologies raise important public interest concerns? This leads us to the second sub-argument advanced in favour of judicial determination of patent-eligibility questions: the assumed moral neutrality of patents.

1.2. Moral Neutrality

As mentioned, the second sub-argument advanced in favour of tribunals taking jurisdiction over questions of patent eligibility is that such questions do not raise important social or theoretical issues. That is, the question of patent eligibility has more to do with the internal technical coherence of patent legislation than any larger public interest. We can see evidence of this position in the United States Supreme Court decision in *Chakrabarty* where the Court held that it was not open to the Court to decide questions of “high policy” and that it was limiting itself to the morally neutral task of statutory interpretation. The Court went even further, dismissing the social and ethical importance of a decision to grant patents over genetically-engineered organisms. According to the majority,

26. *Ibid.* at 266.

27. *Ibid.* at 264–66.

28. *Ibid.* at 263.

29. *The National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2nd Cir. 1997), <<http://laws.lp.findlaw.com/2nd/967975.html>>.

30. *Supra* note 25 at 262.

[t]he grant or denial of patents on micro-organisms is not likely to put an end to genetic research or to its attendant risks. The large amount of research that has already occurred when no researcher had sure knowledge that patent protection would be available suggests that legislative or judicial fiat as to patentability will not deter the scientific mind from probing into the unknown any more than Canute could command the tides. Whether respondent's claims are patentable may determine whether research efforts are accelerated by the hope of reward or slowed by want of incentives, but that is all.³¹

Academic commentators seem to agree with this assessment.³² Crespi is perhaps the most explicit in this respect, stating that, "[p]atenting, as such, is neither wrong nor right, but could be classed as 'ethically neutral.' To refuse a patent would be a futile gesture that would not by itself stop the invention being put to practical use."³³

The importance of this isolation of patent-eligibility decisions from ethical concerns is magnified given our recognition, in the previous section, that it is no more logically sound to conclude that the legislature would have intended to extend patent eligibility to new classes of innovation than to conclude the opposite. This means that courts and tribunals must make this determination on their own, without the benefit of legislative intent with respect to the particular technology. As noted by Justice Brandeis in *INS*, however, since courts and tribunals ought to be wary about making determinations that involve a complex balancing of public interests, courts would have to step aside in favour of a legislated solution if decisions of patent eligibility were ethically charged.³⁴ This point was noted by the *Chakrabarty* majority as well:

What is more important is that we are without competence to entertain these [moral and ethical] arguments either to brush them aside as fantasies generated by fear of the unknown, or to act on them. The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives.³⁵

The problem here is that courts and tribunals cannot evade the ethical and social implications of their decisions regarding patent eligibility so easily. Claims that statutory interpretation is ethically neutral have long been suspect within the

31. *Chakrabarty*, *supra* note 2 at 317, [references omitted].

32. See, for example, R. Crespi, "Biotechnology Patenting: The Wicked Animal Must Defend Itself" (1995) 17 *Eur. I.P. Rev.* 431; Alison E. Cantor, "Using the Written Description and Enablement Requirements to Limit Biotechnology Patents" (2000) 14:1 *Harv. J.L. & Tech.* 267, <<http://jolt.law.harvard.edu/articles/pdf/14HarvJLTech267.pdf>>.

33. R. Stephen Crespi, "Biotechnology Patents and Morality" (1997) 15 *Trends in Biotechnology* 123.

34. *Supra* note 25 at 266.

35. *Chakrabarty*, *supra* note 2 at 317.

law, at least since the days of the Legal Realists.³⁶ Given the vagueness of the term “invention” and the inherent lack of legislative intent with respect to questions of patent eligibility for new classes of innovation, courts and tribunals cannot escape the fact that they are engaging in the very activity that the *Chakrabarty* court warned against. As has been pointed out elsewhere,³⁷ the decision to allocate the right to exclude others from a good has immediate ethical implications. For one, it shifts the “burden of persuasion” away from the rights holder to those who would limit the rights holder’s use of the good.³⁸ That is, the mere granting of a right to exclude brings with it the presumption that the holder of that right should not be burdened by any restriction on the use of the subject-matter of the right unless persuasive reasons exist not only (a) to impose restrictions generally but also (b) to impose the specific restrictions on the rights holder.

This double burden was obvious in *Chakrabarty*. In that case, scientists, including Nobel laureates, warned the Court of the potentially harmful environmental and health implications of encouraging research into genetically-modified organisms.³⁹ In the absence of patent rights, such concerns may have been sufficient on their own to support a legislated moratorium (there was already an informal moratorium) on research until the safety concerns had been investigated and addressed (which was subsequently done). This changed, however, once the Court agreed to grant patent rights over genetically-modified organisms. After the *Chakrabarty* decision, those concerned about the environment and health had to not only demonstrate the safety risks but had to argue why those risks were sufficient to outweigh the commercial interests of the patent holder.

Second, the grant of patent rights gives the patent holder the ability to exclude others not only from the economic benefit of the invention but other benefits as well. Recent controversies over the effect of gene patents on the availability of genetic tests illustrate this concern well. To the extent that a gene patent holder has the ability to exclude others from using that gene for the purposes of conducting a genetic test, the patent holder not only holds the right to exclude others economically, but also to exclude them from obtaining the most appropriate type of test technologically available.⁴⁰ Thus, the patent holder has rights that effectively go well beyond the economic domain and impinge on patient autonomy.

36. It is, after all, exactly this argument that the United States Supreme Court gave in 1856, in *Dred Scott v. John F.A. Sandford* (1856), 60 U.S. 393 at 405, to defend the institution of slavery:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy of these laws. The decision of that question belonged to the political or law-making power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

37. See Wendy A. Adams, “The Myth of Patent Neutrality: Patents, Animal Rights and Animal Welfare in *Commissioner of Patents v. President and Fellows of Harvard College*” (forthcoming) Can. Bus. L.J.; E. Richard Gold et al., “Shifting Lenses: Biotechnology Innovation and the Patent System” (2003) Working Paper, Robert Schuman Centre for Advanced Studies, European University Institute [“Shifting Lenses”].

38. Joseph W. Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000) at 68.

39. *Supra* note 2 at 316.

40. Richard E. Gold, Timothy A. Caulfield & Peter N. Ray, “Gene Patents and the Standard of Care” (2002) 167:3 Canadian Medical Association Journal 256, <<http://www.cmaj.ca/cgi/content/full/167/3/256>>.

All of this leads to the conclusion that, despite judicial and academic commentary to the contrary, the separation of patent-eligibility determinations from ethical and social concerns⁴¹ ignores the fact that once a class of innovation is held to be patent eligible, the very framework within which ethical concerns are addressed is fundamentally altered. This means that courts and tribunals making patent-eligibility determinations cannot rest on the claim of moral neutrality. In making these determinations, they have the obligation to advance positive reasons to find new classes of innovation patent eligible that overcome or at the very least accommodate competing ethical concerns. The argument that courts usually put forward to do this work is that patents are necessary to ensure the continued development and dissemination of innovation. We thus turn to this claim next.

1.3. *Necessity of Patent Rights*

One of the continuing refrains in both the academic and judicial discourse concerning patents is that patent rights are essential to the continued growth of the industry and that, therefore, all products of value ought to be patent eligible. Again, Crespi is perhaps clearest on this point:

The value and efficacy of the present patent system to the industries that translate both academic and industrial research into products that benefit the public cannot seriously be disputed. The same can be said of private and public funding bodies. We do not need to gather more empirical evidence to prove what is staring us in the face.⁴²

Despite this refrain, there are both normative and empirical reasons to doubt its veracity.

From a normative point of view, unless there is a good reason to do otherwise, all knowledge—including that contained in innovation—ought not to be subject to exclusive rights.⁴³ The fact that the knowledge has value—to a person or to an industry—has never been considered a sufficient reason for subjecting that knowledge to exclusive rights. Knowledge about demographics, the financial results of public corporations or where to locate a store are valuable and yet not exclusive. Justice Holmes of the United States Supreme Court noted that courts do not grant exclusive rights over things of value; courts award exclusive rights where there are specific reasons beyond mere value to do so.⁴⁴ Thus, the mere claim of economic value is an insufficient basis on which to grant patent rights.

41. See, for example, Stephen Crespi, "Patenting and Ethics: A Dubious Connection" (2003) 85 J. Pat. & Trademark Off. Soc'y 31; Cantor, *supra* note 32; Robert P. Merges, "Intellectual Property in Higher Life Forms: The Patent System and Controversial Technologies" (1988) 47 Md. L. Rev. 1051.

42. Stephen Crespi, "Models of Intellectual Property" (2002) 20 Trends in Biotechnology 451 at 451.

43. Edwin C. Hettinger, "Justifying Intellectual Property" (1989) 18 Philosophy and Public Affairs 31.

44. *Supra* note 25 at 246.

Second, despite assertions to the contrary, there is no empirical justification for the claim that patents are necessary to increase the level of innovation in several fields of technology, including biotechnology and computer programs, or to increase distribution of that innovation to the public.⁴⁵ As has been pointed out elsewhere, recent international economic research that takes into account the differences between the patent systems of different countries casts serious doubt on earlier work done in single-country closed systems that had concluded that patents have a positive effect on innovation.⁴⁶ Further, recent empirical studies on certain biotechnological innovations, such as genetic testing, support the conclusion that in some areas, patents hinder the development of, and access to, those innovations.⁴⁷

None of this argues that there may not be a potential overall positive link between the award of patent rights and increases in scientific research and dissemination of that research. Further social science research could, for example, reveal that patents play a crucial role in some or many components of the biotechnology or information technology industries. The difficulty is that with our current state of knowledge, any such assertion is no more than conjecture. Perhaps if the patent-eligibility decision were, in fact, ethically neutral, conjecture would be enough to justify courts and tribunals engaging in patent-eligibility determinations. But given the normative presumption against courts creating new exclusive rights and the ethical implications of awarding such rights over new classes of innovation, no contemporary court or tribunal can properly assume to itself this jurisdiction. The United States Supreme Court in fact, recognized this conclusion in 1978 in the following terms:

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45. R.K. Burch, P.J.D. Smith & W.P. Wheatley, "Divergent Incentives to Protect Intellectual Property: A Political Economy Analysis of North-South Welfare" (2000) 3 *Journal of World Intellectual Property* 169; Amy J. Glass, "Costly R&D and Intellectual Property Rights Protection" (2000) 19 *International Journal of Technology Management* 179; Elhanan Helpman, "Innovation, Imitation, and Intellectual Property Rights" (1993) 61 *Econometrica* 1247; Vittorio Santaniello *et al.*, *Agriculture and Intellectual Property Rights: Economic, Institutional and Implementation Issues in Biotechnology* (New York: Oxford University Press, 2001); Pamela J. Smith, "How do Foreign Patent Rights Affect U.S. Exports, Affiliate Sales, and Licenses" (2001) 55 *Journal of International Economics* 411; Pamela J. Smith, "Patent Rights and Trade: Analysis of Biological Products, Medicinals and Botanicals, and Pharmaceuticals" (2002) 84 *Amer. J. Agr. Econ.* 495; Pamela J. Smith, "Are Weak Patent Rights a Barrier to U.S. Exports?" (1999) 48 *Journal of International Economics* 151; W.M. Cohen, R.R. Nelson, & J.P. Walsh, "Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)" (February 2000) NBER Working Paper No. w7552 (Cambridge, MA: National Bureau of Economic Research); Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, D.C.: Institute for International Economics, 2000); Bronwyn H. Hall & Rosemarie Ham Ziedonis, "The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry, 1979-1995" (2001) 32 *RAND Journal of Economics* 101; Mariko Sakakibara & Lee Branstetter, "Do Stronger Patents Induce More Innovation? Evidence From the 1988 Japanese Patent Law Reforms" (2001) 32 *RAND Journal of Economics* 77; James Besson & Eric Maskin, "Sequential Innovation, Patents, and Imitation," Working Paper No. 00-01 (Cambridge, MA: Massachusetts Institute of Technology, Department of Economics, 2000), <<http://www.researchoninnovation.org/patent.pdf>>; Robert Hunt, "Patent Reform: A Mixed Blessing for the U.S. Economy?" *Business Review—Federal Reserve Bank of Philadelphia* (Nov-Dec 1999) 15.
46. See *e.g.* "Shifting Lenses", *supra* note 37; E. Richard Gold *et al.*, "Needed: Models of Biotechnology Intellectual Property" (August 2002) 20:8 *Trends in Biotechnology* 327.
47. Jon F. Merz *et al.*, "Diagnostic Testing Fails the Test: The Pitfalls Of Patents Are Illustrated by the Case of Haemochromatosis" (2002) 415 *Nature* 577; Mildred K. Cho *et al.*, "Effects of Patents and Licenses on the Provision of Clinical Genetic Testing Services" (2003) 5:1 *Journal of Molecular Diagnostics* 3.

It is our duty to construe the patent statutes as they now read, in light of our prior precedents, and we must proceed cautiously when we are asked to extend patent rights into areas wholly unforeseen by Congress. As Mr. Justice White explained in writing for the Court:

[W]e should not expand patent rights by overruling or modifying our prior cases construing the patent statutes, unless the argument for expansion of privilege is based on more than mere inference from ambiguous statutory language. We would require a clear and certain signal from Congress before approving the position of a litigant who, as respondent here, argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought. No such signal legitimizes respondent's position in this litigation.⁴⁸

The traditional approach of courts, as reflected in *Parker v. Flook*⁴⁹ and in the line of cases limiting *INS*, is that courts should not engage in the balancing of complex public interests without a strong signal from the legislature to do so. As we have seen, no such strong signal exists with respect to patent-eligibility determinations. Yet courts and tribunals beginning in *Red Dove*, and continuing through to *Chakrabarty* and the European Patent Office's *Harvard College* decision, abandoned the traditional approach of judicial caution in favour of the logically tenuous current approach.

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2. REVISIONIST COURTS AND STEALTH LIBERTARIANISM

GIVEN THE ABOVE CONCLUSIONS, a narrow, technical approach to questions of the patent eligibility of new technologies is suspect. The sudden shift in judicial policy toward the judicial assumption of jurisdiction over what were previously considered political matters requires explanation. The most likely explanation for the re-framing of patent-eligibility decisions as a technical question of statutory interpretation is the advent of "stealth libertarianism." Recall that libertarianism holds that the free market is a natural right, so that its distributive results are inherently just. Unlike its more open variety, I define stealth libertarianism as libertarianism that hides itself as something else. In the area of innovation, stealth libertarianism cloaks itself in the mantle of utilitarianism.

To fully appreciate this position, we need to supplement our discussion with a little history. Virtually all English intellectual property law and, apart from certain aspects of copyright law, the majority of European intellectual property law rests on utilitarian arguments. Since the beginning of the modern patent age at the very end of the eighteenth century, countries have premised their patent laws on maximizing social welfare. The argument has been that patent rights provide an essential set of incentives to encourage innovation⁵⁰ and disclosure. In

48. *Parker v. Flook*, 437 U.S. 584 at 596 (1978), 98 S. Ct. 2522, 57 L. Ed. 2d 451.

49. *Ibid.*

50. "The Patent System," *supra* note 7.

other words, the proponents of the regime argue that patent rights are a necessary evil to achieve overall social welfare. The UK Commission recognized this point on Intellectual Property Rights:

[A]n IP right is best viewed as one of the means by which nations and societies can help to promote the fulfillment of human economic and social rights. In particular, there are no circumstances in which the most fundamental human rights should be subordinated to the requirements of IP protection.⁵¹

Stealth libertarians have turned this utilitarian calculus on its head. Instead of viewing patent rights as a tool to promote social welfare, stealth libertarians depict intellectual property as an end in itself. This inversion is evident in the hollow manner in which revisionist courts assert the necessity of patent rights. As noted above, courts merely affirm the desirability of patents: rather than asking whether and how patent rights actually encourage inventive activity and dissemination of innovations, courts have simply presumed that they do so in the absence of, and sometimes against, actual evidence.

This attitude was certainly in evidence in the *Chakrabarty* decision but also underlies a significant amount of the discussion of intellectual property on the Internet and in international trade circles. Additional support for this claim may be found in the courts' explicit refusal to consider public policy concerns in patent-eligibility determinations. In basing their jurisdiction on such false premises as the moral neutrality of patent decisions, the courts shirk their responsibility to ensure that their decisions address the social and ethical context in which technology presents itself.

The courts' willingness to abandon their traditional deference to the legislature and to acknowledge that legislatures are better suited to balance social and ethical concerns arising from the expansion of patent law is illustrated by one of the key arguments that the United States Supreme Court advanced in *Chakrabarty*. There, the Court argued that it should not read limits to the scope of patent legislation as follows: "We have also cautioned that courts should not read into the patent laws limitations and conditions which the legislature has not expressed."⁵² The Court cited the case of *United States v. Dubilier Condenser Corp.* for this proposition.⁵³ Yet, far from supporting the expansion of judicial power over patent law, the full quotation from the *Dubilier* Court actually argues against the *Chakrabarty* Court's conclusion:

51. United Kingdom, Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: Commission on Intellectual Property Rights, September 2002) at 18, <http://www.iprcommission.org/graphic/documents/final_report.htm>.

52. *Chakrabarty*, *supra* note 2 at 308.

53. 284 U.S. 178 at 199 (1932) [*Dubilier*].

The courts ought not to declare any such policy; its formulation belongs solely to the Congress. Will permission to an employee to enjoy patent rights as against all others than the government tend to the improvement of the public service by attracting a higher class of employees? Is there in fact greater benefit to the people in a dedication to the public of inventions conceived by officers of government, than in their exploitation under patents by private industry? Should certain classes of invention be treated in one way and other classes differently? These are not legal questions, which courts are competent to answer. They are practical questions, and the decision as to what will accomplish the greatest good for the inventor, the Government, and the public rests with the Congress. *We should not read into the patent laws limitations and conditions which the legislature has not expressed.*⁵⁴

The purposeful omission of broader social considerations, coupled with a blind acceptance of the desirability of patents, belies a hidden libertarian agenda that favours existing distributions of wealth. In their framing of the internal logic of patent rights, revisionist courts overemphasize the private incentive aspect of innovation while downplaying the social returns from this innovation. In the process, they neglect the needs of researchers, the public and lower-income countries. With increasing frequency, researchers must choose between seeing their inventions brought to the public through private companies, and preserving their status of being free from conflicts of interest. The general public is seeing its access to the public domain continually diminished by expanding claims over electronic and biological technologies. Developing nations only barely gained the ability to secure access to patented health products, such as AIDS medications.⁵⁵ In short, the judicial assumption of jurisdiction of patent-eligibility determinations has permitted a shift in the benefits of new technologies away from users and lower-income countries in favour of technology producers and developed countries. This support for the existing distribution of goods underscores the real danger of stealth libertarianism: it couches the increasing divergence between patent law and the values it is meant to protect.

Despite the increasing power of stealth libertarianism, the Supreme Court of Canada has so far resisted it. As we see in Part 3, the Supreme Court explicitly rejected the revisionist approach in the *Harvard College* case⁵⁶ and returned to tradition by leaving patent-eligibility determinations to the legislature.

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3. LEGISLATIVE COMPETENCE: THE SUPREME COURT AND THE HARVARD MOUSE

THE FACTS OF THE *HARVARD COLLEGE* CASE begin with research conducted at Harvard College by Leder and Stewart in the 1980s. These researchers geneti-

54. *Ibid.* at 198–199 [emphasis added].

55. See generally World Trade Organization, General Council, “Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health” 30 August 2003, WTO Doc. WT/L/540, <http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm>.

56. *Harvard College*, *supra* note 14.

cally modified a mouse so that it was more prone to contract cancer.⁵⁷ As the modified gene was incorporated into both somatic and germ cells, the mouse was able to transmit this characteristic to its offspring. The purpose of creating such mice was to provide a way to test suspected carcinogens as well as suspected treatments for cancer.⁵⁸

Harvard College applied for a United States patent over genetically-modified mammals containing an oncogene in their somatic and germ cells. The United States Patent & Trademark Office granted this patent in 1988.⁵⁹ Harvard similarly applied for patents over these mammals at the European Patent Office and what is now the Canadian Intellectual Property Office. The European Patent Office, following an appeal by Harvard, issued the patent in 1992.⁶⁰ Greenpeace and others filed an opposition that was not resolved until the fall of 2001 when the Appeal Board upheld the patent but restricted the claims to cover only rodents, not all mammals.⁶¹ In Canada, the patent examiner assigned to the file rejected the inventors' claims over the genetically-modified animal in 1993 on the basis that animals were not patent eligible. The Patent Commissioner and the Patent Appeal Board in 1995 confirmed this decision. The Federal Court, Trial Division, rejected the appeal from this decision in 1998, holding that complex life forms are not patent eligible for a variety of technical reasons. The Federal Court of Appeal reversed this decision in 2000, citing the United States Supreme Court decision in *Chakrabarty* with approval.⁶²

At approximately the same time as the Federal Court of Appeal was considering the *Harvard College* case, the Canadian Biotechnology Advisory Committee ("CBAC"), an independent Committee of experts established by the Canadian government, decided to examine the policies Canada ought to have with respect to the patenting of higher life forms. CBAC commissioned studies during 2000 and held stakeholder meetings in 2001 before issuing an interim report in the fall of 2001. After requesting comments, the CBAC issued its final report on the subject in June 2002, just after the *Harvard College* appeal had been argued before the Supreme Court of Canada but before that Court issued its decision.⁶³

The CBAC explored the issue of higher life form patents within a broad policy framework, taking into account the purpose of the patent system, the needs of Canadian society and ethical concerns. It framed the general purpose of patent legislation as follows:

57. *Transgenic non-human mammals*, European Patent Office Patent Number EP0169672 (1992) [Transgenic EPO Patent].

58. *Ibid.*

59. *Transgenic non-human mammals*, United States Patent & Trademark Office Patent Number 4,736,866 (1988).

60. Transgenic EPO Patent, *supra* note 57.

61. Alison Abbott, "Harvard Squeaks Through Oncomouse Patent Appeal" (2001) 414 *Nature* 241.

62. *Harvard College*, *supra* note 14.

63. Canada, Canadian Biotechnology Advisory Committee, *Patenting of Higher Life Forms and Related Issues*

The patent system...aims at attaining the public good. This matches the principle of justice, which we define in part as "a commitment to ensure a fair distribution of benefits and burdens." The patent system attains this goal by providing inventors with a sufficient incentive—but not more than sufficient—to disclose their inventions and to make their inventions available to the public. Therefore, except where their grant indicates a lack of appropriate respect for the subject-matter of the patent right—as in the case of the human body—patent rights ought not be judged in and of themselves but in terms of their effects on society as a whole. This involves a balancing of interests of the various stakeholders in any given field of endeavour such as biotechnology. In other words, the formulation of patent policy with respect to higher life forms calls for commitment to justice.⁶⁴

While finally recommending that higher life forms, other than human beings, ought to be patent eligible, the CBAC was careful to state that this should only occur if certain safeguards were simultaneously incorporated into the *Patent Act*. That is, the CBAC was adamant that the decision concerning the patent eligibility of higher life forms be directly linked with the incorporation of counter-balancing measures within the *Patent Act*:

We propose a series of recommendations designed, on the one hand, to extend patent coverage to higher life forms and, on the other, to ensure that the scope of the patent rights granted is no greater than the patent right granted over other, non-biological, inventions. *In order to achieve this goal, it is essential that Recommendation 2 [the recommendation that higher life forms be patent eligible] be read together with Recommendations 3, 4, 5, 10 and 13 (farmers' privilege, protection for innocent bystanders, research and experimental use exception, guidelines for biological inventions, and establishment of an opposition procedure).*⁶⁵

The CBAC's approach to the question of the patent eligibility of genetically-engineered life forms is noteworthy for a number of reasons. By establishing for itself a mandate of studying biotechnology in the context in which it is developed and used, the Committee was able to look at the social and ethical environment in which technology operates. Rather than dismissing the social and moral implications of patent rights as in-existent or irrelevant, the CBAC engaged in its analysis of patent law with an eye towards the broader considerations of awarding patents in biological material. In this respect, the CBAC's report presents an example of policy makers succeeding where courts and commentators have fallen short.⁶⁶ That is, revisionist courts neglect the more fundamental issues posed by new technologies by continuing to ask narrow questions. As noted in the introduction, responsible regulation of technology involves asking

(Ottawa: Canadian Biotechnology Advisory Committee, June 2002), <<http://www.cbac-cccb.ca/epic/Internet/incbac-cccb.nsf/vwGeneratedInterE/ah00188e.html>>.

64. *Ibid.* at 8.

65. *Ibid.* at 12.

66. Other examples of policy-makers outperforming judges and academics can also be found. See, for example, Ontario, Ministry of Health, *Genetics, Testing & Gene Patenting: Charting New Territory in Healthcare*, <http://www.gov.on.ca:80/MOH/english/pub/ministry/geneticsrep02/report_e.pdf>; UK *Commission on Intellectual Property Rights*, *supra* note 51.

what constitutes a just distribution of the benefits that this new technology entails. The CBAC's report implicitly acknowledges this concern in its balancing of patent rights against a number of countervailing interests.

Not surprisingly, the CBAC argued that given this need to balance, a legislated, rather than a judicial, resolution was needed to decide whether higher life forms are patent eligible. The CBAC's report states that "[e]ven if the courts could technically develop answers to what can and cannot be patented and could formulate the necessary rules to implement that decision, the principles of accountability and autonomy call for a parliamentary solution."⁶⁷

The timing of the CBAC's report made it eligible for consideration by the Supreme Court of Canada in the *Harvard College* case. In fact, in its December 2002 decision, the majority of the Supreme Court of Canada echoed CBAC's argument that a legislated, and not a judicial, solution was needed. Thus, a majority of five of the Court's nine members reversed the Federal Court of Appeal ruling and held that higher life forms—including animals, plants and seeds—were not patent eligible in Canada.

Unlike their counterparts in the United States and Europe, the majority in the Supreme Court of Canada took seriously the issue of judicial competence over determinations of patent eligibility. In reviewing the concerns raised about the different nature and effect of patents over higher life forms, the majority concluded that determinations of patent eligibility involve a complex balancing of interests that only the legislature could resolve. In doing so, the majority drew on the CBAC's report and its conclusion that patent-eligibility decisions are deeply interconnected with other changes that need to be made to the *Patent Act*:

Owing to the fact that the patenting of higher life forms is a highly contentious and complex matter that raises serious practical, ethical and environmental concerns that the Act does not contemplate, I conclude that the Commissioner was correct to reject the patent application. This is a policy issue that raises questions of great significance and importance and that would appear to require a dramatic expansion of the traditional patent regime. Absent explicit legislative direction, the Court should not order the Commissioner to grant a patent on a higher life form.⁶⁸

Later in its judgment, the majority was even more explicit about its lack of institutional competence to make determinations of patent eligibility:

As noted above, only Parliament is in the position to respond to the concerns associated with the patenting of all higher life forms, should it wish to do so, by creating a complex legislative scheme as in the case of crossbred plants or by amending the *Patent Act*. Conversely, it is beyond the competence of this Court to address in a comprehensive fashion the issues associated with the patentability of higher life forms.⁶⁹

67. *Supra* note 63 at 7.

68. *Harvard College*, *supra* note 14 at para. 155.

69. *Ibid.* at para. 196.

These quotes emphasize the importance that the Court placed on the issue of judicial competence. Unlike courts in the United States and in Europe, the majority recognized that the *Patent Act* itself was silent on parliamentary intent and that arguments could be made one way or another about what Parliament would have done if it had been confronted with the issue of the patent eligibility of higher life forms. On this point, the majority concluded that "the respondent's argument that the object of the Act leads inexorably to the broadest reading of the definition of invention possible is problematic and is, in my view, based on an oversimplification of the patent regime."⁷⁰ The majority also recognized that patent-eligibility determinations bring with them important social and ethical consequences. According to the majority, these included the rights of farmers to reuse seed and to be free from unintentional patent infringement, the possible inhibiting effect of patents on other research, and the appropriate recognition of the non-patent eligibility of human beings. Taken as a whole, the majority's opinion provides a sound critique of the view that courts are not only competent to make patent eligibility decisions, but that they ought to exercise that competence by enlarging the scope of patent eligibility as far as the technical rules of patent law permit.

The *Harvard College* decision is of particular relevance to developing countries whose courts have yet to make determinations as to the patent eligibility of the products of biotechnology. By following the example of the Supreme Court of Canada, courts in these countries may avoid the institutional difficulties engendered from an overly ambitious enlargement of judicial jurisdiction. The positive implications of both the majority decision in *Harvard College* and the CBAC's report suggest that, due to their contentious nature, patent-eligibility determinations must be made within the particular context in which innovation takes place and is used. Accordingly, the question of whether particular forms of technology ought to be patent eligible requires a complex balancing of factors specific to the technology and its application to and effect on society. In representative democracies, only the legislature is institutionally competent to weigh the competing social policy goals at play in such decisions.

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4. CONCLUSION

WHILE COURTS HAVE TRADITIONALLY RECOGNIZED the dangers of extending, by judicial fiat, exclusive rights to cover new classes of innovation, courts and tribunals in the United States and Europe in the 1970s and 1980s rejected this authority by finding themselves competent to determine which classes of goods ought to be subject to patent rights. This course of conduct, started in the United States in the *Chakrabarty* decision, found its apogee in the Federal Court of Appeals for the Federal Circuit decision in *State Street Bank* when the court found that business methods were patent eligible.⁷¹

70. *Ibid.* at para. 186.

71. *State Street Bank & Trust Co. v. Signature Financial Group*, 149 F.3d 1368 (Fed. Cir. 1998), 47 U.S.P.Q. 2D (BNA) 1596 (Fed. Cir. 1998), <<http://www.law.emory.edu/fedcircuit/july98/96-1327.wpd.html>>.

Rather than recognizing that determinations concerning patent eligibility give rise directly to ethical and social consequences, these courts have acted as if they were simply interpreting positive law. Instead of evaluating the social good as it relates to new classes of innovation, libertarian courts couch their desire to grant exclusive rights in utilitarian rhetoric. Unproven pronouncements regarding the value of patents are used to gloss over flawed logic and unsound idioms. This presumption of utility (in the sense used in utilitarianism and not patent law) does more than just tip the scales in favour of patent eligibility. It is the Trojan horse used by stealth libertarians to impose a libertarian theory of patent rights.

By obfuscating means and ends, revisionist courts end up assuming what they set out to determine. This approach allows courts to skirt possible conflicts between competing policy interests. The utilitarian concern for the social good is artificially made to coincide with the libertarian belief in natural rights in property. In this manner, courts justify their technical approach to questions of patent eligibility by creating the appearance of aligned and harmonious policy considerations.

As noted, given the nature and implications of new innovations, such a narrow approach must be treated with suspicion. If we believe that a just and responsible distribution of new technologies involves broader considerations—such as who ought to be able to use the technology, for what purposes and in what circumstances—we must acknowledge that the question of patent eligibility is not simply technical, but also ethical. Stealth libertarianism then proves problematic, even dangerous, because it fails to genuinely confront public policy concerns. The resulting risk is that patent-eligibility determinations will become divorced from the values that underlie patent law.

Perhaps the most apt antidote to this problem was set out by philosopher Charles Taylor when he asserted:

What our situation seems to call for is a complex, many-levelled struggle...in which the debates in the public arena interlink with those in a host of institutional settings...and here these disputes both feed and are fed by the various attempts to define the place of technology and the demands of authenticity and beyond that, the shape of human life and its relation to the cosmos.⁷²

For lawyers, academics, courts and legislators, this means investigating the way that the legal system as a whole—from its distributional base in property law, to its human rights implications in international human rights law—helps to shape the social, ethical and economic implications of technology. In the end, given the multiple and multifarious competing interests at stake in determinations of patent eligibility, the judiciary lacks both the capacity and the competence to resolve such issues.

In resisting the revisionist trend, the Supreme Court of Canada's decision in *Harvard College* evidences a return to traditional judicial concern over the appropriate role that courts ought to play in "finding" new exclusive rights. The Court noted that judiciary and administrative bodies are ill equipped to make

72. Charles Taylor, *The Malaise of Modernity* (Toronto: House of Anansi Press, 1999) at 120.

these determinations. In so doing, the Court reminds us of the need to examine the purpose of patent legislation and the social context in which it acts.

The decision marks an important step in a return to a more holistic and responsible approach to new technologies. Patent-eligibility determinations involve fundamental notions of institutional competence and respect for democratic processes. Given the potential inherent in new knowledge and innovations, any justificatory theory that rationalizes forms of control and particular distributions must not only be transparent, but constantly re-assessed. We must ensure that our patent laws both create and reflect desired social outcomes as determined by enlightened and competent authorities. Only in this way can we avoid the dangers inherent in narrow, technical approaches. Only in this way can we guarantee a more just use of new technology.