THE AUTHORITY OF LAW IN TIMES OF CYBERSPACe

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As the Internet grows ever more pervasive, the debate continues over what ought to be the proper relationship between existing law and this new virtual realm called “cyberspace.” In this Article, Professor Mayer-Schönberger examines the question from a postmodern perspective and presents his arguments in a unique format comprised of a four-act play to better convey the emotional aspects of the debate and its potential for variable outcomes. The acts are set around only two characters: “authority of law,” which represents “the law” and all its attendant social processes, and “cyberspace,” which represents both the physical and communicative structures of that realm. Each of the four acts represents a different view of the relationship between “the law” and “cyberspace.”

Act One depicts a struggle between law and cyberspace that arises from the view that cyberspace is either a sleazy, ruleless place in need of cleaning up, or an extension of the real world. In both cases, law must triumph and subjugate cyberspace so that safety is restored or to prevent unfairness from the uneven application of rules between the real and virtual worlds. The characters again do battle in Act Two, but this time cyberspace is the victor, vanquishing law and replacing it with a regulatory framework dictated by the information infrastructure. In Act Three, law and cyberspace coexist, not by cooperating, but by de-coupling from each other. Both retain authority in its own area, with cyberspace existing outside the law, either lawless or open for self-regulation. The last act, Act Four, represents the author’s view of the true nature of the relationship between the two characters. For the first time, we see law and cyberspace engage in communicative behavior, and the ensuing dialogue reinforces, yet also displaces, law. Law is reinforced through implementation in a new realm, but it is displaced through lack of individual accountability and participation, erosion of individual and social memory, and disruption of the status quo.

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Thus, the author sees law being subtly undermined and transformed by the interaction with cyberspace.

Over the course of only a few years, "cyberspace," the virtual space created by the existence of the Internet, has turned into a household word. "On the net" has become the stereotypical answer to the question, "Where are things happening?" Life, it seems, must be made bearable by adding the prefix "cyber" to everything. Indeed, there is a term describing this phenomenon of cyber-philia, net-mania, and web-phoria: cyber-hype.1 Some early net advocates have already changed sides and now attack the information infrastructures for not delivering what in cyber-hype everyone is expecting. For example, hacker hero Clifford Stoll provides polemic frontal assaults against the net.2 But I do not, for the purpose of this Article, want to indulge in superficial cyber-bashing. Instead, I will focus on one aspect of cyberspace: its connection with and influence on the authority of law. Much ink has been spilled,3 including some of my own,4 in law review articles analyzing the application of real life rules, i.e., "the law," to cases arising in the more virtual realm of cyberspace. Most of these works focus on specific problems of extending the reach of traditional national legal rules to the Internet.5 What is rarely discussed in these articles is their underlying assumption that cyberspace cannot remain outside the scope of legal rules.6

In contrast, this Article is devoted to the simple question of how cyberspace and the authority of law may interact. My attack on conventional wisdoms then, if it classifies as an attack at all, is a meta-level, indirect attack. The following Article describes four scenes. Each of these scenes represents a specific way of thinking about the relationship between cyberspace and legal authority. To dramatize the

6. A minority of authors however have argued eloquently that the interface between legal rules created for our real world and the virtual world of cyberspace is not as mono-dimensional as the majority assumes. In fact, they suggest that cyberspace may be outside the existing legal system. See infra Act Three.
possible scenarios, both "cyberspace" and the "authority of law" are personified. As persons, they can be imagined to live, to experience their struggle. Each description of a scene is accompanied by a short analysis—a few related, but certainly incomplete thoughts.

This Article does not take sides. In this sense it is not argumentative. The metaphor of a play is used to create emotional pictures and to communicate the permutations of outcomes. But it is also used to show that these debates over possible outcomes are themselves just individual pearls (or knots?) of a long string. This Article has a post-modern bend, and not only insofar as it is meant to be an assault on overly simplistic images of the nature of law in cyberspace. As such it is playful, imaginary, and un-real.

SETTING THE STAGE & INTRODUCING THE CAST

The stage is a vast empty space with no predefined size, shape, or other dimension. In the following I will use, knowingly, a rather simplistic set of assumptions to better define the actors and activities on stage.

First, "doing law" is portrayed here as a social integratory tool, a kind of practice, a custom in which we all participate in a largely formalized, constantly reiterating and self-replicating exchange of what is right and what is wrong. It is an act of continuous repetition of bits of itself in mostly formalized arguments within a never-ending stream of dialogue that forms what we so happily label the "legal discourse." "Doing law" then reinforces its own authority and the authority of what we somewhat mystifyingly call "the law." The authority of law is dependent upon the existence and continuation of this social practice. When the "authority of law" appears on stage, it does not only represent

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8. This is based on the Habermasian notion of communication as the central societal process. See generally 2 JÜRGEN HABERMAS, LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., Beacon Press ed. 1987) (1981); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (explaining process-perfectionism similar to the process emphasis in Habermasian communicative theory).


10. Somek, supra note 9, at 779.


12. Somek, supra note 9, at 769 (citing RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (1985)).

13. Derrida, supra note 11, at 929.

the force of law, it represents the entire social practice of “doing law,” of continuing the formalized societal debate about right and wrong.

“Cyberspace,” on the other hand, is envisioned as a consequence of the existence of a technological artifact, a global information infrastructure called the Internet. But it is also a communicative space, and its communicative structure is not a “neutral container.” What can and cannot be communicated in this “cyberspace” is shaped by its structure, by the way it is created and functions.

To be sure, I do not advocate a simple model here of the technological structure impacting on society, like ricocheting billiard balls, or that society itself molds the technological structures, that technology is an expression of culture. Rather, I caution for a more indeterminate view, or “social constructivism,” in that technological structures, like the net and society, influence each other without imposing a certain and determinate change or outcome on one another. The information infrastructure then is a communicative space that— itself influenced by society—functions as a “material force that reflects back upon social processes.”

These two groups of assumptions on law and communicative structures provide the cast for the following “play,” in four acts.

15. This is, of course, not completely accurate. Arguably some kinds of cyberspace existed even outside the Internet, on bulletin board systems, restricted early online services like Compuserve, The Source, Prodigy, the European Videotex, or the French Minitel system.


19. This is the title of the seminal work by WIEBE BIJKER et al. eds., SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS (1987). See also CLAUDE FISHER, AMERICA CALLING—A SOCIAL HISTORY OF THE TELEPHONY TO 1940 16 (1992).


ACT ONE: COLLISION COURSE

The stage is empty, except for a middle-aged white male in conventional dress, sitting on a better-than-average chair in the middle of the stage. He is talking to himself, over and over again, advancing arguments that sound somewhat similar. They are combined into a long stream of mumbled utterances. A strange kind of internal dialogue is taking place, and it seems the repetition has an encouraging, even energizing effect upon the actor. Him I want to call the “authority of law,” or simply “authority.”

From the left enters an object of strange appearance, a person veiled in white linen, undefined and indefinable, headed towards the actor. “Cyberspace” this is.

Slowly at first, then harder and more intensely, they start to quarrel, then to fight. When the confrontation ends, “authority” returns to its chair, starting his recitation anew, now with “cyberspace” following suit on all fours, like a faithful pet trailing its master.

In this first scenario, cyberspace is described as an open challenge to the authority of law. Rising to the challenge, “authority of law” fights back—and wins. “Authority” continues to do what it has always done while cyberspace has been subjugated to being just an additional instance of reality, an appendix to which the existing system, the traditional norms, are easily extended. And, its subordination symbolizes the acceptance of the law as the authority and of cyberspace existing under it, neither next to, nor above it.

The struggle of law against cyberspace can come in two “flavors.” One is to look at cyberspace as the metaphorical seedy, dark alley, in which porn is produced, children are molested, drugs are dealt, and mob money is laundered while average citizens lose their belongings in illegal gambling and widespread credit card fraud. Conceived in such a fashion, cyberspace is in desperate need of a cleanup, of tough measures to clear out the smut and crime. “The law” should provide the tools to do so, but cyberspace is an exception to reality and to the rule of law. It is seen as a true challenge to the existing legal authority. New, tough laws are needed to tame it, to subjugate this exception and meet its not-so-implicit challenge. Adherents to this view advocate for specific


23. Senator Grassley (R) proclaimed in the congressional debate about the CDA: “83.5 percent of all computerized photographs available on the Internet are pornographic, according to the Carnegie Mellon study.” 141 CONG. REC. S9017-02 (daily ed. June 26, 1995) (statement of Senator Grassley).

The co-sponsor of the bill, Senator Exon (D), made his motives clear: “It is my intention to point out to the U.S. Senate some of what I think is highly improper, what I think is eroding the society and will continue to erode the society of America, unless we have the courage to stand up and do something about it, despite the minority of naysayers in the United States of America who do not want to change anything.” 141 CONG. REC. S8087-04 (daily ed. June 12, 1995) (statement of Sen. Exon).
"cyberlaws" to bring cyberspace in line, to break its resistance, and thus guarantee society's well-being.

The Communications Decency Act ("CDA") and the Child Online Protection Act ("COPA") are good examples of such an approach. For Congress, it was not sufficient that pornography was already regulated in federal and state laws. Congress deemed it necessary to also outlaw constitutionally-protected indecent speech accessible to minors, but without clearly defining what indecent speech was. The legislative attempt to prohibit more online than offline speech was what ultimately made the Supreme Court invalidate the CDA. The Court found unconvincing the reasons suggested by the government for this legislative exceptionalism. But the exceptionalism was not a legislative accident. On the contrary, congressional aids deliberately portrayed cyberspace as a lawless place in need of subjugation. Disgusting pictures of molested children were shown to wavering legislators shortly before the congressional votes. The subtext was clear: the CDA will sweep clean this seedy cyberspace.

Legislators learned little from the CDA's failure to pass constitutional muster. Almost as if on a mission, Congress later passed COPA, only to be told again that it was unconstitutional. CDA and COPA are not singular incidents. Similar laws have been passed all over the world (and, unfortunately, so far only some have been invalidated by a high court).

However, not all people comfortable with the outcome of this first scenario necessarily fall into the category of the exceptionalists. There is a much more mainstream interpretation of this outcome as well. It is the view that cyberspace, while a communicative place, is not outside our real world. Even though in a virtual space, it is still real people in real places who are engaged in real conversations. Their actions, even if they are only communicative, must have the same consequences as in real life.

29. Id. at 877-78.
32. See ACLU v. Reno, 217 F.3d 162, 175 (3d Cir. 2000).
According to this thinking, cyberspace is not an exception in need of exceptional rules, rather the contrary. It is but an extension of the real world. Not applying real world rules to it would only create a dangerous unevenness. The path to victory for the authority of law is not to add special rules to the existing legal framework and thereby implicitly accept the “otherness” of cyberspace. Accepting this “otherness” would create the very “monster,” a cyberspace outside the real world and its rules, that one is trying to combat. The logical step then is to deny cyberspace its special role, extend the existing legal regime to it, and thus deprive it of a reason for special treatment.

Adherents to this first scenario differ in their analysis, means, and method. But they do not differ in their desire to see the “authority of law” win over cyberspace. Regardless of important differentiating details, for both views described above, the overall position is clear: cyberspace is undermining existing authority. The consequential subordination is a necessary symbolic act within the discourse of law—to reinforce the authoritative claim of the law. Like any good Hollywood movie, even the outcome is predictable from the outset. The challenger is destined to lose the challenge. In the end, “authority” not only remains intact but emerges reinforced.

ACT 2: ALMOST DÉJÀ VU

The beginning is familiar. The actor on its chair, reciting, is “authority of law” at work. “Cyberspace” enters from the side. A short moment of tranquility follows. Then tension slowly mounts, followed by struggle, fight, and battle.

While both are struggling, “cyberspace” suddenly pulls a gun, firing a single shot. The “authority of law” is hit, falls over—dead. “Cyberspace” dominates the stage, whistling to itself a new, original tune.

Victory of existing authority is only one of the possible outcomes. Some predict that instead of the newcomer, the “old system” is more prone to collapsing.

In this scenario—similar to the first and unlike the following one—the fate of both “authority” and “cyberspace” are intertwined, linked to one another. If one wins, the other must lose.

Consequently, commentators of this viewpoint do not argue that cyberspace is a ruleless place. Rather they assume that in cyberspace a functioning substitute exists for the real-life law and its enforcement.
structures. Thus, law in cyberspace is no longer effective or even necessary.

Mitchell, for example, suggests that cyberspace will not create a new "legal system" or an "authority-facilitating" discourse. Instead the information infrastructure already embodies through its technical components a set of rules, hard-coded. The physical and organizational structure of the net, exemplified through computer code, then is the new "regulatory framework" in the communicative space. Reidenberg has advanced a similar viewpoint. And Samarajiva’s dictum that cyberspace is "no neutral container," too, points at the rule-making capacity of the communicative structure itself.

But by far the most eloquent and popular representative of this line of thinking is Lawrence Lessig. He has not only made popular the shorthand "[software] [c]ode is law," but also detailed his view in a recent, at times bleak, book called "Code: and Other Laws in Cyberspace." According to Lessig, we already have substituted legitimate democratic rule-making in cyberspace with intransparent software code written by some unaccountable programmer within a profit-oriented company. Worse yet, Lessig argues that not only have we as a society ceded control to the coders of cyberspace, we also have given up the will to influence the coders. We are content, he maintains, with the fact that code is law in cyberspace, and this code is produced as part of an illegitimate, intransparent process. He closes his book with a dark, sad prediction: "[W]e are no more ready for this revolution than the Soviets were ready for theirs. We, like [the Soviets], have been caught by a revolution. But we, unlike they, have something to lose."

This is but another way to say that the authority of law, as the symbol for legitimate societal governance, struggles with cyberspace, fights, dies—and is replaced by structural rules, by software code. What is lost is legitimacy, the notion of societal involvement in the practice of applying the rules, of "doing law."

38. Mitchell calls these rules "coded conditionals." Id. at 111.
42. Id.
43. Id. at 39-60.
44. Id. at 61-110.
45. Id. at 220-25.
46. LESSIG, supra note 41, at 234.
Not everybody writing on the power of code is as bleak as Lessig. Andrew Shapiro bases his analysis on two very similar foundations. For him, software code is law in cyberspace and both governments and businesses attempt to establish and retain control over the creation of code, while the public at large has been too passive to get involved. But Shapiro calls us to arms, urges us to take back control over the establishment of rules in cyberspace. He sees this replacement of existing rules and rule-making structures by a new kind of social contract in cyberspace as a rare opportunity, a chance for improvement.

Again, Lessig's and Shapiro's accounts are but two different flavors of the same scenario—one in which cyberspace wins and the "authority of law" as we know it loses. They share the same analysis. For them "doing law" is elevated to the level of system and infrastructure design in cyberspace: not lawyers and legislators, but technicians and network managers are the actors accentuating and effectuating the societal discourse on rules and limits. Under this conception, current authority of law is collapsing, and law and its discourse are being replaced as part of a more or less deliberate process, at least in the domain of cyberspace, by software and structural design.

ACT 3: SEPARATE LIVES

The same stage, the same actor representing the "authority of law" on the same chair. As in the previous acts, the veiled person symbolizing "cyberspace" appears from the left but this time stops a couple of feet away from the muttering "authority."

After a short break, "cyberspace" starts to chatter and mumble as well. Both remain on stage, independently acting, like a scene taken from Beckett or Ionesco, a drama of the absurd, where the acting persons have nothing in common, nothing to share, nothing to exchange, and nothing to communicate.

In the previous scenarios we got acquainted with exceptionalists and legalists who believe in extending the authority of law to cyberspace. We also got to know cyber-structuralists, who maintain that the rules implicit in the communication structures of cyberspace will substitute for the authority of law.

48. Id. at 63-101.
49. Id. at 105-68.
50. See generally Shapiro, supra note 47, at 168-230.
51. Id. at 231-33.
52. See generally SAMUEL BECKETT, WAITING FOR GODOT AND ENDGAME (Steven Connor ed., 1992).
53. See generally EUGENE IONESCO, EXIT THE KING (Donald Watson trans., 1963); EUGENE IONESCO, FOUR PLAYS (Donald M. Allen trans., 1958).
Advocates of this third scenario do not want to make us believe that one side wins or the other, but that this really does not matter. They assume that it is possible to de-couple in one society the formal discourse of “doing law” and the discourse (including the governance discourse) happening on the net.

In its most radical conception, some see the net as an anarchic communicative medium, in which any regulatory intrusion is utterly undesirable. John Perry Barlow, the quintessential spokesperson for this cyber-libertarian stance, has even declared cyberspace’s independence from the rest of the world and all its rules. Barlow’s take is not only radical, it is also normative. His aim is to deliberately keep real world rules away from cyberspace, to let cyberspace remain anarchic.

However, in practice, cyberspace, like any space of social interaction, is not bereft of all rules. Rules just become more implicit, unspoken, less articulated. People who violate the unspoken and unarticulated rules of the net, the so-called “netiquette,” are losing their communicative voice. When in the early days of the Internet boom, two lawyers sent mass e-mails around to advertise their legal expertise, the netizens viewed these unsolicited e-mails as despicable “spam” and reacted accordingly. They flooded the lawyers’ e-mail box with tens of thousands of angry return e-mails and by doing so managed to bring down the mail server the lawyers were using. Not amused, the lawyers’ Internet provider canceled their contract. They lost their voice, their virtual soapbox. Free-speech advocates may call it a case of virtual lynching. The cyber-community saw it differently: in their view, the lawyers had to be punished because they had violated an unspoken rule of netiquette—a rule the netizens themselves successfully enforced. The virtual society took justice into its own hands.

Cyberspace, then, is hardly anarchic. It is not even purely Darwinian, in the sense that the loudest, the most eloquent, the one with the most time and bandwidth, in short, the “fittest” wins. Sometimes “netiquette” takes control and causes the virtual society to react as a

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55. Id. at 458-62. See also infra note 56 and accompanying text.
56. “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone.... We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.” John Perry Barlow, A Declaration of the Independence of Cyberspace, 56 THE HUMANIST 18-19 (May/June 1996).
57. See, e.g., VIRGINIA SHEA, NETIQUETTE (1994).
59. Id.
60. Gibbons, supra note 58, at 511.
61. Id.
whole. But netiquette has its drawbacks. For one, it is quite an amorphous body of rules, based on unclear definitions and varying interpretations. For another, there is no established and accepted process to create, amend, or repeal a rule of netiquette.

Some have suggested keeping cyberspace apart from the existing real-world legal structures and permitting it to develop its own legitimate set of rules as the result of deliberations by its virtual citizens. “Self-regulation” is the catchphrase used for this suggestion. “Self-regulation” sounds wonderfully like civic participation, like governance by the people, yet few of its proponents understand the implicit euphemism of the term. If governance is to be legitimate in our Western, democratic, republican sense, then all governance by definition is more or less “self-regulation,” regulation created by a public who agrees to be bound by it. Self-regulation of and by virtual communities was tried in the earlier days of cyberspace, permitting us to look at these attempts to better understand how self-regulation may fare in cyberspace.

The first case of organized self-regulation happened in 1993 within the LambdaMOO, at that time one of the most popular recreational social virtual realities on the Internet. The LambdaMOO was created by Pavel Curtis and run on his server at the famous Palo Alto Research Center of the Xerox Corporation. It provided a text-based virtual reality, in which participants could wander through many thousands of rooms, explore even more objects in these rooms, engage in conversations with each other, and, most importantly, even add their own rooms and objects to the LambdaMOO world. Access to the LambdaMOO was open to anyone.

One day a participant, who called himself Mr. Bungle but who in real life was a student at New York University, executed a software script which permitted him to force the virtual characters of other participants

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65. Id.

66. Id.
of the LambdaMOO to follow his commands. He then proceeded to virtually harass, torture, and rape them.

This incident of deviant behavior sparked a huge debate among the LambdaMOO regulars on how to punish Mr. Bungle. At that time the LambdaMOO had rules of behavior decreed by its creator. Other perpetrators had been routinely punished before. Punishment was inflicted by a caste of "super-users" called wizards and ranged from a forced change of the punished character's description, to public display of his punishment, to expulsion from the LambdaMOO, seen as the ultimate penalty. Thus, few were surprised to see Mr. Bungle being expelled from the community after a proper debate and hearing.

Despite the resolution of the case at hand, the community continued to discuss the more fundamental implications of the case. Was it a despicable and subversive act in need of stark punishment or just an exercise of free speech, however repulsive its content? Soon participants asked whose rules governed their virtual community. It was this heated, sustained debate about authority and governance that prompted the creator of the LambdaMOO to force upon the community the "rule of law" and a republican system of governance. He created an elaborate system of petitioning and balloting, essentially a rule-making structure and decreed that in the future wizards would only enforce rules passed by the community. Thus, the LambdaMOO had its constitutional moment.

This example runs counter to the cyber-anarchists' contention that cyberspace should and will, if only let alone, remain a lawless place.


68. *Id.* at 239-42.
69. *Id.* at 242-52.
70. *Id.* at 245-46.
71. *Id.* at 246.
73. He later signed on again with a different account number and name but did not engage in similar activities anymore. Dibbell, *supra* note 67, at 254.
74. *Id.* at 253.
75. *Id.*
76. *Id.*
77. *Id.* at 253-54.
78. The LambdaMOO consists of more than 20,000 objects and "rooms" through which people can stroll and in which they can interact virtually. A couple of thousand people use the MOO on a regular basis, with concurrent use being in between 30 and over 150 users at any given time, 24 hours a day, 365 days a year. See Amy Bruckman et al., *Approaches to Managing Deviant Behavior in Virtual Communities*, *PROCEEDINGS CHI '94*, at 183, available at ftp://ftp.cc.gatech.edu/pub/people/asb/papers/deviance-chi94.txt (last visited Aug. 20, 2000) (on file with the University of Illinois Journal of Law, Technology & Policy).
LambdaMOO community desired a more transparent system of rules and rule-making, and its creator enacted it. Cyber-separatists, though, emphasizing the "separate-ness" of cyberspace from the real world and its system of rules, may rejoice and take the LambdaMOO case as prime evidence that self-regulation is not just possible, but what the governed themselves desire.

If one believes those who have studied LambdaMOO's experience with a democratic system of self-regulation, however, there is little to rejoice. The direct democratic structure imposed on the community did not create civic discourse and the evolvement of consensus. Instead, it apparently brought division and aggression to the group. The system worked so badly that it was not used as a role model for a second case of virtual community self-governance, the MediaMOO.

The MediaMOO was another interactive virtual reality, quite similar to the LambdaMOO. Amy Bruckman at MIT created it. Unlike the LambdaMOO, however, the MediaMOO was not open to anyone. People desiring to become participants needed to apply for admission. Bruckman's aim was to create a community of people interested in media studies and a virtual space in which they could meet. When she was faced with instituting governance, she looked at the LambdaMOO experience and decided not to implement direct democratic rule. Instead she decreed a different set of "constitutional" meta-rules, instituting a rule-making Council, whose members would be elected by the community. Representative democratic rule-making, she hoped, would ensure a more deliberative, republican process. In a remarkable account of the experiment, she confesses that she was wrong. This form of governance, too, seemed to run aground. Ultimately, Bruckman was forced to dissolve the Council, which had become deeply divided and unable to address important issues.

Advocates of a conception of the net as outside the law but open for self-regulation will be undeterred by these two accounts. They will take

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79. Amy Bruckman, "Democracy" in Cyberspace: Lessons from a Failed Political Experiment, http://UG.mit.edu/afs/athena.mit.edu/org/w/womens-studies/www/bruckman.html (last visited Aug. 20, 2000) (on file with the University of Illinois Journal of Law, Technology & Policy). Bruckman writes: On LambdaMOO, there is a system of petitions. If you get enough signatures on your petition, it becomes a ballot. If the ballot gets a two-thirds vote of the population, then it becomes a law. There is also an arbitration process, which was set up by a ballot, to handle disputes between people... It is an elaborate system which, in my opinion, doesn't work particularly well. Basically, it is a flame-fest; it is a horrendous flame-fest.

80. Id.
81. Id.
82. Id.
83. Id.
84. Bruckman, supra note 79.
85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Bruckman, supra note 79.
these two accounts as proof that self-regulation is wanted and can be implemented and will be successful once the few initial problems of an equitable rule-making structure, one reinforcing the community, has been devised. Moreover, they will point at the shortcomings of the LambdaMOO and MediaMOO systems and find striking similarities with much debated shortcomings in our real-world communities. In the end, they may argue, these two cases prove more than anything else that cyberspace can—even must—de-couple itself from “real life” discourse. Reality and virtuality are seen as coexisting next to but not interfering with each other, creating two domains—one real, one virtual—and each retaining authority in its area.

According to this conception, traditional rules of geographic proximity for example, will work differently in the real and virtual communities. My virtual neighbors, it is argued, are not the ones living next door, but the ones I meet on the net.91 We are virtual neighbors because we share similar interests.

So far courts have not accepted this line of argument. In a well-known case, two Californian residents operating an electronic bulletin board system of sexually explicit pictures for members throughout the United States were tried for violating federal obscenity laws.92 The prosecution brought the case to court in conservative Memphis, Tennessee after a jury in California acquitted them on similar charges.93 The choice of location was deliberate, as obscenity is decided based on local community standards.94 But what is the appropriate locale? California or Tennessee is the choice if one sticks to the real world.95 The lawyer for the defense, however, suggested a theory of two different domains—one virtual, one real—and argued that the correct standard is one that focuses on the virtual neighborhood in cyberspace.96 The Supreme Court thought otherwise and let stand the conviction based on Tennessee standards.97

The Court’s decision is not surprising. The Court did not accept the notion of two separate, distinct domains—one real and one virtual. Indeed, it is quite unlikely that a court, an institution of the traditional structure of legal authority and intended to strengthen this authority, would implicitly accept the existence of a new domain outside its realm. Unlike the cyber-separatists, they may think that acceptance of that separateness would be little else than dealing a blow to its very own foundation. Positively phrased: the reluctance of old structures to

93. Id. at 13.
94. Id. at 13, 16-18.
95. United States v. Thomas, 74 F.3d 710, 710-11 (6th Cir. 1996).
96. Id. at 711.
embrace new ones is hardly objective evidence against a "self-regulatory" approach in cyberspace.

Cyber-separatists focusing on self-regulation may have a point. But even if they ultimately succeed in realizing their goal of keeping the authority of law of our real world outside of cyberspace and substituting it with a new set of rules and structures, one may wonder whether their approach truly differs from the existing one in the real world. In the long run, cyber-separatists may have to conclude that—seen from a meta-level—their "new" approach is but a copy of the real-world regime of doing and enforcing law through authoritative discourse. All the cyber-separatists may have achieved then is—in techno-parlance—to re-boot, albeit with the same operating system.

Possibly equally problematic, the "authority of law" in the real world remains unaltered by the self-regulation of cyberspace in this scenario. Both worlds are disconnected, completely independent from one another. Self-regulation advocates usually do not argue (or should one say dare to argue?) that what they suggest for cyberspace will question or even affect the authority of law in the real world. But is it probable that self-regulating cyberspace will not affect at all the rule structures in the real world?

These three scenarios (side A wins, side B wins, it is a tie) of what happens when cyberspace meets law's authority represent a view of the relation between the two sides that is rather static and binary in a dramaturgical sense. The two sides might clash, but they don't engage one another communicatively. The encounters are framed in terms of total fight or utter self-autonomy, bloody war or eternal peace, if you will. Such dramatic rigidity commonly signifies a lack of thematic richness. Against such a static backdrop, one needs to juxtapose a conception of the relation between cyberspace and the law and its authority that is more discursive, dialectic, taking into account the exchange, the dialogue between the two sides, the "theatrical" communication going on.

ACT 4: DIALOGUE AND DISCOURSE

The familiar cast is on stage, this time engaged in an intense dialogue, in which—it seems—"cyberspace" is speaking "authority's" language. "Authority," our white male, feels understood, encouraged, and reassured.

Over time, he manages to get himself into a state of euphoria, talking faster and faster, higher and higher, until he begins to sing, to chant a tune—a tune, which in turn resembles the one sung by "cyberspace" in the previous act.

98. I use here "law" and "authority of law" as interchangeable metaphors. In real life, of course, they are not. But for the purpose of positioning one vis-a-vis the other in a theatrical context, this "blurriness" is acceptable.
In the three previous acts, we have seen authority being challenged but reinforced, challenged and destroyed, or left untouched. Now, we look at authority transformed.

In a number of ways, cyberspace is reinforcing existing structures of authority. It may, for instance, perpetuate the societal status quo as it ensures that people with better education, more time and bandwidth, and more money to spend may better utilize the net than other less "connected" ones. Critical theorists may even argue that it helps deepen the divide between information-haves and information-have-nots.99

Moreover, as we have seen in the previous scenario, even self-regulation in cyberspace may reinforce existing structures of legal authority. This happens when one looks at the kind of self-regulatory structures implemented in cyberspace. They resemble the structures we know. Arguably, implementing something known in a different realm reinforces the belief in the validity of that structure in general. Quite absurdly then, enthusiasts of self-regulation may in the end find themselves in a world similar to the one they set out to leave.

But, at the same time, cyberspace fundamentally displaces existing structures of authority, largely—as paradoxical as it might sound—by promoting it. In a very metaphorical sense, cyberspace is a Trojan horse. Let me venture to describe three aspects exemplifying this displacement through reinforcement.

These three aspects are intricately connected to the fabric of the existing authority of law. First, law is based on the assumption of individual responsibility. In general, if someone breaks the law, only that person is held accountable, not somebody else or society as a whole. But accountability is only one dimension of individual responsibility. Participation in democratic deliberations of rule-making is another part of individual responsibility, of the "burden" society places not just on all of us as a whole, but on each one of us individually. "Authority of law," as we know it, may only function if participation and responsibility remain squarely in the realm of the individual.

The second aspect is the ability of a society to create a collective memory of what is right and what is wrong, of what is true and what is false through the act of engaging in discursive practices—our deriving authority through "doing law."100 Any discursive practice rests upon the notion of progress through communication, which is inconceivable if the individual participants and/or the society as a whole have no shared memory about previous discussions and decisions.


100. Derrida, supra note 11, at 925-27.
The third aspect discussed below is the importance traditional authority of law places on the status quo, the state of the distribution of rights as it is. To be sure, our legal system is all about transactions. But these transactions presuppose a distribution and enforcement of legal rights. Property rights, for example, are the necessary requirement for property transfers, and thus, legally enforceable market transactions. Without guaranteed property rights, everyone would just take what she wants or needs. No markets could develop, as nobody would pay for what she could get for free. Implicitly then, in our society, possessing a right is more important than transacting about it, as only the possession of a right makes possible the “derivative” transaction.\(^{101}\)

Consequently, our traditional legal system is built on strong guarantees of individual rights, or, seen from a societal vantage point, of the status quo. Transactions are only permissible insofar as they do not violate these rights. The system then in some sense values “possessing” more than “transacting.”

Superficially, cyberspace supports these three foundational aspects of the existing system. It permits for more individual accountability and participation, greatly facilitates the creation of collective and individual memories as part of the societal discourse on right and wrong, and even provides a structural framework for the assignment and enforcement of information rights, the property rights pendant in the information economy. The following brief closer look, however, reveals that this notion may be utterly wrong—or at least starkly incomplete.

A. Individualized, but Not Individual

Modern information infrastructures provide a bi-directional communicative link. Theoretically, people can engage each other in intense civic debate on issues of current affairs. Referring to the Habermasian idyll of discourse by engaged and engaging citoyen,\(^{102}\) a number of authors\(^{103}\) have pointed at this quality of the net as an eternal spring, a rejuvenating force of the antic agora. Through the net it is, we are told, now technically feasible to replace uni-directional mass-media with a bi-directional global electronic town hall.\(^ {104}\)

The truth, however, is more mundane. The use of this bi-directionality is not restricted to public discourse. In fact the main beneficiary of cyberspace’s bi-directionality is going to be the business sector. In an economy of mass production no scalable bi-directional

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information structure exists. Instead, goods are produced based on sales estimates and uni-directional mass media are used to facilitate the generation of economic demand through information, marketing, and advertisement.

But the Internet permits the shift from mass production to a model of flexible production, in which supply is produced to meet specific, already existing demand. Communication then, is not necessary to generate demand among potential buyers but to relay information of specific demand from potential buyers to production facilities. Cyberspace offers the long sought-after bi-directionality, thus providing a structural framework not just for a shift in economic models, but for very substantial efficiency gains.

Moreover, responding to a concrete customer demand can be automated. Bi-directionality in cyberspace will not require much of an additional overhead. This is different for the public sector, in which bi-directionality is envisioned to bring about society-wide discourse. Its aim is not efficient processing of purchasing orders but unfettered electronically-mediated public debate. To be sure, at the beginning, public authorities will listen to individual information feedback over the net. Quickly, however, this “civic discourse,” under the pressure of sheer numbers, must degenerate to a formalized routine that only simulates substantive discursive engagement. For example, the White House computer responds automatically with a polite boilerplate e-mail reply and immediately discards the message received without anyone ever reading it.105 In the end, the much celebrated electronic agora may be little more than two machines talking with each other, keeping alive in a highly formalized manner the idea of a people engaged in civic dialogue.

Software in use by other luminaries is even more sophisticated. Boilerplate answers become so customized that automatically-generated e-mail replies are difficult to distinguish from human ones. The electronic agora then is a meeting place of machines, exchanging polite messages with each other and with human beings who don’t mind, or even prefer, the machines’ canned politeness.

What is troubling about this formalized, automatic agora is the illusion it creates of the actuality of widespread participation in civic and other discourse. It ostensibly realizes dialogue, while at the same token relegating it to a content-free practice of message exchange. In the short run, this formalization will strengthen, through the now “enhanced” discourse, the overall authority of law. But in the long run, it is prone to displace the very foundation upon which it is built.

105. Those wishing to experience this phenomenon may send an e-mail to the White House’s official site at http://www.whitehouse.gov/contact/ (last visited Feb. 23, 2001). Within minutes, you will receive an e-mail response from the autosender@whitehouse.gov informing you that the White House receives too many e-mails to review and that you will not receive a further response. Just as well, because most messages to the White House are sent by automatic mailers.
B. Memorable, but Not Memorized

The emphasis of form over content, too, is evident when looking at the social memory cyberspace may help to build. Superficially, cyberspace, as a powerful information infrastructure, offers an efficient and affordable way to accumulate, store, and share societal memory. Every civic discussion in cyberspace held, every decision taken, can be easily recorded. Should the issue arise again in the future, these records can be revisited, reminding society of the previous alignment of arguments and the ultimate disposition of the matter.106 This increases the efficiency of the overall discourse and strengthens it as well.

A successful build-up and use of societal memory depends first on the ability to attribute opinions and facts to specific people, to guarantee a certain authenticity of the recorded discourse. Authenticity, in turn, ensures that the record is representative of the societal debate which has taken place and the disposition of the matter. The discursive record needs to be easily accessible to the society, and, finally, society must be willing to consult the societal memory when faced with the recurrence of a previous debate.

In theory, cyberspace, with the help of technologies like digital signatures,107 can provide a very high level of authenticity and function as an excellent structure for community memory. Current reality, however, is different. Authenticity of communication relies on the identity of the author. But netizens seem to hardly worry about the identity of the communicative partner with whom they interact. Creating a new personality for oneself in cyberspace is as easy as opening a web-mail account at Yahoo108 or Hotmail.109 Taking on somebody else's identity is not much more difficult either. People in cyberspace are known by their network names. Nobody can be certain whether the other, the communicative partner, is indeed the one she pretends to be, or whether the entire communication, the whole interaction has been a farce—and few people seem to even care.

In 1994, computer human interaction specialist Brenda Laurel conceded that while participating in the MediaMOO, the social virtual reality mentioned earlier, she had a wild, hot and steamy flirt with a bartender in a virtual bar until a third person entered the virtual room and told her that the virtual “bartender” was a simple software program responding automatically to her comments.110 Laurel then admitted that she felt betrayed less by the software program than by the human being

106. This does not, of course, foreclose the ability of society to take up the issue again.
depriving her of the illusion of a flirt.\textsuperscript{111} Apparently for her the simulation of the flirt was as good as the real thing.

Moreover, authenticity is not lacking only in interpersonal communication. Made-up news stories are abundant in cyberspace. My two favorite such stories are the one of Bill 602-P, rumored to impose a surcharge on all e-mails\textsuperscript{112} and the one of a rare disease causing human skulls to explode in cases of extensive brain activity.\textsuperscript{113}

What is much more important than these spoofs, however, is the reaction of the people discussing these stories in civic debate in cyberspace: they engage in intense discussions, some even question the factuality of the story, but they do not seem to care to find out the truth. Usenet newsgroups had debated the exploding skulls story a half dozen times in 1996 when I first followed it. At that time I was struck by the inability of the newsgroups to retain and share any community memory of previous discussions. In 1999, when I looked again, I found that the exact same story with the exact same words had made its rounds again in two such discussion groups within the last couple of weeks.\textsuperscript{114} It seems

\textsuperscript{111} Id.
\textsuperscript{112} Yahoo!, at http://dir.yahoo.com/Society_and_Culture/Mythology_and_Folklore/Folklore/urban_legends/Bill_602_P/ (last visited Dec. 17, 2000).
\textsuperscript{113} The text of the spoofed news report is as follows:

Moscow-Doctors are blaming a rare electrical imbalance in the brain for the bizarre death of a chess player whose head literally exploded in the middle of a championship game! No one else was hurt in the fatal explosion but four players and three officials at the Moscow Candidate Masters' Chess Championships were sprayed with blood and brain matter when Nikolai Titov's head suddenly blew apart.

Experts say he suffered from a condition called Hyper-Cerebral Electrosis or HCE. "He was deep in concentration with his eyes focused on the board," says Titov's opponent, Vladimir Dobrynin. "All of a sudden his hands flew to his temples and he screamed in pain. Everyone looked up from their games, startled by the noise. Then, as if someone had put a bomb in his cranium, his head popped like a firecracker."

Incredibly, Titov's is not the first case in which a person's head has spontaneously exploded. Five people are known to have died of HCE in the last 25 years. The most recent death occurred just seven years ago in 1991, when European psychic Barbara Nicole's skull burst. Miss Nicole's story was reported by newspapers worldwide, including WNN (Weekly World News).

"HCE is an extremely rare physical imbalance," said Dr. Anatoly Martinenko, famed neurologist and expert on the human brain who did the autopsy on the brilliant chess expert. "It is a condition in which the circuits of the brain become overloaded by the body's own electricity. The explosions happen during periods of intense mental activity when lots of current is surging through the brain. Victims are highly intelligent people with great powers of concentration. Both Miss Nicole and Mr. Titov were intense people who tended to keep those cerebral circuits overloaded. In a way it could be said they were literally too smart for their own good." Although Dr. Martinenko says there are probably many undiagnosed cases, he hastens to add that very few people will die from HCE. "Most people who have it will never know. At this point, medical science still doesn't know much about HCE. And since fatalities are so rare it will probably be years before research money becomes available." In the meantime, the doctor urges people to take it easy and not think too hard for long periods of time.

"Take frequent relaxation breaks when you're doing things that take lots of mental focus."

Posting of Marvin, physchem@earthlink.net to http://x52.deja.com (Dec. 3, 1999) (on file with the University of Illinois Journal of Law, Technology & Policy).

\textsuperscript{114} Id.; Posting of Gloria and her Pikachu, alkiperson@aol.comBYESPAMY, to http://x76.deja.com (Sept. 20, 1999) (on file with the University of Illinois Journal of Law, Technology & Policy).
that every time the debate starts anew, no one cares that only a couple of weeks or months earlier the case had already been settled.

Indeed, one of the groups discussing the exploding skulls is called "alt.folklore.urban." One would think that the story was met with knowing chuckles by the discussants in this group. After all, that is presumably what they talk and laugh about in a newsgroup focusing on "urban folklore."

Instead, one participant posted the story with the heading, "Here's a story that is going around" as if this old tale was something new. It immediately caused a response by another discussant asking, "This is a joke, right?" Dozens of similar debates about that very story had taken place in numerous online discussion forums before. Records of these discussions were readily available for free to everyone interested, but again, nobody seemed to care. Cyberspace's qualities may, in theory, enhance community memory based on authentic communication, but in practice, civic debate is neither highly authentic nor apparently memorable. Engaging each other in the debate seems to be more important than reaching substantive conclusions.

C. Processing, but Not Possessing

Related to this flight from substance is the third example, devoted to the importance of process in cyberspace. One of the first to analyze this phenomena, Lorenzo Simpson suggests that what he refers to as "contraction of time" in cyberspace, a "culture in which space 'displaces' time," causes a general devotion to process. He argues that, despite our deep-rooted cultural inclination to possess, we now prefer to consume. (Post)-Capitalism and cultural postmodernism are displacing in our society the mode of ownership and possession with the mode of consumption. Process is succeeding status, and functionality is the

115. See supra note 113.
116. Id.
118. See, e.g., posting of Prytobscur, prytobscur@aol.com to http://x63.deja.com/getdoc.xp?AN=453613941&search=thread&CONTEXT=97958824.1848901677&HIT_CONTEXT=979588681.1774321682&HIT_NUM=18&hitnum=0 (Mar. 11, 1999) (on file with the University of Illinois Journal of Law, Technology & Policy); posting of Joe Sixpack, joe_6pak@hotmail.com to http://x63.deja.com/getdoc.xp?AN=489586755.1&CONTEXT=979588681.1774321682&hitnum=14 (June 14, 1999) (on file with the University of Illinois Journal of Law, Technology & Policy).
120. SIMPSON, supra note 7, at 147.
121. Id.
122. Id. at 146.
123. Id. at 141.
“name of the game.”  For Simpson, “in the era of hyperreality we become merely terminals of multiple information networks; we are constituted by our place in information flows . . . . Everything is seen in functional terms.”

Simpson may use extreme rhetoric, but his argument merits further analysis. Today’s cyberspace transactions (i.e., contracts concluded, information supplied, downloads achieved, cookies distributed, and pages viewed) provide what seems like the sole quantifier for success or failure. Indeed, in such an environment, transactions are viewed as more important than possession. Jeremy Rifkin’s latest book centers around a somewhat similar argument as well. This trend towards process-orientation only reinforces what mass customization and the lack of (and need for) a societal memory of authenticity and identity have already introduced—a fundamental shift of form over function, of simulation over reality, of process over substance.

This in turn will cause, I believe, a profound transformation of the authority of law. Despite the fact that in our legal discourse, “doing law” is already seen as a process, the “rules” it produces and the societal status it creates are static. In the future, the possession may not constitute authority, but process.

Already, in the field of copyright, (for over a century a stronghold of property and symbolized by ownership) discussions have drastically shifted to envisioning transaction-centered systems in which the occurrence of a legal transaction is valued higher than the actual property rights involved.

Act Four then, is the postmodern version of the interplay between legal authority and cyberspace, in which Balkin’s legal discourse, the “continuing series of struggles between various sets of opposed ideas,” is facing a hidden challenge more subtle, encroaching, and pervasive than the ones of Acts One to Three. What is happening is not an open feud, a public undermining of existing authority. To speak in terms of the play: there is no open struggle, on the contrary, there is ostensible understanding. The formalized practices and de-naturalized discourses reiterate their subordination under existing authority, only to ultimately displace it with a set of their own.

Let me sum up: Cyberspace will not demolish the authority of law, but rather reinvent it, and elevate it, if you want, to its own level of hyper-reality. The act of discourse; the dialogue on stage; or to remain in

124. Id. at 142-44.
125. Id. at 144, 151.
129. This is intentionally Habermasian and not Gadamerian. See Simpson, supra note 7, at 6.
Terms of virtual game play, the "game," is not "over," we may have just reached "the next level."