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# Law and Society Approaches to Cyberspace

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# The International Library of Essays in Law and Society
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# Law and Society Approaches to Cyberspace

*Edited by*

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# Contents

# Acknowledgements

# Series Preface

*The International Library of Essays in Law and Society* is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

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# Introduction

The very title of this volume, *Law and Society Approaches to Cyberspace*, contains within it two significant puzzles that demand exploration at the outset. First, what constitutes a 'law and society approach' to any particular subject? And second, why refer to online interaction as 'cyberspace' and in what way is cyberspace a distinctive topic for legal analysis? Thinking in more detail about both of these puzzles will help to elucidate the themes contained in the provocative essays that follow.

## A Law and Society Approach

It may seem odd to be asking, in 2007, what a law and society approach actually is. After all, the law and society movement has been around for at least forty years now, and the movement's legal realist forebears achieved prominence as far back as the beginning of the last century. So, one might think that by this time we should all agree on the methodological paradigms law and society (or sociolegal) scholars use. Yet, for better or worse, the law and society movement has long had an extraordinarily 'big tent' approach to the issue of methodology.

As a result, a law and society approach can plausibly be said to describe a diverse series of encounters with law. We must therefore begin as Rick Abel once did: 'When asked what I study, I usually respond gnomically: everything about law except the rules' (Abel, 1995). Abel's comment reflects the idea that, while lawyers usually treat rules as a given and therefore focus on ways to understand, manipulate and systematize those rules, sociolegal scholars study the world in which the rules are created and the world in which the rules are applied. Accordingly, a law and society approach considers the institutional structures, behaviours, personnel, culture and meaning that form the social context, symbolic content and practical application of those rules in everyday life. This is the source of the classic law and society distinction between law as it exists 'on the books' and law 'in action' (Pound, 1910).

But *how* should law 'in action' be studied? Here is where the methodological polymorphousness emerges, and it is largely attributable to the diversity of theoretical approaches from which the law and society movement emerged. For example, some sociolegal scholarship can trace its origins to nineteenth-century (and earlier) historians, who sought to put law in broader contexts and chart changes over time (for example, Maine, 1861; Montesquieu, 1756; Parsons, 1966; Redfield, 1964; Savigny, 1831; Tönnies, 1963). Others hearken back to the classic social theory of Marx, Weber and Durkheim, each of whom studied law as part of the transformation of social, political and economic institutions that took place during the passage from traditional to industrial society (for example, Durkheim, 1964, 1973; Hirst, 1972; Hunt, 1978; Weber, 1978). Meanwhile, anthropological studies of law outside of courts or other formal institutions led to both a broader understanding of what counts as law and a focus on 'dispute resolution' as an essential lens for viewing forces of social control, hierarchy and resistance (for example, Bohannan, 1967; Collier, 1975; Hoebel and

Llewellyn, 1941; Moore, 1969; Nader, 1965). Political scientists, following a 'behaviourist' approach, turned the focus away from abstract appellate opinions to the front-line day-to-day operations of court bureaucracies (for example, Blumberg, 1967; Feeley, 1977; Packer, 1968). Psychologists began studying such issues as law and popular opinion, and the construction of deviance (for example, Cohen, Robson and Bates, 1958; Kalven and Zeisel, 1966; Moore, and Callahan, 1944; Rose and Press, 1955). And of course the legal realist influence led to an emphasis on empirical understanding of judicial decision-making, power dynamics and the relationship of legal institutions and societal processes (for example, Peltason, 1955; Schmidhauser, 1960; Schubert, 1965).

And all of that is only law and society as it was in the early days! In the late 1970s and 1980s, sociolegal and critical scholars began to incorporate the insights of postmodern theory, tracing the political and ideological components inherently imbedded in law and legal reasoning (for example, Frug, G.E. 1984; Frug, M.J. 1985; Gordon, 1984; Kairys, 1982; Kelman, 1987; Kennedy, 1976; Unger, 1983). Subsequently, law and society scholarship took a more interpretive turn, building on the work of Gramsci (1971), Foucault (1980), de Certeau (1984) and the vast, vaguely defined field of cultural studies. Thus, sociolegal scholars began to engage in cultural analyses of law, taking a constitutive, rather than an instrumental, approach to legal rules, and focusing not on how law might serve progressive goals, but instead on how law works within a society to help shape social relations (for example, Hunt, 1978; Silbey, 1992). This constitutive approach viewed legal discourse, categories and procedures as a framework through which individuals in society come to apprehend reality. Thus, law was seen not merely as a coercive force operating externally to *affect* behaviour and social relations, but also as a lens through which we view the world and actually *conduct* social interaction. The constitutive turn, when combined with the earlier social science emphasis on law's hegemonic power, became a study of legal consciousness itself: the ways in which 'legality is experienced and understood by ordinary people as they engage, avoid, or resist the law and legal meanings' (Ewick and Silbey, 1998, p. 35). Thus, scholars have attempted to study law in 'everyday life', asking how 'commonplace transactions and relationships come to assume or not assume a legal character? And in what ways is legality constituted by these popular understandings, interpretations, and enactments of law?' (Ewick and Silbey, 1998, p. 33). By emphasizing the everyday moments when people negotiate their own understanding of legality, such scholarship sought to walk the fine line between liberal theory's assumption of autonomous individuals exerting free will in society, and structuralism's conception of the individual as determined by social and economic forces (Mezey, 2001). Thus, this approach operated as a critique not only of liberal conceptions of law (which tend to view law as a self-contained system of rules), but also of many Marxist critiques (which tend to view law as unidirectional, emanating from capitalist class interests and entrenched elites). As one scholar has observed, the study of legal consciousness was 'neither attitude nor epiphenomenon, but cultural practice' (Mezey, 2001, p. 151).

Finally, law and society scholarship in recent years has gone global. While there have always been sociolegal scholars outside the United States, sociolegal scholarship had generally been focused on domestic or indigenous legal systems. Interestingly, it may be that law and society ignored international law for the same reason some conservative international relations realists do: because there are few obvious sites of coercive authority or bureaucracies of enforcement (Dickinson, 2007). In addition, some more anthropologically inclined law and society scholars

may have neglected international law because of their concern for the local (Merry, 2007). But with the increasing proliferation of international and transnational tribunals and the growing recognition that many international institutions significantly impact the economic, environmental, human rights and development climate of the world, law and society scholars have 'discovered' the international. Thus, we now see pluralist perspectives that emphasize the interaction of official and non-official bodies at all levels of the international and transnational system (for example, Berman, 2007a, 2007b; de Sousa Santos and Rodriguez-Garavito, 2005; Rajagopal, 2005), a new interest in international bureaucracies (for example, Riles, 2000; Warren, forthcoming), analyses of how 'local' and 'international' discourses intersect and affect each other (for example, Berman, 2006; Goodale, 2002; Merry and Stern, 2005), studies of the interest group politics at work in international and transnational institutions (for example, Keck and Sikkink, 1998; Pollack and Shaffer, 2001; Warren, forthcoming) and so on.

In short, although we are now in the fifth decade since the founding of the Law and Society Association, the distinctive hallmarks of a law and society approach are even more difficult to describe or define than they were at the start. Indeed, to return to Abel's 'definition', nearly any interpretive lens that looks to the context of law and not just its formal rules can plausibly be called a law and society approach. And though the lack of an overarching methodology can be a flaw (because law and society scholars might not be pushed sufficiently to discuss or develop their methodologies with sufficient rigour), the resulting cacophony can also be liberating, because it recognizes that no one methodology, on its own, will capture the multifaceted ways in which law interacts with society.

In any event, this collection will employ the 'big tent' approach exemplified by Abel. The essays that follow include law professors analysing issues involving online interaction from the perspectives of history, critical theory, cultural studies, anthropology, legal realism and philosophy. In addition, I include authors who probably would not say they are doing legal scholarship at all. But what knits the essays together, I believe, is an understanding that legal doctrine does not exist in a vacuum and that the interaction between law and society is part of the essential study of the emerging field of online regulation.

## Cyberspace

But is 'online regulation' really a discrete field worthy of a separately defined study? After all, mightn't we just talk about a law and society approach to communication of all varieties and just treat online activity as one mode of interaction? And why call it 'cyberspace'? Is there really a distinct space or place involved in online interaction that makes it different from, say, 'telephone space'? If so, are there specific types of legal disputes about online interaction that can be termed 'cyberlaw' disputes or does 'cyberlaw' refer to any dispute with an online component? As it turns out, such questions have been asked from the very first emergence of online interaction into the popular consciousness, circa 1995. Thus, as a first attempt to define cyberspace as a field of inquiry, we might begin by analysing the now long-standing debates within the field, as well as the various scholarly waves that have washed over cyberlaw scholarship during the last ten-plus years.

From the beginning, scholars and judges have questioned whether the world of online interaction really constituted a new area of law or whether instead Internet legal issues could

be resolved within existing legal paradigms. The most famous early sceptic, US Court of Appeals Judge Frank Easterbrook, provocatively argued that studying cyberlaw as a separate field of study would be no different from studying the 'law of the horse' in the nineteenth century (Easterbrook, 1996). As Easterbrook saw it, horses caused torts, horses were bought and sold, horses were stolen, but all that activity did not necessitate a unique field of study. Rather, he argued, 'general rules' of tort, property, contract or criminal law could easily be applied to horses without the need to invent a new legal regime. Likewise, according to Easterbrook, we can apply general legal principles to online interaction without needing anything called 'cyberlaw'.

Easterbrook's critique and responses to it effectively divided early legal scholarship regarding online communication into two camps. On one side were the cyberspace 'unexceptionalists' who argued in various contexts that the online medium did not significantly alter the legal framework to be applied (for example, Goldsmith, 1998a, 1998b; Stein, 1998). On the other, cyberspace 'exceptionalists' argued that the medium itself created radically new problems requiring new analytical work to be done (for example, Burk, 1996; Johnson and Post, 1996; Post, 2002).

This was a false dichotomy from the start, of course. First, one's perspective on whether the online medium creates a new problem depends in large part on what the legal question is. For example, defamation is generally defined as the communication of a false statement about someone with the requisite degree of intent. This communication can be written or oral, and if it is written, there does not seem to be much of a legal difference whether the written defamation is communicated by postal mail, fax or e-mail. Thus, unexceptionalism seems to apply to defamation law. But when we turn to the question of *intermediary* liability and ask whether (and under what circumstances) various types of Internet service provider should be held liable for defamatory content accessible through their portals, then we have a question that is not easily answered without some conceptual understanding of what an Internet service provider is or should be. So, online defamation issues require either an exceptionalist or an unexceptionalist approach, depending on whose liability one is discussing.

The second reason the dichotomy was unhelpful from the beginning is that the unexceptionalist position assumes that there actually *are* well-settled 'general' principles of law that can simply be applied to new legal settings without alteration. And yet it is the nature of law (and especially the common law) that it changes over time. Thus, what is well-settled for one generation (or in one century) is apt to be very different from what is well-settled for the next. Even more importantly, new technologies that alter the culture are precisely the sorts of changes that tend to result in *shifts* to well-settled legal principles.

For example, in the nineteenth century, 'well-settled' principles of legal jurisdiction saw jurisdiction as rooted almost exclusively in the territorial power of the sovereign. Each sovereign was deemed to have jurisdiction, exclusive of all other sovereigns, to bind persons and things present within its territorial boundaries. By the early twentieth century, growth of interstate commerce and transportation put pressure on the idea that a state's judicial power extended only to its territorial boundary. In particular, the invention of the automobile and the development of the modern corporation meant that far-away entities could inflict harm within a state without actually being present there at the time of a lawsuit. Not surprisingly, by the end of the twentieth century it had become 'well-settled' that a state may indeed assert jurisdiction over a defendant if the effects of the defendant's activities are felt within the

state's borders, even if the defendant has not literally set foot there. And, of course, this new well-settled rule felt as commonsensical and obvious to most judges, lawyers and observers as the sovereigntist view felt in the nineteenth century.

Now, jurisdictional rules are in flux again, at least in part because of the Internet (Berman, 2002). Indeed, the so-called 'effects doctrine' described above has been difficult to apply to online interaction because material on a website potentially creates effects anywhere the material is viewed. For example, in the celebrated case involving France's efforts to prosecute Yahoo!.com for allowing French citizens to download Nazi memorabilia and Holocaust denial material. It was in some sense perfectly reasonable for France to move against Yahoo! because material available on Yahoo!'s servers created harm in France. Yahoo!, in turn, argued that the French assertion of jurisdiction was impermissibly extraterritorial in scope. According to Yahoo!, in order to comply with the injunction it would need to remove the pages from its servers altogether (not just for the French audience), thereby denying such material to non-French citizens, many of whom have the right to access the materials under the laws of their countries. Most importantly, Yahoo! argued that such extraterritorial censoring of American web content would run afoul of the First Amendment of the US Constitution. Thus, Yahoo! and others contended that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for Internet expression.

Yet, the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. Indeed, we should *not* be surprised that as the Internet itself becomes less US-centred, a variety of content norms will begin competing for primacy (Reidenberg, 2002). And though geographical tracking software might seem to solve the problem by allowing websites to offer different content to different users, such a solution is probably illusory because it would still require the sites to analyse the laws of all jurisdictions to determine what material to filter for which users.

Addressing the particular jurisdictional conundrum raised by the Yahoo! case (and others) is beyond the scope of this introductory note. Suffice to say that however one resolves the issue, 'well-settled' principles of jurisdictional law are unlikely to be very helpful because such principles are themselves always in flux, often precisely because of the pressures placed on such principles by new communications technologies such as the Internet. Thus, in some sense a pure unexceptionalist position is difficult to maintain.

If unexceptionalists have relied too much on the application of mythical well-settled principles, the exceptionalists have, at times, tended to the opposite extreme, assuming that the rise of cyberspace upended nearly all extant ideas about law and the role of the state. Indeed, many so-called 'enforctarians' rejected the idea that Internet 'communities' could or should be governed by territorially based sovereigns at all. For example, in 1996, John Perry Barlow issued his much-quoted Declaration of Independence of Cyberspace, in which he wrote:

> 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. . . . I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. . . . Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, and there is no matter here (Barlow, 1996).

Exceptionalist legal scholars were more measured in their rhetoric, but similarly aggressive in their policy prescriptions. Perhaps most provocatively, David Johnson and David Post, echoing Barlow, argued that cyberspace could not legitimately or effectively be governed by territorially based sovereigns and that the online world should create its own legal jurisdiction (or multiple jurisdictions) (Johnson and Post, 1996). In response, others focused on the need for, and legitimacy of, regulation by nation-state sovereigns, pointing to the significant harms that could be caused online and the interest of states in combating those harms (for example, Goldsmith, 1998a, 1998b; Stein, 1998).

These initial debates from the first five or so years of cyberlaw commentary – between exceptionalists and unexceptionalists, cyberlibertarians and nation-state sovereigntists – eventually gave way to a 'second generation' of scholarship. Given the myriad ways in which governments and corporations mobilized to regulate and control online activities, commentators could no longer speak confidently about cyberspace as an inherently unregulatable space, where sovereign governmental entities would be impotent and where newly empowered individuals would force the collapse of all kinds of cultural intermediaries and brokers, from political parties, to media conglomerates, to corporations. At the same time, however, unexceptionalism seemed similarly quaint. By 1998, it was clear that *something* was going on and that simply holding on to old legal solutions and attempting to paste them onto Internet problems was not a useful strategy either.

Into this environment, the second generation of thinking about the Internet emerged, far less sanguine in its analysis of online regulation and more sober in its discussion of individual empowerment (for example, Boyle, Chapter 7 this volume; Cohen, 1998a; Lessig, 1999; Reidenberg, 1998). Perhaps the most significant observation made by such second-generation theorists concerned the ways in which behaviour may be regulated online. Many of us tend to think of regulation solely as the coercive commands of a sovereign entity. When the legislature passes a law proscribing some behaviour, or an administrative agency establishes rules, or a court issues an order, it is easy to see how such activity regulates behaviour. In contrast, it is more difficult to recognize the powerful way in which our environment and the architecture of our space applies a regulatory force. If one wanted to prohibit automobiles from driving into a public park, for example, one could pass a law forbidding such conduct and then hire police officers to patrol for violations. But one could also simply build walls that make it much more difficult (if not impossible) as a practical matter for the automobile to enter the park in the first place. It is important to realize that both the law and the wall function as regulatory tools.

In cyberspace, this second type of regulation is likely to be more powerful than the first because the 'architecture' of cyberspace is determined by software code, which is infinitely malleable and operates through the technology itself. Thus, in order to limit access to obscene or indecent speech, a sovereign government can try to pass a law banning such speech, but the government is likely to encounter enforcement problems. Such problems might include the difficulty of tracking down online perpetrators – particularly those who disguise their identities – and the possibility that an offender is from a different jurisdiction, rendering him beyond the regulatory reach of the enforcing government. Indeed, as noted previously cyberlibertarians initially proclaimed the online world an inherently unregulatable space precisely because of these types of problems. A government is not limited to this style of regulation, however. Instead, it can create (or encourage the creation of) filters that will effectively 'zone' cyberspace into areas that can be entered only by those possessing certain qualifications – a credit card,

for example, or an adult identification number. This 'code-based' regulation is potentially far more efficient – and therefore far more powerful – than a coercive command issued by a sovereign because the enforcement mechanism is embedded in the technological architecture itself. Thus, as James Boyle observes in Chapter 7, the 'Austinian' positivist model of the lumbering state, regulating through its unwieldy apparatus of power, is being replaced in cyberspace by a model of power more akin to that envisioned by Michel Foucault, where coercion is so much a part of the landscape that we often fail even to recognize it.

Moreover, not only sovereign governments, but also private entities can wield this code-based power. If an access screen requires a user to click 'OK' to contractual terms, and those terms obligate the reader to pay a dollar per page viewed at a given website, then the dollar fee becomes the 'law' of that website, even if the copyright law would have permitted the use for free. Similarly, if America Online or Google wishes to censor a user's speech, it can simply eliminate the user's online privileges or remove the user's website from its search indexes, regardless of whether the First Amendment would protect that speech. And, perhaps most importantly, because the technical standard-setting bodies of cyberspace are non-governmental, they may face no real oversight at all (Froomkin, 2000; Weiser, 2001). Thus, scholars resurrected legal realist arguments about how private entities, in concert with state enforcement of property and contract law, would effectively regulate (and control) a space that had at first seemed unregulatable (for example, Cohen, 1998b; Radin, Chapter 6).

This sceptical (and perhaps even dystopian) second generation focused on cyberspace not as a place of freedom but as one increasingly of control. We were reminded of how many of the freedoms we take for granted exist simply because, in the physical world, certain forms of regulation or invasion of privacy are impossible or impractical. Thus, for example, it would be difficult to track customers in a shopping centre to catalogue each product that every customer so much as looks at. But such tracking of browsed items is trivially easy online (Kang, 1998). Likewise, it would be prohibitively expensive for content providers to install censors in every library photocopy machine to trace copyright violations. But again such traceability is potentially built into every download. As a result, so the dystopian vision would have us believe, the online world is one where freedom is curtailed, content is distributed only for a fee, privacy is non-existent and private filters limit access to information (Lessig, 2001). Moreover, that same technology might even threaten to derail political discourse because every person's news will be filtered through self-imposed blinkers imposed using pre-determined criteria selected by the individual (for example, Sunstein, 2001). In such a world, the important role of the state as a locus for debate and collective decision-making (assuming it ever played such a role) is undermined.

Now, it seems that we may have reached a third generation of scholarship which, perhaps not surprisingly, is merging some of the perspectives of the previous two (for example, Benkler, 2006; Johnson, Crawford and Palfrey, 2004; Zittrain, 2006). Like the exceptionalists, these scholars believe that there is something profoundly different about cyberspace that opens up new spheres of connection, generates new opportunities for creativity and potentially alters political economies and cultural politics. At the same time, like that of the second generation, the new scholarship is preoccupied with questions of technical architecture and private power. The result is a focus on how to maintain the Internet as a place where users – separately and collectively – retain the ability to develop infinite adaptations and innovations. These scholars take seriously the idea that the architecture of cyberspace is infinitely malleable and

that the forces of greater control have a vested interest in turning the Internet into something more resembling a series of connected appliances with specifically delimited functionality (think TiVo machines) than a truly free-wheeling generative space (Zittrain, 2006). Thus, these scholars seek structural ways to imbed more generative architecture, and they analyse the variety of ways in which networks of users resist regulatory efforts through the use of technology.

Having briefly surveyed these trends in scholarship over the last decade, we are perhaps in a better position to answer the questions with which we began: Does 'cyberlaw' encompass every legal issue having to do with online interaction? And is it even useful to think about 'cyberlaw' as a distinct field of inquiry? As to the first question, the answer seems clearly to be 'no'. The unexceptionalists are undoubtedly right that there are many issues involving online activities that do not require new paradigms to resolve them. Indeed, to the extent that the Internet is functioning only as the medium of communication without changing the framework underlying the legal question at issue, then we can plausibly exclude that legal question from the category of 'cyberlaw'.

The second question requires more explanation, but the underlying idea reflected in the title of this volume is that, yes, 'cyberlaw' really is something important and distinct, and therefore worth studying on its own. In part, this is simply because the Internet has unsettled a whole host of legal doctrines, and a time of flux is also a time of opportunity. As judges, legislators and scholars struggle to apply old legal principles to new contexts, they are – in a far more self-conscious way than usual – questioning whether those old legal principles really work in the brave new world they are encountering. Such a time of self-conscious inquiry opens the conceptual space to allow one to go back to first principles and ask important jurisprudential and sociologically charged questions that run throughout all of law. Thus, we can productively view many dilemmas of legal doctrine, jurisprudence and social context through the lens provided by cyberlaw.

In addition, thinking of 'cyberlaw' as a whole, rather than as a discrete series of legal doctrines applied to online interaction, allows one to see important structural patterns. It is not an accident that each of the three waves of scholarship described above takes a structural approach, emphasizing large-scale cultural, economic, political and legal forces that are more fundamental than just how particular legal rules will apply to particular sorts of interactions. The study of cyberlaw encourages such macro-theorizing. And again, the insights gained will undoubtedly apply to law and society more generally, and not just online interaction.

Finally, for anyone interested in sociolegal scholarship, studying cyberlaw provides a wonderful case study of law and culture turning like a mobius strip, one into each other. Consider the sequence. Legal regulation and governmental institutions provide a context for technological innovation concerning online interaction. Then, the Internet explodes into the popular imagination far more than anyone could have dreamed. Then, law tries to catch up, technical architecture begins to function as a form of law, nation-states struggle to craft enforceable legal rules with bite and this variety of legal and quasi-legal regulation proliferates, changing the online experience in fundamental ways (compare people's ideas of online community in 1995 with those in 2005). But then new social forms – such as peer-to-peer file-sharing, blogging, YouTube, MySpace and so on – emerge to upset the new efforts to control behaviour, and the mobius strip turns again. And of course, this linear sequence is not truly linear at all, as the legal and the social interpenetrate at every stage.

   This is a veritable treasure trove for law and society scholars seeking the variety of ways law shapes and is shaped by the interactions we collectively term the 'social'. Moreover, in cyberlaw we find all of the quintessential law and society debates – about law on the ground vs. law in action, the role of entrenched economic power, the importance of embedded (though often invisible) legal regimes, the ubiquitous (though again often invisible) role of the state, the significance of non-state communities to the construction of norms, the role of globalization – played out in a context where people are ready and willing to think reflectively and embrace new ideas and alternative paradigms. Thus, of all the ways cyberlaw can be viewed, one particularly fruitful way is as a law and society laboratory. The rest of this book is devoted to surveying some of this new and exciting 'laboratory' work.

## The Essays

The collection begins with a consideration of the interaction between communications revolutions and societal change. As discussed above, it is difficult to rely on settled legal principles to resolve online disputes because communications revolutions can *unsettle* the very legal principles being applied. Sherry Turkle, a professor in the sociology of science, was one of the first academics to consider the psychological and sociological impact of online interaction in her groundbreaking book, *Life on the Screen: Identity in the Age of the Internet* (1995). In that book, and in the short essay included as Chapter 1 in this volume, Turkle argues that the very way in which we think – the metaphors, the cognitive categories, the narratives we employ – are affected by the dominant technologies of the era. Thus, just as the vast machinery of the industrial revolution became the prototype for modernist thought – with its emphasis on mechanics, industrial production and assembly and disassembly – Turkle suggests that the computer is the technology of postmodernism, a world of surfaces, simulation and flexible identity. Indeed, it is interesting to consider the extent to which 'webs' have become a dominant trope for thinking about today's world, whether they are used as a way to chart multinational corporate activity, transnational legal regulation or global terrorism. Network theory itself is a creature of the rise of online interaction, both because the Internet facilitates the creation of networks and because it provides a set of metaphors and 'test objects' for *thinking* in terms of networks. And, as Turkle points out, the rise of computers affects our understanding of what it means to be human, how the brain works, what privacy means and a myriad of other micro- and macro- social and psychological changes. Thus, Turkle's essay, though it does not specifically mention law, provides a useful introduction to any consideration of how the cognitive categories of law might be affected by the rise of new technologies.

   Richard Ross' contribution (Chapter 2) then offers a historical perspective on similar questions, considering the impact of the printing press on legal culture. Such a study, Ross argues, should complicate accounts that assume new technologies will simply affect legal culture in a unidirectional way. Rather, Ross suggests that a more contextual approach is required, one that analyses what he calls 'conjunctive causation'. In this approach, we would understand that the impact of new communications technologies always depends on their interaction with variable sets of background conditions within narrowly defined local contexts. Accordingly, we cannot simply assume that 'the Internet changes everything' without a set of grounded analyses of how the rise of online communication interacts with pre-existing local political, social and economic dynamics.

Although Turkle's essay touches on the idea of the computer as a metaphor, in Chapter 3 Dan Hunter more explicitly takes up the role of metaphor in legal regulation of online interactions. Specifically, Hunter explores the impact of thinking about 'cyberspace' as a place and the use of a variety of spatial metaphors for describing the online experience. According to Hunter, such thinking has tended to push both judges and scholars towards legal regimes that overly 'propertize' online interaction, importing metaphors of trespass and private property to realms where they arguably create perverse results. Hunter's analysis therefore demonstrates the importance of the law–society tie: the metaphors that become common parlance for describing some activity inevitably influence the legal rules developed to regulate that activity, and vice-versa. Given that the use of metaphor is both an inevitable part of human cognition and a fundamental part of the common law legal process, this is an important insight indeed. And, as Ross would remind us, the particular metaphor chosen is itself influenced by political and economic interest, in this case a libertarian capitalist ideology of unfettered private enterprise.

The next two contributions consider the relationship between online interaction and globalization. Since the end of the Cold War, the terms 'cyberspace' and 'globalization' have become buzzwords of a new generation. And it is probably not surprising that the two entered the lexicon almost simultaneously. From its beginning, the Internet heralded a new world order of interconnection and decentralization, while the word 'globalization' conjured for many the spectre of increasing transnational and supranational governance as well as the growing mobility of persons and capital across geographical boundaries. Thus, both terms have reflected a perception that territorial borders might no longer be as significant as they once were. Social theorist Gunther Teubner has been discussing global law beyond the state for many years, so it is not surprising that he would latch on to cyberspace as a site for considering non-state-based constitutionalism. Continuing to build from Niklas Luhmann's work (for example, Luhmann, 1995) emphasizing the importance of autonomous social systems, rather than just states, Teubner (Chapter 4) sees the state as only one law-making force among many. My essay in this volume (Chapter 5) similarly seeks to deprivilege the idea of nation-state legal jurisdiction defined by reified territorial boundaries and physical location. Instead, I advocate a cosmopolitan approach that seeks to steer a middle ground between territorialism and universalism. I believe that, although people often associate cosmopolitanism with utopian universalism, a more nuanced account of cosmopolitan theory takes seriously people's *multiple* community attachments: local, global and non-territorial. And I use this cosmopolitan approach to analyse the sorts of cross-border legal issues that are increasingly common in an era of online interaction.

Whereas globalization is a relatively recent academic trope, legal realism has a pedigree going back to the beginning of the twentieth century. Moreover, as noted above, legal realism was one of the important progenitors of the law and society movement itself. So, what does legal realism have to contribute to a discussion of cyberspace? As the essays by James Boyle and Margaret Jane Radin make clear, a legal realist perspective offers a response to cyberlibertarians who see the Internet's nature as inherently pushing in the direction of more individual liberty. In Chapter 6 Boyle challenges the claim that states will inevitably wield less power over the online environment, and he points out ways in which the government can embed power into the technical architecture of the Internet itself. In Chapter 7 Radin focuses on the problem of private – rather than state – power, noting that the use of online contracts

backed by technological protection measures can effectively replace the balances struck by, say, copyright law with the 'law of the firm'. Radin therefore, like her legal realist forebears, emphasizes the ways in which private power relies on state enforcement of background contract and property regimes, rendering the line between 'public' and 'private' ordering murky at best.

Lawrence Lessig and Jack Balkin, in their discussions of freedom of expression, are similarly concerned about threats to freedom posed by private, and not just state, power. In Chapter 8 Lessig even goes so far as to argue that regimes in which the government would create 'zoning' rules to regulate speech would actually be *preferable* to the widespread use of private speech filters. This is primarily because speech filtering can take place at the service provider, browser or search engine level and therefore can occur without users even knowing about it. Significantly, Lessig focuses almost exclusively on the amount of speech regulated and cares much less about who does the regulating: private entities or the state. This is a paradigm shift from the traditional 'rights against the state' model of free speech constitutionalism, whereby the principal target of concern is government censorship. In Chapter 9 Balkin similarly focuses on corporate as well as state impingements on free expression. But Balkin argues that digital technologies alter the social conditions of speech and therefore should change the touchstone of free speech theory altogether. Thus, instead of training the First Amendment gaze only on how to foster democratic participation in political discourse, he suggests that we should turn our attention to how we can best provide individuals with the means to participate in the production and distribution of culture.

In this domain of culture, freedom of expression sits in an uneasy relationship with copyright law because copyright law effectively censors speech in the name of providing incentives to create. The essays by Jane C. Ginsburg and Jessica Litman offer differing approaches to copyright issues in cyberspace. Ginsburg, in Chapter 10, argues that we need to strengthen authorial control over digital distribution of creative works. According to Ginsburg, such increased authorial control is most likely to provide the incentives necessary to give the public access to more (and more widely varied) material. In Chapter 11 Litman, in contrast, argues that the current copyright regime only makes sense in a world where most means of mass dissemination required investments in printing presses, distribution networks, broadcast towers and so on. In such a world, she suggests, we may have needed to ensure that publishers and distributors received money through strong copyright protection. However, according to Litman, we are now in a world where what she calls 'untamed anarchic digital sharing' through peer-to-peer networks is demonstrating itself as a superior distribution mechanism, or at least a useful adjunct to conventional distribution. If that is the case, Litman argues, we ought to encourage the new form of distribution rather than use strong authorially based copyright protection to stifle it. In the contrasting positions of Ginsburg and Litman, we see the 'exceptionalist'/'unexceptionalist' debate play out, with Ginsburg arguing for application of standard copyright principles to a new medium, and Litman advocating a new paradigm altogether.

Privacy is another area where the information processing and data storage capability of the online world threatens to upend established paradigms. Indeed, the entire idea of 'informational privacy' has in some respects replaced traditional privacy concerns about surveillance as the principal subject of debate. And, as in the works of Radin, Lessig and Balkin, Julie Cohen's essay on informational privacy (Chapter 12) focuses on threats to freedom posed by non-state

actors, in this case the many corporations amassing huge stores of searchable data. Moreover, Cohen rejects the 'consent' model usually used to address issues of data privacy, whereby users are given 'freedom of choice' to opt in to or opt out of data collection activities. To Cohen, such a formulation does not do justice to individual autonomy, because it renders individuals simply the objects of choices created by others. Instead, Cohen argues that protections for data privacy should be grounded in an appreciation of the conditions necessary for individuals to develop and exercise autonomy.

A focus on personal autonomy also leads naturally to questions of community identity and membership because arguably autonomy implies both the ability to connect with others and the ability to choose from a number of flexible affiliations. The final two sections of this collection address issues of cyberspace, personal identity and the formation of community. Even before the idea of online communication entered the popular consciousness, online devotees and scholars of the Internet were considering the implications of 'virtual worlds' or 'virtual communities'. In the early days of the Internet, this meant studies of online chatrooms and primitive text-based role-playing spaces known as MUDs or MOOs. Now, the debate has shifted to the use of the Internet by potentially marginalized communities and the increasingly lucrative sphere of multiplayer simulated worlds. The four essays that conclude the volume variously ponder these issues of identity and community and their relationship to law.

Anupam Chander and Jerry Kang consider the effect of the Internet on racial and ethnic minorities. In Chapter 13 Chander responds to concerns that the Internet will cause cultural fragmentation by allowing individuals to insulate themselves from competing views, which, so the argument goes, will make it more difficult for societies to inculcate shared understandings of reality. According to Chander, any such assimilationist longing for shared understandings ignores the significance of the Internet as an engine for multiculturalism. Chander argues that cyberspace empowers minority groups by allowing them to create transnational communities of interest, ethnic identity, religious belief or other affiliation. Chander suggests that such transnational bonds may help give members of minority groups a fuller sense of citizenship, what he describes as 'a right to a practice of citizenship that better reflects who they are'.

Kang strikes a similarly optimistic note in Chapter 14, arguing that online interaction, because it allows racial anonymity and pseudonymity, could fundamentally alter the social context for racial politics in the United States (and presumably elsewhere). Kang argues that, because racial identification is mostly invisible in the online environment (at least until video overtakes text as the dominant means of online self-presentation), three important results are likely to follow: (1) racial mapping will be undermined by pervasive online racial anonymity; (2) increased interracial social interaction will foster racial integration; and (3) the increased ability to 'pass' as a member of another race will destabilize the significance of racial categories altogether.

The dark side of both Chander's and Kang's visions, of course, is the possibility of increased self-segregation and the empowerment of *illiberal* thought through international cybernetworking. Indeed, if the rise of online interaction enables minority groups to combat isolation by linking with others, as Chander argues, then it also enables lonely extremists to find a welcoming transnational community that may encourage violently racist or sectarian beliefs. Likewise, while the erasure of race online offers opportunities for changing social attitudes in a more inclusive direction, the existence of illiberal sites may help to amplify, inculcate and encourage exclusionary (or even violent) beliefs. The inevitable conclusion is

that cyberspace is virgin social space, and as such it inevitably offers both promise and peril, as it reflects and transforms the social life that migrates there.

As noted above, such cyber social life includes the creation of alternative communities. And the development of these communities inevitably raises questions about the legal rules that should govern such communities. Are they, after all, their own legally defined communities exercising their own forms of governance, jurisdiction and sanction? Or are these communities simply elaborate games to be governed either by the game creator or by the sovereign that exercises authority over the players as they sit in their (territorially delimited) chairs in front of computer screens across the globe? The final section considers such questions. In Chapter 15 Jennifer Mnookin describes a notorious 'cyber-rape' in an early online community, LambdaMOO, as well as the group's efforts to build a fledgling governance structure to address online misbehaviour. Fast-forwarding a decade or so, James Grimmelmann, in Chapter 16, looks at legal/governance issues in the new generation of multiuser game communities. Grimmelmann even goes so far as to suggest that we think of virtual worlds as alternative legal systems and thereby analyse them through the lens of comparative law.

This discussion returns us full circle to the original cyberlaw debates between exceptionalists and unexceptionalists. In the end, nearly all of the essays in this collection suggest that the rise of cyberspace has fundamentally altered sociolegal reality. Whether they are discussing how people think, how globalization affects legal analysis, how public and private power is deployed online, how debates about free speech, copyright and privacy are reconfigured by the rise of the Internet or how concepts of racial, ethnic or community identity may shift, most of the authors in this volume seem to believe that *something* is changing.

Perhaps that is to be expected. After all, if one takes a law and society approach, one cannot look at 'well-settled' legal principles in a vacuum or rely on such principles to orient oneself in the social world. Instead, law and society scholarship has always opened up the black box of legal doctrine to let the messy on-the-ground realities pervade the discussion. And once such realities are part of the analytical framework, it becomes nearly impossible to insist that the extraordinary social changes wrought by the Internet would *not* have an effect on legal doctrine (though, as Ross cautions, those effects are never unidirectional nor are they uninfluenced by pre-existing political and economic power and interest). Thus, if there's one thing that a law and society approach to cyberspace suggests it is that cyberspace is in fact worth studying as a sociolegal phenomenon in its own right, a phenomenon whose myriad affects and dislocations we are only just beginning to perceive.

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# Name Index