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Jonathon Penney

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JONATHON W. PENNEY*

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ABSTRACT

This article discusses the central ideas within an emerging body of cyberlaw scholarship I have elsewhere called the "New Virtualism". We now know that the original "virtualists"– those first generation cyberlaw scholars who believed virtual worlds and spaces were immune to corporate and state control – were wrong; these days, such state and corporate interests are ubiquitous in cyberspace and the Internet. But is this it? Is there not anything else we can learn about cyberlaw from the virtualists and their utopian dreams? I think so. In fact, the New Virtualist paradigm of cyberlaw scholarship draws on the insights of early cyberlegal work while acknowledging the need to bring more realism and empiricism to cyberlaw analysis. With reference to examples of both original and new virtualist work, I set out three key features or innovations of the New Virtualism: first, its recognition of the permeability of real and virtual space; second, its reliance on the interdependence of cyberlaw analytical perspective; and third, its rejection of the cyber-utopian's Legal Immunity Thesis. The paper concludes with a discussion of future directions for New Virtualist scholarship in both privacy and copyright law.

* Jonathon W. Penney is a Fulbright Scholar at Columbia Law School, and was recently a Mackenzie King Travelling Scholar at the Faculty of Law, Oxford University. He would like to thank the Journal of Internet Law's Executive Managing Editor Robert V. Hale for his assistance in preparing this piece, and Professor Greg Lastowka for advice and encouragement about the importance of the emerging body of virtual law.

BEYOND CYBER-UTOPIANISM

Few still maintain the "utopianism" of early cyber theorists like John Parry Barlow and Julian Dibbell, who believed that the internet would remain free of government control.[1] Indeed, many scholars today write of "first" and "second generation" cyberlaw scholarship.[2] We now know that the original "virtualists"[3] – those first generation cyberlaw scholars who believed virtual worlds and spaces were immune to corporate and state control – were wrong; these days, such state and corporate interests are ubiquitous in cyberspace and the Internet. But is the whole story? Is there not anything else we can learn about cyberlaw from the virtualists and their utopian dreams? I believe so.

The virtualist intellectual paradigm was never really about law or politics, at least not directly. Rather, it was about the fundamental nature of cyberspaces and virtual worlds themselves. Underlying the virtualist's legal thesis about cyberspace's immunity from government control was a deeper philosophical assumption about its character: cyberspace is infinitely unique and different; it was, to borrow overused Latin legalese, *sui generis*— an entirely new world and frontier. This Uniqueness Thesis is what the (flawed) Legal Immunity Thesis was based on: because cyberspace was inherently unique, old forms of control like law, corporate power, and state coercion, neither *should* nor *could* apply. But cyberspace proved vulnerable to these traditional forms of control, despite the unique challenges it presented.[4]

Today, the Legal Immunity Thesis is dead, but the Uniqueness Thesis, in many ways, lives on. Building upon these earlier ideas about the unique legal challenges posed by cyberspaces, a new body of virtualist scholarship is emerging. Elsewhere, I have heralded this scholarship as the "New Virtualism".[5] I called it "virtualism" because it still explores the complex challenges to law and policy posed by cyberspaces and virtual worlds, as unique places distinct from real space. It thus retains the Uniqueness Thesis of first generation cyberlaw and virtualist scholars. But I also called it "new" because it moves beyond their utopianism, preferring, instead, to tackle real space and cyberspace legal challenges together, rather than dismissing real

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[1] Orin S. Kerr, *Enforcing Law Online*, 74 U. CHI. L. REV. 745, 745, 751 (2007).

[2] *E.g.* LAWRENCE LESSIG, CODE VERSION 2.0, at xiv-xv (2006); Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2044 n.3 (2004).

[3] James Grimmelmann, *Virtual Borders: The Interdependence of Real and Virtual Worlds*, FIRST MONDAY (Feb. 6, 2006), http://www.firstmonday.org/issues/issue11_2/grimmelmann/index.html.

[4] *See* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006); Kerr, *supra* note 1, at 751-52.

[5] Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE. J.L. & TECH. 194 (2008) (For comprehensive, but not exhaustive, citation to scholarship I categorize as the "New Virtualism" see fn 36 of this work).

space concerns, as Barlow might have, as outdated or irrelevant to cyberspace.[6]

But what are the most important innovations of the New Virtualism? The best way to understand the New Virtualism is to compare it with the intellectual product of the first generation cyberlaw scholars— the original virtualists. Here, two pieces readily come to mind. First, David Johnson and David Post's widely influential article "Law and Borders — The Rise of Law in Cyberspace"[7], published in the *Stanford Law Review* in 1996, exemplifies original virtualist scholarship. Johnson and Post rejoiced in the "special character" of cyberspace and called for its independence from the "current law-making authority", that being, the "territorial nation state".[8] Such ideas were the *sine qua non* of the Uniqueness and Legal Immunity Theses. On the other hand, a prototypical (and typically creative) example of New Virtualist scholarship is James Grimmelmann's more recent "Virtual Borders: The Interdependence of Real and Virtual Worlds",[9] which offers an interesting meditation on the "design" of virtual worlds by exploring the connections between virtual and "real life" legal and monetary systems. These articles are discussed below to help outline the key innovations of New Virtualist scholarship.

ONE: THE PERMEABILITY OF REAL AND VIRTUAL SPACES

The original virtualists, or first generation cyberlaw scholars, advocated a strict libertarian approach to the newly emerging virtual worlds and cyberspaces of the early 1990's. Echoing the cyber-utopians, they argued strenuously that cyberspace ought to be left alone by lawmakers and regulators.[10] But as lawyers and legal scholars, they went further than the cyber-utopian philosophers. Instead of simply declaring cyberspace beyond the reach of government, they also offered proposals to achieve a kind of self-determination among virtual communities.[11]

Underlying these and similar proposals was an implicit assumption that cyberspace was defined by hard and clearly defined borders that rendered it separate and apart from "real space", that is, the world beyond cyberspace and virtual worlds. Johnson and Post's piece followed this intellectual roadmap perfectly; even their title

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[6] Penney, *supra* note 5 at 197.

[7] David R. Johnson & David G. Post, *Law and Borders - The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367-75 (1996) (noting possibilities of internal regulation of Internet through competing rule sets).

[8] *See id.* at 1402.

[9] Grimmelmann, *Virtual Borders*, *supra* note 3.

[10] Penney, *supra* note 5 at 200-201.

[11] Penney, *supra* note 5 at 200-201.

announced the emergence of "Borders" as if the new electronic frontier was cabined by territoriality and boundaries. Indeed, in their introductory paragraph they spoke of the "screens and passwords" that "separate" cyberspace from the physical realm, that is, the "'real world' of atoms."[12] These boundaries were hard, clear and defined: the "new boundary", they wrote, "defines a distinct Cyberspace…"[13]

These ideas were essential to the Uniqueness Thesis. Cyberspace was a distinct world and that distinctiveness was possible only by its separation from the "real" world. The "hard" borders of cyberspace not only nurtured and preserved the character of virtual space and its communities, but guaranteed that traditional laws would have little relevance by setting virtual space off from the real. The idea that real space laws might apply to cyberspace was just not conceivable for the original virtualists; it did not accord with what they knew, or believed they knew, about cyberspace and virtual worlds.

As it turned out, the original virtualists were wrong. The developments of the ensuing decade would show that the borders between real space and cyberspace were neither clear nor impermeable.[14] Increasing public use and popularity of the Internet and its cyberspaces and virtual worlds, brought more attention and scrutiny from "real space" state regulators and law enforcement officials. New laws were proposed and new means of controlling this supposed "new frontier" of cyberspace were propagated and enforced, reaching into the presumably impenetrable borders of cyberspace.[15] Increasing electronic commerce and commodification also played a role in blurring borders between cyber and real space.[16] As businesses moved more of their commerce online, they sought new ways to track and influence consumer habits and preferences; that is, they brought traditional business ideas into the cyberworld. The hard and clear borders of cyberspace were not so, and the cyberlaw proposals of the original virtualists, based on this false assumption, were cast into doubt with these important changes.

The New Virtualism, in contrast, embraces these new uncertain borders. Because it is not concerned with the cyber-utopian ideal of wholly independent and self-determining virtual worlds and communities, the New Virtualism need not ignore, or struggle against, the reality that the borders between real and virtual space are gray and permeable. Grimmelmann has no trouble accepting this as apparent

[12] Johnson & Post, *Law and Borders*, *supra* note 7, at 1367.

[13] Johnson & Post, *Law and Borders*, *supra* note 7, at 1367.

[14] Penney, *supra* note 5 at 201-202.

[15] *See generally* GOLDSMITH & WU, *supra* note 4.

[16] *See* Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, at 2059 (arguing that real-world commodification is causing the breakdown between game spaces and real space).

from his title's announcement of the "Interdependence" of "Real and Virtual Worlds".[17] For him, emerging concepts of virtual commerce and trade, and our interest in them, in fact, are meaningless unless we recognize their interrelatedness with more familiar "real world" concepts: "If avatars in virtual worlds were not so profoundly linked to people in the real one, there would be no real–money trade".[18] Moreover, Grimmelmann notes the importance of recognizing that rather than existing as isolated synthetic spaces set apart from "real life" by hard boundaries and borders, as the original virtualists believed, cyberspaces were, inextricably linked to real space:

> Borders both real and virtual attract smugglers, fugitives, bandits, and refugees. It takes two to clean up a borderland. Ultimately, borders connect as well as bound. We can continue to hope that the borders of virtual worlds will be places of fruitful contact and exchange.[19]

By acknowledging this reality, Grimmelmann, and other New Virtualists, are in a (better) position to understand what impact traditional laws have, or should have, on legal norms inside virtual spaces, and the impact that activity in those spaces have on traditional laws. The New Virtualist paradigm has shifted the focus of virtualist scholarship from the original's ideological project, to a more pragmatic function based on analysis and empiricism.

TWO: RECOGNIZING THE IMPORTANCE AND INTERDEPENDENCE OF PERSPECTIVE

The New Virtualism also recognizes the importance of "perspective," as an analytical tool. Orin Kerr notably explained the problem of "perspective" in cyberlaw as a duel between "internal" and "external" viewpoints.[20] Internal or virtual perspectives, Kerr explained, analyze cyberlaw problems from the viewpoint of a person *internal* to a virtual world or cyberspace.[21] Here, the person is understood as an identity, or perhaps avatar, living inside a given cyberspace or virtual community. An external or "real" perspective, on the other hand, is the more traditional viewpoint: it approaches cyberlaw from the perspective of a

[17] Grimmelmann, *Virtual Borders*, *supra* note 3.

[18] Grimmelmann, *Virtual Borders*, *supra* note 3.

[19] Balkin, "Virtual Liberty", *supra* note 16, at 2045.

[20] Orin Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 357-405 (2003).

[21] *Id.* at 357.

person living in real space, in most cases just sitting at their laptop or desktop computer, *external* to any digital space or world.[22]

Original virtualists, like most courts and legal scholars, failed to clearly distinguish between internal and external perspectives.[23] When they did address perspective, however, their cyber-utopian philosophy often led them to embrace the internal or virtual view. This was inevitable given their belief in the Uniqueness and Legal Immunity Theses, which were the foundations of their mode of cyberlaw thought. Cyberspace and virtual worlds, so the Uniqueness Thesis held, were inherently distinct; so, not surprisingly, they likewise rejected the external or realist perspective as irrelevant, or unimportant. This, of course, was part of the Legal Immunity Thesis: the inherent uniqueness meant not only that the laws of real space were irrelevant and inapplicable to cyberspace, but so too was the external or real perspective entailed by real space laws.

Such ideas are central to the main thesis of "Law and Borders". Johnson and Post were not concerned with how to transform or bend traditional laws in order to make them work in virtual worlds and cyberspace; rather, they were concerned with a "new law", one with "distinct rule sets", for cyberspace.[24] Most importantly, they argued these laws require due "deference" from real space lawmakers.[25]

A strong internal or virtualist perspective drives these themes. Their title, just to begin with, sets the tone for the discussion with an important notice as to where to find this new law: "Law and Borders— The Rise of Law in Cyberspace". The "new law" Johnson and Post spoke of would emerge not out of, but within, or "inside" cyberspace, that is, internal to the new virtual spaces and worlds created by "global electronic communications."[26] The new law would not be found in traditional "real space" legal form— not in bills in the legislature, nor judicial courts. The subjects of the new law were not the people and things of real space, but those who commit the "meaningful act" of "[c]rossing into Cyberspace".[27] And the contours of this new law would correspond not to the physical world's geography and challenges, understood by the external or realist perspective, but the "special character" of virtual space, which "differs markedly from anything found in the physical world."[28]

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[22] *Id.*

[23] *Id.* at 357-58 (noting that courts and commentators often switch between external and internal perspective in cyberlaw unknowingly).

[24] Johnson & Post, *Law and Borders*, *supra* note 7, at 1400.

[25] Johnson & Post, *Law and Borders*, *supra* note 7, at 1400-01.

[26] Johnson & Post, *Law and Borders*, *supra* note 7, at 1400-01.

[27] Johnson & Post, *Law and Borders*, *supra* note 7, at 1379.

[28] Johnson & Post, *Law and Borders*, *supra* note 7, at 1401.

The external or realist perspective was not a tool of analysis for the original virtualists. Rather, it was a world view that, like the clunky machinations of the state and its traditional laws, was obsolete in virtual worlds and cyberspaces. People living in "that other place" that is, in real space, lived in the Old World where the external or realist perspective was most appropriate. However, that kind of approach was outmoded and unhelpful for citizens of cyberspace and virtual communities, the New World. As Johnson and Post argued, a "true" law of cyberspace could only develop with a clear "dividing line" between the virtual and "nonvirtual world".[29] Because laws and rules developed within virtual worlds mattered, only the internal or virtualist perspective was relevant and material.

The New Virtualism, we have learned, understands that the borders between cyberspace and real space are not clearly defined, but interrelated and interdependent. The borders, if they exist, are much more grey and porous, and therefore a much more flexible approach to cyberlaw analysis, including perspective, is needed. New Virtualist scholarship remains "virtualist" because it understands the powerful insights that an internal or virtualist perspective can offer in resolving legal problems of cyberspace. However, it also understands that an external perspective should not be ignored. It, too, provides important insights; after all, if, as recent history has shown, traditional laws can influence, shape and control virtual worlds, then no legal solution is a complete without exploring a problem from both an internal and external point of view.

Grimmelmann understands this quite well. Without abandoning the virtualist perspective, he reminds virtual world designers, who often deny the "external perspective", that people in virtual worlds are also people in real life.[30]

> If this is the true virtue of the virtual, then designers need to qualify both of their concerns. Let us start with the request for independence from real–life law, with its denial of the external perspective and of effects jurisdiction. Designers are not going to escape from either if what matters in virtual worlds is their status as real communities for real people.[31]

Virtual people in virtual communities are real people, with real life concerns. Virtual communities are designed by people in real space. Try as they might, the virtual world designers, like the original

[29] Johnson & Post, *Law and Borders*, *supra* note 7, at 1395.

[30] Grimmelmann, *Virtual Borders*, *supra* note 3.

[31] Grimmelmann, *Virtual Borders*, *supra* note 3.

virtualists, cannot escape these simple truths, and thus cannot ignore the legal importance of the external perspective.

The New Virtualism values the uniqueness of virtual worlds and spaces, and thus often begins its analysis from the internal or virtualist point of view. But it also offers the flexibility needed for complete solutions to cyberlaw problems: both the internal and external, the virtual and real, are relevant and necessary. At once, the New Virtualism is more practical, thorough and less ideological. That is how law and public policy ought to be, especially with some as new and complicated for legal analysis as cyberspace.

THREE: REJECTING THE LEGAL IMMUNITY THESIS (OR THE RELEVANCE OF REAL AND VIRTUAL LAWS)

Within an intellectual framework shaped by the Uniqueness Thesis, it made sense to *localize* governance. Self-determination, as an ideal, asserts that *the people themselves*, that is, those within or among the community to be governed, should be the ones making the laws and rules. They live in the community, they know it best— why should the rules and laws of outsiders or aliens govern the community? Such laws, self-determination tells us, will be neither just nor effective.

To the original virtualists, these same premises followed naturally from the unique nature of cyberspace. Anyone outside or *external* to cyberspace could not possibly understand it and should not be making the rules. Rather, the best people to govern cyberspace, to decide its laws, were those people living in, or *internal* to those virtual communities. To put the argument in the simplest terms: once the uniqueness of cyberspace is established, and the uniqueness of inhabiting therein, so too was the inapplicability of real space law as a tool of legitimate government.

This, as I have called it, is one form of the Legal Immunity Thesis. In original virtualist scholarship, it came in different forms, some more tempered than others. Johnson and Post, to their credit, offered a sensible argument (like the one above) for its application based on self-determination and local government: if the new rule sets of virtual worlds do not "fundamentally impinge" upon the "vital interests" of people in real space (who do not inhabit virtual worlds) then "the law of sovereigns in the physical world should defer to this new form of self-government."[32]

The New Virtualism rejects the Legal Immunity Thesis, while retaining the insights of the Uniqueness Thesis. This approach flows naturally from the earlier premises discussed— once the permeability and interdependence of the "borders" of real and virtual space is

[32] Johnson & Post, *Law and Borders*, *supra* note 7, at 1393.

acknowledged, then one cannot take sides, as the original virtualists did, when it came to either the applicability of the external or realist perspective and the concerns of traditional laws of real space. Both the realist perspectives and laws were relevant and necessary for legal analysis. Both virtual laws and real space laws apply.

But acknowledging the relevance of externalism, and rejecting the Legal Immunity Thesis, does not mean the internal or virtualist perspective is likewise dismissed. In this sense, the New Virtualism also rejects the thesis of cyberlaw skeptics who see nothing interesting, unique, or new in cyberlaw, or that it is non-existent.[33] Thus, Grimmelmann notes that acknowledging that real space laws are be relevant is not a complete concession to the predominance of externalism— only that real life concerns cannot be ignored:

> These concessions do not, however, require repudiating entirely the wish for a measure of independence. All that they require are admissions that real–life governments can reach virtual worlds and that real–life governments have a legitimate interest in what goes on in virtual worlds. The former is an acknowledgment that the same people live in the real world and in virtual ones — what Larry Lessig would call "dual presence".[34]

Taking real life concerns or laws into account does not obliterate the virtualist call for autonomy or greater deference; rather it is simply a recognition of certain realities like the interdependence of real space and cyberspace.

Grimmelmann notes the argumentative moves of those, like Johnson and Post, who base their argument for deference on an appeal to the legal sensibilities of real space lawmaking, like self-determination or the need to leave communities to police themselves.[35] But this kind of reasoning, used to reject the external view, is inconsistent, allowing one to pick and choose among real space legal concepts.[36] It amounts, some might say, to having a virtual cake and eating it too. The New Virtualism understands that the original virtualists were wrong to reject externalism, but also reject the claims of cyberlaw skeptics who see nothing unique or new in legal challenges posed by virtual worlds and cyberspace.

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[33] *E.g.*, Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1147 (2000) (suggesting that the "cyberlaw" is "nonexistent").

[34] Grimmelmann, *Virtual Borders*, *supra* note 3.

[35] Grimmelmann, *Virtual Borders*, *supra* note 3.

[36] Grimmelmann, *Virtual Borders*, *supra* note 3.

DIRECTIONS FORWARD

The New Virtualism is, if anything, a portrait of cyberlaw scholarship coming of age: casting off ideologies and tautologies, shedding rigidity for flexibility and choosing empiricism over pureness of thought. Here, the reader might ask: why are these elements innovative? Why does any of this matter? A full answer to these questions takes us far beyond the scope of this article; but let me offer two instances where a New Virtualist approach can offer innovative solutions to some problems of virtual law and cyberspace.

Take privacy for example. Elsewhere, I recently articulated a new approach to protecting privacy in cyberspace based on New Virtualist principles.[37] Privacy scholars, I suggested, have "over-theorized" and "over-categorized" the concept of privacy, and that the predominant approach to privacy in cyberspace (informational privacy) implicitly privileged an externalist or realist perspective.[38] I also argued that an internal or virtualist perspective could define a new approach that spent less time theorizing privacy, and more time theorizing about *persons* in cyberspace.[39] A virtualist approach to privacy in cyberspace is more theoretically and normatively sound, because it reconnects ideas about informational privacy to more a fundamental values like personhood— by tying privacy to the virtual person, however form she may inhabit in cyberspace (such as the 3D avatar in a virtual community or as embodied digital information on the Internet).[40] There are also jurisprudential benefits: most Supreme Court cases recognizing a right to privacy are based on notions of personhood that a virtualist account is firmly grounded in. Informational privacy was cut off from these cases because it was based on ideas of property in information.[41] These ideas offered no means to either adequately protect privacy, or ground a constitutional right. Virtualist privacy, by all accounts, shows a new way forward.

Another natural area of research for New Virtualist scholars is copyright law. Modern copyright law has been transformed in response to, and because of, the use of digital information and media on the Internet and its cyberspaces. Copyright law is also, like informational privacy, theorized from a deeply entrenched "externalist" perspective. This is apparent from the simplistic way modern copyright law applies to online use. In real space, copying and distribution is done by physical processes; a copy is a tangible thing— a DVD, a cassette, etc— and thus, must be physically copied and then

[37] Penney, *supra* note 5.

[38] Penney, *supra* note 5 at 198-199, 210-213.

[39] Penney, *supra* note 5 at 214-216.

[40] Penney, *supra* note 5 at 214-229.

[41] Penney, *supra* note 5 at 207-210.

moved. Copyright law targets these easily defined practices to limit copyright abuse.

But in cyberspace, or other electronic spaces, any time digital media or information is accessed, organized, moved, format shifted, or viewed, it is copied. Each copy is arguably a violation of copyright protections. A skeptic may say such copies are all protected by notions of *de minimus* or fair use, but just this example shows how, at its most basic and fundamental level, copyright law is deeply externalist. An internal or virtualist approach to copyright law would, I think, spend less time pursuing such transient, benign and architecturally necessary copying, and spend more time constructing legal theories of copyright that focus on the kind of processes and copying in virtual space more threatening to copyrights. Copyright law need not be discarded, of course, as cyber-utopians might have opined; it just needs to deploy a virtualist perspective more often, particularly to resolve challenges posed by emerging forms of virtual intellectual property.[42] Again, a proper exploration of these ideas takes us beyond the four corners of this article, but there are certainly fruitful directions, and an interesting future, for the innovations of the New Virtualism.

[42] *See* Jonathan Richards, *Second Life sex bed spawns virtual copyright action*, TIMES ONLINE, Jul. 4, 2007, *available at* http://technology.timesonline.co.uk/tol/news/tech_and_web/article2025713.ece (discussing case where man sues another for "copying and then selling" and thus violating the copyright of a virtual bed he designed for use in the virtual world of Second Life).