



## Invoking Law as a Basis for Identity in Cyberspace

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### I. INTRODUCTION

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On Sunday morning, Ms. B. dials into Prodigy, then logs on to the Prayer Line, a bulletin board storing messages from around the world. She scans a list of the most recent entries: Learning how to lean; Let me pray for you; My father; My mother's stroke; National day of prayer; Please pray; Prayer for health; Ralph needs prayer; The father's heart.<sup>1</sup> These are the supplications of a group that has come to pray together on the Internet.<sup>2</sup> Another member, Reverend R. Stoddard, observes that the Prayer Line is "on the verge of developing a new formation of the church that will be without any of the traditional accouterments of churches. We won't have organs. We won't have buildings. What we will have is an elec-

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<sup>1</sup> *All Things Considered: Prayer Line Links On-Line with Virtual Church* (NPR radio broadcast, June 19, 1995).

<sup>2</sup> *Id.* The Internet is a vast inter-connection of computer networks that communicate according to the same rules and now span the globe. Internet Literacy Consultants, *ILC Glossary of Internet Terms* (last modified July 9, 1997) <<http://www.matisse.net/files/glossary.html>>. For up-to-date introductions to the Internet, see Andy Johnson-Laird, *The Anatomy of the Internet Meets the Body of Law* 1-22 (1996) (report submitted to the International Retreat Conference, Oct. 17-18, 1996, Monterey, Calif.) (published in part in THE CYBERSPACE LAWYER, Sept. 1996); Adam Gaffin, *EFF's Guide to the Internet* v. 3.20 (last modified Dec. 11, 1996) <[http://www.eff.org/pub/Net\\_info/EFF\\_Net\\_Guide/netguide.eff](http://www.eff.org/pub/Net_info/EFF_Net_Guide/netguide.eff)> (explaining the Internet, email, the Usenet, discussion groups and a variety of Internet utilities); J. Quarterman & S. Carl-Mitchell, *RFC 1935: What is the Internet Anyway?* (last modified Apr. 1996) <<http://ds.internic.net/rfc/rfc1935.txt>>; E. Krol & E. Hoffman, *RFC 1462: FYI on "What is the Internet?"* (last modified May 1993) <<http://ds.internic.net/rfc/rfc1462.txt>>; *RFC 1958: Architectural Principles of the Internet* (last modified June 1996) <<http://ds.internic.net/rfc/rfc1958.txt>>; Tracy LaQuey, *The Internet Companion: A Beginner's Guide to Global Networking* (2d ed. 1994) <<http://www.obs-us.com/obs/english/books/editinc/>>. For an overview of the Internet's history, see John Adam, *Geek Gods: How Cybergeniuses Bob Kahn and Vint Cerf Turned A Pentagon Project into the Internet and Connected the World*, WASHINGTONIAN, Nov. 1996, at 66; Michael Hauben & Ronda Hauben, *Netizens: On the History and Impact of Usenet and the Internet* (last modified Oct. 15, 1995) <<http://www.columbia.edu/~hauben/netbook>>.

tronic connection with one another. And I really don't think any of us know what that's going to look like or how that will evolve."<sup>3</sup>

¶2 The arrival of the virtual church is emblematic of the Internet's new role in modern communications. No longer the exclusive domain of technical adepts and academics, the Internet has entered the cultural mainstream. An estimated sixty million people use the Internet worldwide.<sup>4</sup> The humblest of users can access any of over 320 million Web pages with the click of a mouse.<sup>5</sup> The Net's much-touted power allows a person to communicate easily with whole groups of people and exhibit information that anyone else on the Net can access.

¶3 Netizens<sup>6</sup> have been quick to organize these interactions by employing various kinds of topical bulletin boards, variously known as discussion groups, conferences, newsgroups, and virtual communities.<sup>7</sup> Some are run by private organizations and provide access only to paying members. These include the bulletin boards of large service providers like Prodigy and CompuServe (where Prayer Line resides) as well as boards maintained by smaller, "boutique" organizations. In addition, public bulletin boards permeate the Internet, most notably the 15,000 or so topical boards organized as the Usenet.<sup>8</sup> Themes on the Usenet run from living with depression (e.g., alt.support.depression) to political discussion (e.g., alt.politics.radical-left). More than mere forums, these bulletin boards have emerged as the heart of the new cyberspace community.<sup>9</sup>

¶4 If any one perspective describes the diversity of communities proliferating on the Internet, it is the view that the Net is not merely a means of communication but a "place."<sup>10</sup> Cyberspace is the community's meeting hall and the lovers' rendezvous. While this view may just reflect a predisposition to portray reality

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<sup>3</sup> *Id.*

<sup>4</sup> Linda Greenhouse, *Court, 9-0, Upholds State Laws Prohibiting Assisted Suicide; Protects Speech on Internet*, N.Y. TIMES, June 27, 1997, at A1.

<sup>5</sup> Gina Kolata, *It's Confirmed: Web's Size Bogs Down Searches*, N.Y. TIMES, Apr. 9, 1998.

<sup>6</sup> The term "Netizen" derives from the phrase "citizen of the Internet" and commonly refers to the computer literati and dedicated users of the Internet. The term connotes civic responsibility and participation. Internet Literacy Consultants, *supra* note 2.

<sup>7</sup> An Internet bulletin board stores email messages posted by individual users. Anyone with access to the bulletin board can read any and all of these messages, and respond to them by posting their own messages. Through successive postings, groups can conduct round-table electronic conversations.

<sup>8</sup> Lori Hawkins, *Deja News Puts Yesterday's Views at Your Fingertips*, THE AUSTIN AMERICAN-STATESMAN, Mar. 11, 1996, at C1. Unlike many private bulletin boards, the Usenet does not reside on a single computer system. Copies of the Usenet bulletin boards reside on hundreds of thousands of computers throughout cyberspace. In general, a message posted to one copy of a bulletin board propagates around the world because pairs of Usenet computers contact one another regularly to exchange any messages that they do not already have in common. One computer tells two friends, then they tell two friends, and so on, and so on, just like in the commercial. Jacob Palme, *How the Usenet News Protocols Work* (last modified Sept. 1996) <<http://www.dsv.su.se/~jpalme/e-mail-book/usenet-news.html>>.

<sup>9</sup> For an interesting discussion of bulletin boards and bulletin board topics, See HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* 121-36 (1993).

<sup>10</sup> Many observers have treated cyberspace as a "place" for analytical purposes. See, e.g., Linda M. Harasim, *Networks: Networks as Social Space*, in GLOBAL NETWORKS 15-34 (Linda M. Harasim ed., 1993); David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). But see Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996).

through spatial idioms, it may also be an attempt to frame the meaning of the experience in terms that will endure after the computer is turned off for the night. However tentatively adopted, the notion of the Internet as a “place” has prompted many observers to suggest that activity in cyberspace poses a number of new legal questions.<sup>11</sup>

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Recent efforts at regulation, though, reflect a more traditional perspective -- that the Internet functions merely as a sophisticated broadcasting medium. Therefore, the argument goes, Internet “transmissions” should be as tightly regulated as are radio and television.<sup>12</sup> Critics counter that users are engaging in constitutionally protected speech no different from that uttered on the city street. Thus, the debate over regulation of the Internet has been framed, in part, as a debate over limitations on speech.<sup>13</sup> In 1996, Congress passed the controversial<sup>14</sup> Communications Decency Act (CDA), enacted as Title V of the Telecommunications Act of 1996.<sup>15</sup> The CDA criminalized, among other acts, the transmission of indecent or patently offensive material received by children over computer networks.<sup>16</sup> Other efforts at regulation have targeted specific bulletin boards, like

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<sup>11</sup> See, e.g., Anne Wells Branscombe, *Cyberspaces: Familiar Territory or Lawless Frontiers*, 2 J. COMPUTER-MEDIATED COMM. (June 1996), <<http://www.usc.edu/dept/annenberg/vol2/issue1/intro.html>>; Anne Wells Branscombe, *Jurisdictional Quandaries for Global Networks*, in GLOBAL NETWORKS 83-104 (Linda M. Harasim ed., 1993); I. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. (Fall 1996) <<http://law.lib.uchicago.edu/forum/hardy.html>>; David R. Johnson, *Due Process and Cyberjurisdiction*, 2 J. COMPUTER-MEDIATED COMM. (June 1996) <<http://www.usc.edu/dept/annenberg/vol2/issue1/du.html>>; Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, U. CHI. LEGAL F. (Fall 1996) <<http://law.lib.uchicago.edu/forum/perritt.txt>>; David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, J. ONLINE L. 3 (1995) <<http://www.law.cornell.edu/jol/post.html>>; Juliet M. Oberding and Terje Norderhaug, *A Separate Jurisdiction for Cyberspace?*, 2 J. COMPUTER-MEDIATED COMM. (June 1996) <<http://www.usc.edu/dept/annenberg/vol2/issue1/juris.html>>. See also Andy Johnson-Laird, *supra* note 2, at 23-35; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509 (1996).

<sup>12</sup> See 47 U.S.C.A. § 153 et seq. (Law. Co-op. 1996). For a critique of possible government regulatory approaches compared to industry self-regulation, see Dawn L. Johnson, *It's 1996, Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. 51 (1996).

<sup>13</sup> See, e.g., *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996) (upholding criminal sanctions against the owners of a web site located in California but accessible from Tennessee that contained material found obscene by the local community standards of Tennessee); see also Minnesota Office of the Attorney General, *Memorandum re Jurisdiction and the Internet from the Minnesota Office of the Attorney General* (visited Nov. 26, 1997) <<http://www.state.mn.us/ebranch/ag/memo.txt>> (claiming jurisdiction over out-of-state residents who disseminate information into Minnesota via the Internet); Minnesota Office of the Attorney General, *Press Release: Minnesota AG Files Legal Action Against Individuals Involved in Computer On-Line Scams* (July 18, 1995) <<http://www.state.mn.us/ebranch/ag/press.txt>> (announcing lawsuits against parties that allegedly use the Internet to defraud consumers); *Formal Opinion Fla. Att'y Gen. Off.: Gambling on the Internet and on Cruises to Nowhere*, AG0 95-70 (Oct. 18, 1995) <<http://legal.firm.edu/opinions/index.html>> (advising that while federal and Florida state law prohibits gambling-related wire communications, gambling on the Internet poses a national, if not international, enforcement problem); but see Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995) (counseling restraint and causation in the application of common law to activities on the Internet).

<sup>14</sup> See Peter H. Lewis, *Protest, Cyberspace-Style, for New Law*, N.Y. TIMES, Feb. 8, 1996, at A16.

<sup>15</sup> Pub. L. No. 104-104, 110 Stat. 56 (not yet codified). See also Electronic Frontier Foundation *Search Archive* <<http://www.eff.org/>>.

<sup>16</sup> *Id.* at § 502. The CDA imposed fines up to \$250,000 and two years in jail for violation of its decency standard.

a German ban on newsgroups accessible through CompuServe concerning, among other topics, child pornography and homosexuality.<sup>17</sup>

¶6 These legal beachheads in cyberspace have scandalized much of the Internet community. Passage of the CDA sparked a day of online protest against infringement of free speech.<sup>18</sup> Netizens vigorously applauded the recent Supreme Court declaration that the anti-indecency provision of the CDA was an unconstitutionally overbroad restriction on the freedom of speech.<sup>19</sup> Online activists have emerged, vociferously denouncing CompuServe for acquiescing to the German authorities.<sup>20</sup> Ostensibly, the sentiment on the Internet is one of protest against government censorship. But it is also directed against private entities, such as the Church of Scientology, which has attempted to silence its online critics.<sup>21</sup> Netizens even subscribe to their own brand of censorship, particularly with respect to private enterprises that dare to disrupt Usenet discussion groups with advertisements.<sup>22</sup> At the same time, Internet users only seem actively concerned about their *online* rights. The buzz in cyberspace rarely chafes against censorship in general or limitations on “offline” speech.

¶7 Thus, the Internet’s “free speech” movement is better described as a desire for continued “home rule.” It is a call for the preservation of cyberspace as an electronic frontier -- a place where the locals can face unfettered the challenge of self-regulation as they explore the novel possibilities of their environment. This article suggests that the determination with which Netizens guard the Net from government intrusion arises not merely from a sense of turf but because the legal invasion of cyberspace threatens the status quo quasi-legal institutions that define, demarcate, and distinguish communities online. To support this claim, this article documents a variety of cyberspace communities and the laws, in the form of en-

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<sup>17</sup> See Glenn Gamboa, *Foreign Laws Hit Home in the Global Village*, THE RECORD, Jan. 16, 1996, at E4; Ruth Walker, *Why Free-Wheeling Internet Hit Teutonic Wall Over Porn*, THE CHRISTIAN SCIENCE MONITOR, Jan. 4, 1996, at 1.

<sup>18</sup> See Lewis, *supra* note 14, at A16.

<sup>19</sup> Reno v. ACLU, 117 S.Ct. 2329 (1997). The Court concluded that the CDA was overbroad because it effectively required all Internet communication to adhere to a standard of decency appropriate for children, even when the communication actually occurred exclusively among adults. *Id.* Two federal district courts had previously enjoined the CDA, finding it unconstitutionally over-broad. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996) *cert. granted*, 117 S. Ct. 554 (1996). CDA’s prohibition against making indecent material available to minors online is unconstitutional on its face because it cannot be implemented without seriously impeding adult access. Shea v. Reno, 96 Civ. 0976, 1996 U.S. Dist. Lexis 10720 (S.D.N.Y. June 29, 1996). (Order granting preliminary injunction) *appeal filed*. CDA is unconstitutional on its face because it effectively bans protected indecent communication between adults.

<sup>20</sup> Perhaps the most prominent online activist organization is the Electronic Frontier Foundation, at <<http://www.eff.org>>.

<sup>21</sup> The Church of Scientology has sought to obstruct the discussion on alt.religion.scientology, a Usenet newsgroup dedicated to debating and debunking Scientology. See Alan Abrahamson and Nicholas Riccardi, *Scientologists Sue, Seize Critic’s Computer Files*, L.A. TIMES, Feb. 14, 1995, at B3; Alison Frankel, *Making Law, Making Enemies*, AM. LAW., Mar. 1996, at 68. One of several lawsuits brought as part of the Scientologists’ legal strategy has presented the courts with an issue of first impression regarding third party liability on the part of service providers. Religious Technology Ctr. v. Netcom On-Line Communication Serv. Inc., 907 F. Supp. 1361 (N.D. Cal. 1995).

<sup>22</sup> See, e.g., Brad Patten, *Local Lawyers’ Ad Stirs Internet Furor*, PHOENIX GAZETTE, Apr. 15, 1994, at A1.

forced custom, federal statute, and local rule, that govern them. In the process, it explores the many relationships between law and identity. By way of introduction, Section II briefly explains how cyberspace nurtures interpersonal relationships. Section III focuses on how the Usenet has adopted a law based on enforced customs and the constitutive relationship between these customs and community identity. Section IV illustrates the instrumental nature of law and its power to shape identity by describing a number of single-sex Internet groups and how Title IX of the Educational Amendments of 1972 outlawed one of them. Section V relates how LambdaMOO, a cyberspace community dedicated to the construction of a fanciful alternative reality, has struggled both with its identity and its elaborate system of legalistic rules, finding that the two are really different faces of the same coin. LambdaMOO's experience in developing its own virtual rules further suggests an anti-foundationalist interpretation of law, with implications for law in the real world.

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This inquiry into virtual law provides repeated confirmation of the longstanding hypothesis that individual and community identity requires the development of a body of law that defines and distinguishes communities. The proposition is that individual identity is not merely a matter of the self, but of the individual as a participant in a community. Law establishes the community by distinguishing members from non-members. In this light, government proposals to regulate the Internet threaten to encroach not just upon electronic speech, but upon the customs and rules that define community and identity online. In Section VI, the article concludes that those who resist regulation of cyberspace are not just fighting for freedom of speech; they are defending hearth and home. In the process, Netizens' efforts to deny "outsiders" rights attendant to virtual membership, including the right to establish the rules, has itself become a defining characteristic of the virtual community.

## II. THE FORMATION OF COMMUNITIES ONLINE

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The vitality of the cyberspace community is arresting. Uncounted people have supplemented conventional experience with what one observer has termed a "life on the screen."<sup>23</sup> This life is characterized not just by the passing friendships and working relationships of those who interact over great distances. For some, life in cyberspace<sup>24</sup> engages the timeless themes of human experience: birth, death, love, marriage. For instance, six dozen expectant mothers gather regularly on a private discussion group to sort out the trials of pregnancy.<sup>25</sup> Born of common experience, their online friendships have continued to flourish even after their children are born and their original discussions have fulfilled their purpose.<sup>26</sup> Members of another group create a bulletin board dedicated to messages of

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<sup>23</sup> SHERRY TURKLE, *LIFE ON THE SCREEN* (1995).

<sup>24</sup> "Cyberspace" refers to the whole range of information resources available through computer networks. Internet Literacy Consultants, *ILC Glossary of Internet Terms*, <<http://www.matisse.net/files/glossary.html>>.

<sup>25</sup> Ilana DeBare, *Women Lining Up to Explore On-line*, SACRAMENTO BEE, Jan. 22, 1996, at A7.

<sup>26</sup> *Id.*

mourning for one of their number who has died.<sup>27</sup> After a time, they compile their tributes and give them as a memento to the family of the deceased.<sup>28</sup> Other Internet users are so enamored of one another online that they arrange to meet face to face; some eventually marry.<sup>29</sup> Remarkably, some online paramours that have never actually met have staged quite serious online weddings, complete with officiators and well-wishers.<sup>30</sup> They present themselves in their online communities as married while pursuing their conventional lives unwed and apart.<sup>31</sup> In a very real sense, life in cyberspace can augment life in real space.

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To the uninitiated, it may seem ironic and even dubious that a sense of community can arise within the sterile environment of a computer network. After all, cyberspace relationships are rarely conveyed by more than words silently scrolling across the unblinking face of a computer screen. Cyberspace users have been able to create thriving and multi-dimensional relationships for a number of reasons. First, the members of a newsgroup have much in common -- they self-select according to their interest in a particular topic. Second, the medium tends to reduce users' inhibitions by lowering the risks inherent in any conventional interpersonal interaction.<sup>32</sup> The rejected, embarrassed, foolish or bored cybernaut can escape just by logging off. Perceiving that undesirable consequences can be avoided, more users are willing to become acquainted and risk forming relationships.<sup>33</sup> Unfortunately, lowered inhibition all too often leads to blunt, rude, and even harassing behavior.<sup>34</sup> But other participants blossom, letting down their hair, opening up, reaching out, and letting others in.<sup>35</sup>

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The wary also find shelter through pseudonymous and anonymous participation,<sup>36</sup> practices that are not only technically feasible but are generally

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<sup>27</sup> *The WELL as a Community*, Topic 7, No. 18, <<http://www.well.com/conf/vc/7.html>>.

<sup>28</sup> *Id.*

<sup>29</sup> See Alan C. Miller, *Reality Bytes*, L.A. TIMES, Feb.10, 1995, at E1; see, e.g., Andrea Simpson ed., *A Seacraft Wedding* Dec. 14, 1994, <<http://www.spots.ab.ca/~andrea/seacraft/logs/wedding.txt>> (transcript of a PernMUSH wedding); see also Turkle, *supra* note 23, at 192-96; Pavel Curtis, *Mudding: Social Phenomena in Text-Based Virtual Realities* 6 (April, 1992) (unpublished manuscript) <<ftp://ftp.lambda.moo.mud.org/pub/MOO/papers/DIAC92.txt>>; Elizabeth M. Reid, *Cultural Formations in Text-Based Virtual RealityRealities* (1994) (unpublished M.A. thesis, University of Melbourne) <<ftp://ftp.lambda.moo.mud.org/pub/MOO/papers/CulturalFormations.txt>>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> For discussions of this phenomenon, see Malcolm R. Parks and Kory Floyd, *Making Friends in Cyberspace*, 1 J. COMPUTER-MEDIATED COMM. (Mar. 1995) <<http://www.usc.edu/dept/annenberg/vol1/issue4/parks.html>>; Reid, *supra* note 29.

<sup>33</sup> *Id.*

<sup>34</sup> See, e.g., Elizabeth Weise, *On Line Gender Gap*, ROCKY MOUNTAIN NEWS, Oct. 30, 1994, at 110A.

<sup>35</sup> See *The WELL as a Community*, <<http://www.well.com/conf/vc/7.html>>.

<sup>36</sup> For discussions of the legal ramifications of anonymous and pseudonymous communication on the Internet, see George P. Long, *Who Are You?: Identity and Anonymity in Cyberspace*, 55 U. PITT. L. REV. 1177 (1994); David G. Post, *Pooling Intellectual Capital: Thoughts on Anonymity, Pseudonymity, and Limited Liability in Cyberspace*, <<http://www.cli.org/DPost/paper8.htm>>; A. Michael Froomkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases* 15 J. L. & COM. 395, 395-449 (1996).

condoned on the Internet.<sup>37</sup> In contrast to the facelessness of anonymous participation,<sup>38</sup> a pseudonymous user can reveal her innermost thoughts, conceal her real identity, and still present a human face to which others can relate.<sup>39</sup> Pseudonymous accounts also allow a frustrated user to make a fresh start by exchanging an old name for a new one.

¶12 In addition to protecting users, pseudonymity and anonymity also offer new opportunities for self-discovery. It is common for people to explore their alter egos by presenting imaginary personae to other users online.<sup>40</sup> The limits of such self-construction are bounded only by the imagination. At least one user has employed pseudonymity to present two personae within the same Usenet community, alt.sex.bondage. Unbeknownst to the community, the user argued both sides of a heated debate over the propriety of sadomasochism.<sup>41</sup> The other participants were somewhat divided over whether the tactic was an unacceptable subterfuge or a novel exploration of individual identity.<sup>42</sup>

¶13 Pseudonymity also facilitates online experimentation with community characteristics. Taboo communities (for example, the many newsgroups that discuss sexual practices) and communities that portray fantasy worlds may be able to gain wider membership on the Net than they can in the physical world thanks to pseudonymity. The social construction of one such community, LambdaMOO, is discussed in detail below. Some members of these communities welcome the chance to explore a new aspect of themselves without being committed to the fantasy. Others revel in revealing their true nature in an environment that renders a censorious society impotent. Thus, communities have emerged on the Net because, while the medium seems impersonal, it is also empowering. At very little risk to themselves, participants can seek out others with common interests from around the globe and engage them in uninhibited and frank roundtable discus-

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<sup>37</sup> Indeed, at least one court has found that a state law prohibiting anonymous and pseudonymous communication over the Internet violates the free-speech protections of the First Amendment. *ACLU v. Miller*, 977 F.Supp. 1228 (N.D. Ga. 1997). See also Robert D. McFadden, *Internet Laws Overturned in New York and Georgia*, N.Y. TIMES, June 21, 1997, at 22.

<sup>38</sup> Several anonymous remailers are accessible over the Internet. An anonymous remailer forwards email to a desired Internet address after removing the sender's identifying information. The best known anonymous remailer, operating from Finland (email address: Anon.penet.fi) handled over 8,000 messages a day. *The Net: Interview with Jull Helsingius* (BBC television broadcast, July 3, 1995). Anon.penet.fi provided anonymous accounts that allow recipients of anonymous email to reply to the sender without knowing the sender's identity. *Anonymous Help* (Mar. 12, 1996) help@anon.penet.fi>(on file with author). However, the proprietor of this remailer ended operations in late 1996 under the pressure of civil liability. *Press Release: Johan Helsingius Closes His Internet Remailer* (Aug. 30 1996) <<http://www.penet.fi/press-english.html>>; Joshua Quittner, *Requiem for a Go-Between*, TIME, Sept. 16, 1996, at 74 (bemoaning shutdown of anon.penet.fi.). For more information on anonymous remailers, see Andre Bacard, *Anonymous Remailers FAQ* (updated Nov. 15, 1997), <<http://www.well.com/user/abacard/remail.html>>. For a list of other remailers, see Raph Levien, *Remailer List* (Feb. 10, 1997) <<http://www.cs.berkeley.edu/~raph/remailer-list.html>>.

<sup>39</sup> Many Internet access providers support pseudonymous accounts. The arrangement allows the user to communicate over the Internet using a pseudonym. Only the access provider knows the user's real name.

<sup>40</sup> RHEINGOLD, *supra* note 9, at 145-76 (1993); TURKLE, *supra* note 23, at 178-79; see also Alan Aycock, *Technologies of the Self: Foucault and Internet Discourse*, 1 J. COMPUTER-MEDIATED COMM. (Sept. 1995) <<http://www.usc.edu/dept/annenberg/vol1/issue2/aycock.html>>.

<sup>41</sup> Julian Dibbell, *Of Anonymous Bondage: When Does a Denizen of the Online S/M World Lose his Right to Wear a Mask?*, THE VILLAGE VOICE, Nov. 8, 1994, at 52.

<sup>42</sup> *Id.*

sions from the privacy of their own homes. The process of realizing this potential can in itself give rise to the bonds that are the basis of every human community.

### III. SPEECH AND IDENTITY IN CYBERSPACE

#### A. *Speech as the Crux of Online Identity*

¶14 At this stage in the technological development of the Internet, the bonds that shape online communities are built almost entirely through text-based conversations. For the most part, users either send and receive email or converse in real-time through textual “chat rooms.” An individual’s online identity is thus the sum of when, where and how she speaks, and what she says. By the same token, community membership is defined in terms of who may speak, rather than in biological, historical or cultural terms. The topic of discussion establishes the character of the community. Thus, on the Internet, speech is the crux of identity.

¶15 Restrictions on speech, then, are especially significant in cyberspace. The degree to which people are free to speak defines their latitude in exploring their online identities. Restrictions on speech dictate the limits of individual identity. They also constrain the composition and character of the community. For example, in December 1995, German authorities notified CompuServe that some 200 Usenet discussion groups that were accessible through its Internet access service violated federal laws against child pornography.<sup>43</sup> The targeted groups included some dedicated to discussions of AIDS,<sup>44</sup> others discussing self-defense against sexual predators, and all groups discussing homosexuality.<sup>45</sup> German CompuServe users lost access to the discussion groups, which meant that Germans could no longer read or post to these groups.<sup>46</sup>

¶16 The ban did more than hinder discussions of the proscribed topics. It redefined the membership of the targeted bulletin boards. Previously, membership was freely available to German CompuServe users. The ban transferred some autonomy over personal identity from these individuals to the German government. For some German users, the lost venues may have been critical to how they identified online. Similarly, the proscribed communities themselves lost some control over their ability to define themselves and their membership. The ban marred their international character and compromised their independence, qualities that are hallmarks of many Internet communities.

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<sup>43</sup> Gamboa, *supra* note 17.

<sup>44</sup> Paul Vallely, *Sex on the Net: A Very Modern Morality Tale*, THE INDEPENDENT, Jan. 6, 1996, at 15.

<sup>45</sup> Gamboa, *supra* note 17.

<sup>46</sup> *Id.* For many users, however, the ban had only symbolic significance. Hours after CompuServe blocked access, users were sharing information on how to circumvent CompuServe’s electronic obstacles. *Id.*

*B. How Cyberspace Institutions Limit Speech*

¶17 The special significance of speech in cyberspace does not mean that Netizens refrain from imposing restrictions on speech. In fact, as the Internet has evolved technologically and culturally, Netizens have established a number of restrictive institutions to keep an anarchy of words at bay. Authority over speech does not necessarily have to originate outside of cyberspace. In fact, Internet participants impose most of the more common restrictions on online speech. Service providers,<sup>47</sup> access providers,<sup>48</sup> system administrators,<sup>49</sup> discussion group moderators, and even individual Netizens exercise control over speech.

¶18 A discussion group moderator is a caretaker of sorts. Some keep a low profile, mainly handling technical glitches and maintaining distribution lists. Others lead the discussion, raising issues and posing questions. Moderators also enforce the code by which their communities interact. Many are autocratic; others consult their members before handling problems or instituting new rules. With respect to speech, most moderators reject postings at their own discretion. For example, they typically screen out advertisements and postings that are not relevant to the discussion topic. Many also reject “flames,”<sup>50</sup> “spam,”<sup>51</sup> and harassing postings. If an offender is habitual, some moderators refuse all further postings, even unoffending ones, effectively removing the offender from the discussion.

¶19 Some discussion groups are unmoderated. These groups are much more freewheeling and receive any postings sent to them. Insults and flame wars are common in some groups. Most groups try to suppress off-topic postings and advertising. To do so, individual members take it upon themselves to persuade the offending poster to discontinue his unwanted speech. A simple request is almost always sufficient. Occasionally, a recalcitrant offender so annoys members that they unleash a sort of “short-lived electronic jihad.”<sup>52</sup> By electronically evading certain system controls, they can delete the offender’s postings (a privilege normally reserved for the poster), or drop a “mailbomb” on the offender’s email address, disabling it with a flood of junk email.<sup>53</sup> Other intimidation tactics can even crash the offender’s computer system.<sup>54</sup> But because such vigilantism is

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<sup>47</sup> Service providers (e.g. Prodigy, CompuServe, America Online) are commercial enterprises that offer access to their private networks and services (including discussion groups) as well as gateways to the Internet.

<sup>48</sup> Access providers are smaller “boutique” services that offer fewer services than service providers. Primarily, they provide clients with an Internet gateway and rudimentary services like email. Some maintain their own bulletin boards. See, e.g. *The List* (visited Mar. 10, 1998) <<http://thelist.internet.com>>; *Celestin: Providers of Internet Access* (last modified Mar. 6, 1998) <<http://www.celestin.com/pocia>>.

<sup>49</sup> System administrators are responsible for the physical operation of a computer system or network resource. Internet Literacy Consultants, *supra* note 2.

<sup>50</sup> “Flame” refers to any kind of vehemently derogatory comment or insult. *Id.*

<sup>51</sup> “Spam” refers to any unsolicited message sent to a large number of people. It is the Internet equivalent of junk mail. *Id.*

<sup>52</sup> Dibbell, *supra* note 41.

<sup>53</sup> See, e.g. Jared Sandberg, *Mad Hacker Gets Message Across By Burying His Enemies in E-Mail*, WALL ST. J., Aug. 16, 1996, at B1.

<sup>54</sup> See Dennis Romero, *A New Force Lurks Amid the Cyber Shadows*, L.A. TIMES, Dec. 1, 1995, at E1.

necessarily reactive, individual Netizens can punish speakers but not prevent speech *ex ante*.

¶20 As a last resort, Netizens turn to system administrators, access providers and service providers to invoke the ultimate Internet sanction: suspension of a user's account. This is a drastic measure. Not only does it prevent the user from participating in any cyberspace communities, it silences speech before the fact. This punishment is reserved for those who engage in only the most proscribed speech. For example, Icanect, an Internet access provider, suspended the account of an estranged boyfriend caught posting nude images of his ex-girlfriend.<sup>55</sup> Service providers establish their legal right to suspend a client's account contractually. Service contracts typically proscribe "hacking," advertising, online harassment, obscenity, and the like.<sup>56</sup>

¶21 However, the threat of suspension is not as effective as it might seem. Most system operators and access providers handle so many accounts and transmit so much information that it is impractical for them to monitor their users' activity.<sup>57</sup> The onus usually falls on the victim to bring the offensive speech to the access provider's attention. But tracking down the offender can take considerable effort, and if the offender is using an anonymous remailer,<sup>58</sup> it may be next to impossible. Moreover, there is no Internet black list. At modest expense, any offender can circumvent suspension by opening a new account with another, unsuspecting access provider.

### *C. The Function and Meaning of Restrictions on Speech*

¶22 This overview of Internet authority figures suggests that they serve a very practical purpose. They impose a certain level of discipline that makes the Internet more useful. This structure imports the values that form the free speech doctrines of American constitutional law into the Internet community.<sup>59</sup>

¶23 In light of the Internet's origin, it is not surprising that Netizens would exercise their authority over free speech in rough accordance with American First Amendment doctrine. The first computer interconnections from which the Internet eventually emerged were established in the United States, and American culture continues to have tremendous influence on the ways in which the Internet is used. Thus, an American sensibility regarding the appropriate limits on author-

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<sup>55</sup> James W. Roberts, *Nude Photos of Local Woman Lead to Suspension of Internet Account*, ASBURY PARK PRESS, Feb. 17, 1996, at A4.

<sup>56</sup> See, e.g., Yale University, *Policies for Use of Computing and Information Systems Facilities*, (visited Mar. 10, 1998) <[gopher://yaleinfo.yale.edu/7700/00/About/Acceptable/CIS.Policy](http://gopher://yaleinfo.yale.edu/7700/00/About/Acceptable/CIS.Policy)>; CompuServe Online Information Service Agreement Terms (visited Mar. 28, 1998) <[http://www.sci.com/member\\_services](http://www.sci.com/member_services)>; AOL Inc.'s Terms of Service Agreement (visited Mar. 28, 1998) <<http://www.aol.com/copyright.html>>.

<sup>57</sup> *All Things Considered: Computer Bulletin Boards Redefining Sexual Harassment* (NPR radio broadcast, Oct. 1, 1994).

<sup>58</sup> An anonymous remailer is a service which allows users to send anonymous e-mail messages that are difficult or impossible to trace to their source.

<sup>59</sup> U.S. CONST. amend. I. See *infra* parts III.C.1-3.

ity has guided the institutions of authority that Netizens have created. This is not to say that these private authorities are actually bound by the First Amendment.<sup>60</sup> Rather, they merely seem to have internalized its general precepts.<sup>61</sup> Netizens apparently view the First Amendment as a model for self-imposed limitations in much the same way that other private institutions, such as private universities, voluntarily take the First Amendment as their guide when adopting policies like campus speech codes.<sup>62</sup>

¶24 In this light, the nature and structure of authority on the Internet can be more thoroughly understood if viewed through the lens of First Amendment doctrine. Such an analysis offers further insight into the ways in which Internet institutions control speech and illuminates the social purposes that they serve.

### 1. Content-Based Versus Content-Neutral Restrictions

¶25 In doctrinal parlance, a content-based restriction on speech restricts expression because of its message, ideas, subject matter, or content.<sup>63</sup> The moderator's authority to censor bulletin board postings can operate to impose content-based restrictions when it is used to reject off-topic postings. For example, the moderator of a bible study bulletin board might summarily reject a posting critical of Christianity on this basis. In one view, off-topic censorship is highly suspect because it directly and significantly burdens speech.

¶26 Alternatively, such screening might be better interpreted as merely an indirect or content-neutral burden on speech. In many instances, restrictions that are not intended to control the content of speech but incidentally limit it are consistent with the First Amendment.<sup>64</sup> In rejecting a posting, the moderator has not silenced the speaker. Rather, the moderator has requested that the speaker post to a group that discusses the speaker's topic. Between the 15,000 public Usenet discussion groups<sup>65</sup> and uncounted private bulletin boards, the speaker can almost always find at least one receptive community. Thus, if the Internet as a whole is taken as the "relevant forum," off-topic restrictions can be seen as merely organizing the marketplace of ideas, not suppressing it. From this perspective, moderators merely place indirect burdens on speech by regulating the time, place, and

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<sup>60</sup> The First Amendment operates to limit government acts only. U.S. CONST. amend. I.

<sup>61</sup> Now, of course, the Internet comprises an international infrastructure and international participants, so that in cyberspace the First Amendment is something of a local ordinance. John Pery Barlow, *Leaving the Physical World* (visited Mar. 15, 1998) <[http://www.eff.org/pub/Publications/John\\_Pery\\_Barlow/HTML/leaving\\_the\\_physical\\_world.html](http://www.eff.org/pub/Publications/John_Pery_Barlow/HTML/leaving_the_physical_world.html)>.

<sup>62</sup> See generally Thomas A. Schweitzer, *Hate Speech on Campus and the First Amendment: Can They Be Reconciled?*, 27 CONN. L. REV. 493 (1995); Alice K. Ma, *Campus Hate Speech Codes: Affirmative Action in the Allocation of Speech Rights*, 83 CAL. L. REV. 693 (1995).

<sup>63</sup> *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>64</sup> See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50-51 (1961) (the denial of admission to a state bar association based on applicant's refusal to answer questions regarding membership in the Communist party does not unconstitutionally infringe speech); *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456-71 (1994) ("must carry" provisions of federal law are not content-based restrictions on cable television operators' speech and therefore are reviewed under the intermediate scrutiny standard).

<sup>65</sup> See Hawkins, *supra* note 8.

manner of the speech. Notably, government regulations of this kind are generally subject to only an intermediate level of judicial review.<sup>66</sup> As noted above, privately imposed burdens on speech are generally not subject to actual judicial review. But the doctrinal call for a lower level of scrutiny is emblematic of a cultural preference, adopted in cyberspace, for an organizational method rooted in content-neutral rather than content-based burdens.

¶27 Arguably, a moderator's off-topic restrictions do not accord with free speech doctrine because, although they effectively regulate the time, place, and manner of speech, they are based on the content of the posting. First amendment doctrine attempts to distinguish carefully between indirect burdens that amount to content-based restrictions and those that do not.<sup>67</sup> For example, in *Police Department of Chicago v. Mosley*,<sup>68</sup> the Supreme Court invalidated a city ordinance that prohibited all picketing on a public way except peaceful labor picketing because the ordinance regulated speech based on its subject matter. The ordinance, in effect, restricted expression based on the acceptability of the message. In this sense, off-topic restrictions are closely analogous to the *Mosley* ordinance. However, they do not effectuate a content-based restriction on speech with respect to the Internet's newsgroups taken collectively. Instead, they operate to allocate speech to the appropriate forum.

¶28 This conclusion assumes, of course, that even the most disfavored posting will find acceptance within at least one community. In fact, in keeping with cyberspace culture, users who cannot find an appropriate forum are encouraged to create their own.<sup>69</sup> The Usenet, the most widely accessible system of public bulletin boards, admits new boards democratically.<sup>70</sup> Unfortunately, a technocratic coterie exercises significant influence over the process and has been known to undermine the Internet's professed free speech ethic by derailing proposals of particularly disfavored groups.<sup>71</sup>

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<sup>66</sup> To pass intermediate scrutiny, content-neutral restrictions on speech must further an important or substantial governmental interest, be unrelated to the suppression of free expression, and restrict speech incidentally, no more than is essential to further that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see also *United States v. Grace*, 461 U.S. 171, 177 (1983).

<sup>67</sup> See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 20.47, at 296 (2d ed. 1992).

<sup>68</sup> 408 U.S. 92 (1972).

<sup>69</sup> See *Usenet Newsgroup Creation Companion* (visited June 14, 1994) <<http://www.smartpages.com/faqs/creating-newsgroups/helper/faq.html>> (page no longer available at site; hardcopy on file with author); *How to Create a New Usenet Newsgroup* (visited Feb. 17, 1994) <<http://www.smartpages.com/faqs/creating-newsgroups/part1/faq.html>> (page no longer available at site; hardcopy on file with author).

<sup>70</sup> See *How to Write a Good Newsgroup Message* (visited 1994) <<http://www.cs.ubc.ca/spider/edmonds/usenet/good-newsgroup.html>> (page no longer available at site); *How to Create a New Usenet Newsgroup*, *supra* note 69.

<sup>71</sup> *How to Create a New Usenet Newsgroup*, *supra* note 69.

## 2. Freedom of Association

¶29 From another perspective, the moderator assumes responsibility for enforcing restrictions on electronic association. The moderator grants or denies a user's privilege to associate with a community by accepting or rejecting the user's postings, as described above. Here again cyberspace seems to have internalized an approximation of constitutional doctrine, namely the doctrine of freedom of association<sup>72</sup> announced in *NAACP v. Alabama ex rel. Patterson*.<sup>73</sup> In *Patterson*, the Supreme Court inferred a right to associate freely from the First Amendment right to speak freely, finding that "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ."<sup>74</sup> However, the right to associate freely is not absolute.<sup>75</sup> The government may restrict that right in various ways, depending on the purpose for which it is exercised. In brief, the Supreme Court has generally held that government restrictions on economic association (association for commercial purposes) need only pass a rational basis test.<sup>76</sup> But similar restrictions on intimate association (for example, spousal or familial relationships)<sup>77</sup> and expressive association must pass strict scrutiny.<sup>78</sup> Expressive association may be characterized as that which has some connection to rights explicitly established by the First Amendment: the freedom to speak, worship, and petition the government for the redress of grievances.<sup>79</sup>

¶30 Cyberspace institutions impose on the freedom of association by restricting membership. Moderators refuse postings from rule breakers; the Usenet organizes postings by topic; some groups even restrict posting by gender.<sup>80</sup> In the physical world, government regulation of membership restrictions is subject to a

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<sup>72</sup> For general discussions of the freedom of association, see ROTUNDA & NOWAK, *supra* note 67, at § 20.41; HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 241-587 (Jamie Kalven ed. 1988); James W. Torke, *What Price Belonging: An Essay on Groups, Community and the Constitution*, 24 IND. L. REV. 1 (1990).

<sup>73</sup> 357 U.S. 449 (1958) (holding that the state of Alabama could not compel the NAACP to disclose membership roster where past disclosures had resulted in reprisals).

<sup>74</sup> *Id.* at 460.

<sup>75</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding state law requiring an organization of men to admit women because the state had a compelling antidiscrimination interest, notwithstanding the expressive purpose of the association).

<sup>76</sup> *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (upholding law prohibiting union policy of racially discriminatory membership). A government restriction passes rationality review if there is a reasonable relationship between the means that the restriction uses and its ends. *Id.*

<sup>77</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (inferring the freedom of intimate association, namely to choose one's spouse, from constitutional privacy rights); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) (constitutional protection of family relationship).

<sup>78</sup> See *Patterson*, 357 U.S. 449 (requiring that a law serve a compelling state purpose and achieve that purpose through a means that is least restrictive of the associational freedoms it affects in order to pass strict review).

<sup>79</sup> See generally William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986); Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984).

<sup>80</sup> See *infra* part IV.

level of scrutiny corresponding to the purpose for which the members associate.<sup>81</sup> For example, where club membership is in large measure an economic association, a state may prohibit the exclusion of women from the organization.<sup>82</sup> However, such a prohibition does not survive strict scrutiny where membership restrictions are fundamental to the organization's expressive purpose.<sup>83</sup> Cyberspace culture seems to have adopted analogous principles. In most discussion groups, an "open door" attitude is the norm as long as the participant is willing to comply with the group's expressive purpose. There is good reason to extend membership only to those who are willing to keep to the subject: such a restriction is the only means by which a group can *define* its expressive purpose. The importance of this imperative is underscored by the fact that Netizens pursue it in the face of the anathema -- an abrogation of the rights to association of anyone excluded from the discussion group.

### 3. *The Moderator and the Law*

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The observation that there is a close nexus between the concepts of speech and association in the physical world<sup>84</sup> is especially true in cyberspace, where users associate by speaking, and speak, in part, by associating. Thus, restrictions on one activity can be depicted in terms of restrictions on the other. Moreover, as the above discussion demonstrates, such restrictions, whether depicted as a forum allocation system or as a means of regulating membership, transcend mere functionality. Control over speech implies power to define the character of the discussion group. It enables the moderator to specify the attributes of the discussion group and distinguish it from other Internet communities. In screening postings, the moderator asserts the group's chosen characteristics and demarcates the line between members and "outsiders." Just as speech is the crux of online identity,<sup>85</sup> limitations on speech are essential to the formation and individuality of virtual communities. Notably, the moderator regulates one form of expression--posting--to safeguard another--association. At the same time, the moderator restricts association to give context to an expressive community. As a group, moderators constitute an institution that determines the distribution of, and the accommoda-

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<sup>81</sup> See, e.g., *Roberts*, 468 U.S. 609.

<sup>82</sup> *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (state law requiring admission of women to Rotary club membership does not violate the First Amendment where club membership is an entre to the business community).

<sup>83</sup> See *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981) (recognizing the right of political parties to refuse membership to those with adverse political principles). LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 791 (1978) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.").

<sup>84</sup> *Patterson*, 357 U.S. at 460 ("[T]his Court has more than once . . . remark[ed] upon the close nexus between the freedoms of speech and assembly . . .") (in reference to *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) and *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

<sup>85</sup> See *supra* part III.A.

tion between, both forms of expression with respect to online communities taken collectively.

¶32 The free speech ethos that imbues Netizen society is essential to the balancing act that the moderators perform. It provides a basis (though not necessarily the only possible one) for accommodating inevitable tensions, whether between forms of expression or between competing conceptions of a discussion group's identity. As an enforced custom, it has a quasi-legal character, and the Internet culture invokes it as a constituent element of community formation.

¶33 This "law" is not literally the constitutional doctrine that has been hammered into shape by the Supreme Court. Rather, it is an imperfect reflection of this doctrine, adapted to the unique needs of cyberspace and the private authorities under which the Internet operates. But Netizens themselves might argue that this is hardly "real" law, for there is no formalized text, no body of interpretation, and no explicit agreement among Internet users. Netizens might claim that this is merely a description of the ways in which they use the Internet, rules of conduct that are as necessary as they are natural. Yet, one view of law, the constitutive view, would cite this protest as itself evidence that a form of law undergirds cyberspace society. This view holds that law is inherent in human affairs.<sup>86</sup> In the words of Sarat and Kearns:

[in the constitutive view,] we have internalized law's meanings and its representations of us, so much so that our own purposes and understandings can no longer be extricated from them. We are not merely the inert recipients of law's external pressures. Rather, we have imbibed law's images and meanings so that they seem our own. As a consequence, law's demands seem natural and necessary, hardly like demands at all. . . . Law enters social practices and is, indeed, imbricated in them, by shaping consciousness, by making law's concepts and commands seem, if not invisible, then perfectly natural and benign.<sup>87</sup>

¶34 In other words, customary rules shape the meaning of each electronic interaction and determine the self-understanding and status of each participant.<sup>88</sup> This is true even for ordinary users, like the virtual-church-going Ms. B.<sup>89</sup> Her church can exist because the Prayer Line's speech and association conventions accept prayers but redirect those who wish to debate religion to other "places," like the roundtable discussion at alt.religion.christian. The identity of the Prayer Line community thus depends on customary law. Moreover, the interrelationship between electronic identity and law is a necessary element of individual identity.

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<sup>86</sup> See David Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 604 (1984).

<sup>87</sup> Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 1, 29-31 (Austin Sarat & Thomas R. Kearns eds., 1993).

<sup>88</sup> See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 218-19 (1983); Christine Harrington & Barbara Yngvesson, *Interpretive Sociological Research*, 15 *LAW & SOC. INQUIRY* 135, 140-41 (1990). For one account of the political origins of this school of thought, see Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW* 413, 417-22 (David Kairys ed., 1990). For comparisons between the constitutive view of law and other contemporary legal theories, see Trubeck, *supra* note 86; Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

<sup>89</sup> See *supra* notes 1-3 and accompanying text.

Ms. B. herself identifies as a virtual-church-goer not only because customary law makes such a church possible, but because its customary practices embrace Ms. B's postings as symbols of valid participation.

#### IV. GENDER-SPECIFIC COMMUNITIES AND ANTIDISCRIMINATION LAW

¶35 In addition to defining identity, law, in the form of enforced custom, also plays other roles in cyberspace. The following sections explore another means by which Netizens invoke law and examine the different relationships that can arise among law, community formation, online identity, and restrictions on speech. This article examines two types of online communities. One, exemplified by a community known as LambdaMOO, is a miniature electronic society, where law takes the form of a complex body of formalized local rules. The other type of community restricts membership to a single gender; some cater to women, some to men. The WOC and MOC communities at Santa Rosa Junior College typify exemplify this second type. It is appropriate to introduce these topics by examining the treatment of women on the Internet in general as typified by their experience in a discussion group known as the Women of the WELL.

##### A. Women on the Internet

¶36 "Hey, babeee" scrolls up the screen. "I know u want it." "Your chat room or mine?" Women of the world, welcome to cyberspace: a place where things like race and gender couldn't matter anymore, unless, of course, you log on as Angie or Sherry.

¶37 For better or worse, men dominate the Internet. Observers estimate that as recently as 1995, eighty to ninety percent of online users were men.<sup>90</sup> But women are coming into their own in cyberspace. Recent surveys suggest that women now constitute more than a third of the online population.<sup>91</sup> While women's participation in public Usenet discussion groups is growing, many are dissatisfied with their treatment there,<sup>92</sup> where even groups dedicated to discussing women are dominated by men.<sup>93</sup> Some women simply avoid the pick-up scene. "I stay out of singles bars, and I stay out of chat rooms," says one Netizen.<sup>94</sup> Others

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<sup>90</sup> Alyce Diamandis & Suzie Siegel, *A Woman's Place*, TAMPA TRIB., Feb. 27, 1995, Baylife, at 1.

<sup>91</sup> Dennis Romero, *A New Force Lurks Amid the Cyber Shadows*, L.A. TIMES, Dec. 1, 1995, at E1; Judy Heim, *Online Q & A*, PC WORLD, Mar. 1996, at 244.

<sup>92</sup> See Ilana DeBare, *Women Lining Up to Explore On-line*, SACRAMENTO BEE, Jan. 22, 1996, at A7; Mike Godwin, *SOLO Contender: Free Speech vs. Sex Discrimination Online*, INTERNET WORLD ONLINE (Feb. 1995) <<http://www.iw.com/1995/02/law.htm>>.

<sup>93</sup> Examples of male-dominated Usenet discussion groups include soc.women and soc.women.lesbian-and-bi. Soc.feminism may be the only newsgroup with "feminism" in the name that men don't dominate. Diamandis & Siegel, *supra* note 90.

<sup>94</sup> DeBare, *supra* note 92.

stick to mailing lists that, perhaps by virtue of the topic, seem to attract few men.<sup>95</sup>

¶38 But as the number of female users has grown, more women have aspired to a chat room of their own. Today there are a variety of discussion groups that restrict membership to women.<sup>96</sup> Most of them are open to the public in the sense that any woman may join. Some are privately organized email lists; others are operated by private service providers. The service providers sell subscriptions that allow members to access their computers, which are privately owned. Services typically include a variety of discussion groups, real time chat rooms, MUDs,<sup>97</sup> and gateways to the Internet.<sup>98</sup>

### B. *The Women of the WELL*

¶39 The Whole Earth 'Electronic Link (known as the WELL) was one of the first service providers to establish gender-specific discussion groups.<sup>99</sup> It offers two, WOW (Women on the WELL) and MOW (Men on the WELL). Both WOW and MOW are moderated. In order to screen prospective members by gender, the moderators must resort to real world institutions: the telephone, a driver's license, or the assurances of someone known to the moderator.<sup>100</sup> Both discussion groups require that their members agree to keep the contents of the discussions confidential.<sup>101</sup> In addition, all WELL members must abide by the "house rules." Each member must sign up using his or her real name,<sup>102</sup> and must, in some discussions, agree to abide by a particular code of civility.<sup>103</sup>

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<sup>95</sup> See, e.g., Heim, *supra* note 91.

<sup>96</sup> At least twenty six discussion groups limit their membership to women. They include bulletin boards like Women on the WELL (operated by the WELL, a California service provider) and Babes in Their Cyberspace Hangout (operated by Echo, a New York service provider), as well as email lists on topics ranging from feminist activism (ABIGAILS-L, formerly BEIJING95-WOMEN) to Christian community (WOMEN-IN-MINISTRY) to life as a law student (XXANDLAW). For a comprehensive list of women-specific email lists, see Joan Korenman, *Gender-Related Electronic Forums* (last modified Feb. 4, 1998) <<http://www-unix.umbc.edu/~korenman/wmst/forums.html>>. Dozens of other email lists target (but are not limited to) specific populations of women, from female mathematicians to women of particular races and ethnicities. *Id.*

<sup>97</sup> A MUD is a kind of cyberspace community. See *infra* Part V.A.

<sup>98</sup> One example, the WELL, describes its services on its web site. *The Well* (visited Feb. 18, 1998) <<http://www.well.com/tools.html>>.

<sup>99</sup> The WELL is the brainchild of Stewart Brand of the Point Foundation and Larry Brilliant of Networking Technologies International. *The Well Backgrounder* (visited Feb. 18, 1998) <<http://www.well.com/background.html>>. It has approximately 10,000 members and approximately 280 public conferences. Email interview with Michelle Fox, Conference Administrator, The WELL (July 31, 1996). To find The WELL, visit <<http://www.well.com>>.

<sup>100</sup> Email interview with Flash Gordon, Moderator of Men on the WELL, The WELL (July 1, 1996).

<sup>101</sup> *Men on the WELL Conference Front Page* (visited Feb. 18, 1998) <<http://www.well.com/conf/mow.pri/>>.

<sup>102</sup> *More About Policy on The WELL* (visited Feb. 18, 1998) <<http://www.well.com/conf/policy/more.html#yoyow>>.

<sup>103</sup> *WELL Etiquette and Policy* (visited Feb. 18, 1998) <<http://www.well.com/confteam/etiquette.html>>. For example, on the WELL's Private Gay and Lesbian Conference, the moderator prohibits personal attacks and homophobic remarks (conference membership is not based on gender or sexual orien-

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But there are few other restrictions on speech. Unlike public Usenet discussion groups, WOW does not focus on any particular topic. In fact, its 400 female members have divided their postings into dozens of “threads,” or conversations. They range from current events and movies to the latest trends in food and fashion.<sup>104</sup> A member cannot *be* off-topic. It is just a place for women to enjoy one another’s company online. Thus, WOW exemplifies an essentialist conception of identity. The community conditions membership on a single characteristic: gender in the physical world. WOW avoids the issues that essentialism raises<sup>105</sup> by treating gender as an exogenous variable (although this is not true of all cyberspace communities), a variable that is otherwise meaningless in the context of cyberspace.<sup>106</sup>

### C. Gender Conferences at Santa Rosa Junior College

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However, context can, even within cyberspace, affect and even define the significance of a community. Gendered communities on the private computers of the WELL mean one thing; but gender specificity in the context of a publicly funded bulletin board means quite another: violation of federal anti-discrimination law. In a case described as the first of its kind,<sup>107</sup> the U.S. Department of Education’s Office of Civil Rights (OCR) found that a public college that sponsored gender-specific discussion groups had discriminated against its students based on sex<sup>108</sup> in violation of Title IX of the Educational Amendments of 1972.<sup>109</sup> Santa Rosa Junior College had created a computer bulletin board system called SOLO that offered over 200 discussion groups for the students’ exclu-

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tation.) Email interview with David Marley, Moderator of the Private Gay and Lesbian Conference, The WELL (June 30, 1996).

<sup>104</sup> Moreover, woman-specific discussion groups are not by definition out for male blood. For example, the women in the Washington conference of Meta Network even started a topic called “Celebrating Men to collect their tributary musings.” “I love the way they look at you intensely,” contributed one member. Elizabeth Weise, *Women Seize Some Internet Space*, RECORD, Oct. 25, 1994, at C4.

<sup>105</sup> For illustrations of the problems that essentialist conceptions of identity normally pose, see JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH CENTURY ETHNOGRAPHY, LITERATURE AND ART*, Ch. 12 (1988); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991); MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES*, 57-69 (1986).

<sup>106</sup> Perhaps it would be more accurate to say that WOW treats externally verifiable manifestations of gender as an exogenous variable in its reliance on driver’s license as gender determinative. WOW’s rules of membership have not engaged the problem of defining gender in the physical world. For an introduction to this issue, see BEN AGGER, *GENDER, CULTURE, AND POWER: TOWARD A FEMINIST POSTMODERN CRITICAL THEORY* (1993); SUSAN J. HEKMAN, *GENDER AND KNOWLEDGE: ELEMENTS OF A POSTMODERN FEMINISM* (1990); GLENN JORDAN & CHRIS WEEDON, *CULTURAL POLITICS: CLASS, GENDER, RACE, AND THE POSTMODERN WORLD*, 176-247 (1995).

<sup>107</sup> Tamar Lewin, *If Flames Singe, Who Is to Blame?*, N.Y. TIMES, Sep. 25, 1994, §3, at 4.

<sup>108</sup> Letter of Preliminary Finding from John E. Palomino, Regional Civil Rights Director, Office of Civil Rights, to Dr. Robert F. Agrella, President, Santa Rosa Junior College, June 23, 1994 (on file with author) [hereinafter Palomino Letter].

<sup>109</sup> 20 U.S.C. § 1681(a) (1994).

sive use.<sup>110</sup> In early 1993, at the request of female students, the college added a women-only conference (WOC).<sup>111</sup> Male students responded by calling for a men-only conference (MOC).<sup>112</sup> As on the WELL, postings in both conferences were confidential; they could not be shared with non-members.<sup>113</sup>

¶42 Within a few weeks two female students accused the college of condoning sexual harassment.<sup>114</sup> Three different male students had repeatedly posted anatomically explicit and sexually derogatory remarks to the MOC, referring to the subjects by name.<sup>115</sup> After the postings were leaked,<sup>116</sup> the female students who were insulted requested permission to join the men-only conference to reply to the insults.<sup>117</sup> The college refused to give them access because the conference was restricted to men.<sup>118</sup> The women filed suit.

¶43 Beyond sexual harassment, the claimants leveled a broader charge at the college. They claimed that by excluding women from the men-only conference, the college had discriminated against them based on their sex, in violation of Title IX.<sup>119</sup> Title IX prohibits the recipients of federal funds from providing separate educational programs on the basis of sex.<sup>120</sup> SOLO came within the scope of Title IX because it was funded with the College's federal resources and was used exclusively for educational purposes.<sup>121</sup> The Office of Civil Rights found that, in establishing the gender segregated computer conferences, the college had violated Title IX. The OCR directed Santa Rosa to discontinue the conferences.<sup>122</sup>

¶44 The federal proscription against MOC and WOC for the most part dismayed Netizens. This was the first time that the federal government had asserted authority to modify an online distribution of communication and association privileges among discussion groups. Moreover, this decision left open the question of whether the government can use Title IX to intervene in other parts of cyberspace.<sup>123</sup>

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<sup>110</sup> Nina Martin, *P.C.U.*, HOTWIRED (June 1995) <<http://www.hotwired.com/wired/3.06/departments/electrosphere/rosa.html>>.

<sup>111</sup> *Id.*

<sup>112</sup> Tamar Lewin, *Dispute Over Computer Messages: Free Speech or Sex Harassment?*, N.Y. TIMES, Sep. 22, 1994, at A1.

<sup>113</sup> Palomino Letter, *supra* note 108, at 2.

<sup>114</sup> *Id.* at 5.

<sup>115</sup> Lewin, *supra* note 107, at 2-3.

<sup>116</sup> *All Things Considered: Computer Bulletin Boards Redefining Sexual Harassment*, *supra* note 57.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> 20 U.S.C. § 1681(a) (1994).

<sup>120</sup> *Id.* See also 34 C.F.R. § 106.32, § 106.41 (regulations implementing Title IX).

<sup>121</sup> Palomino Letter, *supra* note 108, at 3-4.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> Private organizations that do not receive federal funds, such as the WELL, are beyond Title IX's reach. *But see* Grove City College v. Bell, 465 U.S. 555 (1984) (holding Title IX's prohibition against sex discrimination applies to a private college that receives federal funding indirectly through loans to its students). Because public universities own and operate much of the Internet's hardware infrastructure, and academics moderate many of its bulletin boards, Title IX may reach many parts of cyberspace. See DARREL MENTHE,

¶45 The application of Title IX to Santa Rosa College has many implications for the SOLO system. Foremost, it transfers the authority to distinguish between members and non-members from moderators to the federal government. In effect, the law preserves a coed community while destroying gender-specific ones. Further, Title IX implicitly imposes restrictions on the ability of potential members to speak and associate online. Male students at Santa Rosa College cannot speak and associate as an online community of men. Female students also lose speech and association rights. By closing the MOC, Title IX eliminated any possibility that the female claimants might post a reply directly to the male-only conference. As one claimant protested, “The answer isn’t less free speech, it’s more free speech.”<sup>124</sup> Her comment underscores the power that context gives to the meaning of speech. In the claimant’s opinion, the significance of her reply apparently depended on the nature of her audience - either the male students she wished to criticize, or her fellow students as a whole. Consider the (in)significance of her reply if it were addressed to herself alone or to, say, dairy farmers in Wales. In shaping the SOLO community, law informs the meaning of the speech that a community receives.

¶46 This invocation of Title IX demonstrates that law in cyberspace can adopt more than one guise. As applied to MOC and WOC, Title IX played an instrumental rather than a constitutive role in shaping identity. SOLO clearly did not internalize Title IX’s prescriptions.<sup>125</sup> Its members did not adopt its representations of themselves as participants in an exclusively coed community. Title IX’s demands were not so “natural and necessary” for the SOLO community that they hardly seemed like demands at all. Rather, the OCR applied Title IX as an instrument to alter the form and character of the SOLO community.

¶47 The instrumentalist conception of law depicts law as external rather than internal to a community.<sup>126</sup> Instrumentalism conceives of a “fairly firm division between the legal and the social with law being an important influence on society, but standing outside of it.”<sup>127</sup> In this instrumentalist role, law is a force for

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JURISDICTION IN CYBERSPACE: THE THEORY OF INTERNATIONAL SPACES (1995); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996) (discussing the issues related to federal jurisdiction in cyberspace); see also David G. Post, *Dispute Resolution in Cyberspace: Engineering A Virtual Magistrate System*, *Cyberspace Law Institute Working Paper #2*, (May 22, 1996) <<http://www.law.vill.edu/ncair/disres/DGP2.htm>> (examining the arguments for and against judicial courts dedicated to Internet transactions).

<sup>124</sup> Martin, *supra* note 110. (The OCR’s findings did not address whether the prohibition against such conferences violated any participant’s First Amendment rights. However, the Supreme Court has upheld the constitutionality of Title IX in several contexts).

<sup>125</sup> *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding the gender-based admissions policy of a state nursing school violates Title IX under an intermediate standard of review); see also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (sex discrimination in employment); *O’Connor v. Bd. of Ed. of Sch. Dist. 23*, 449 U.S. 1301 (1980) (competitive sports teams based on gender do not violate Title IX); Palomino Letter, *supra* note 108, at 5-6. OCR did address (and dismiss) rights to free speech in the context of the sexual harassment claims.

<sup>126</sup> See Sarat & Kearns, *supra* note 87 (comparing and critiquing instrumentalist and constitutive views of law). See also David M. Trubeck & John Esser, “Critical Empiricism” in *American Legal Studies: Paradox, Program, or Pandora’s Box?*, 14 L. & SOC. INQUIRY 13-38 (1989) (accounting and critiquing instrumentalism as a premise for law and society research).

<sup>127</sup> See generally Sarat & Kearns, *supra* note 87.

changing behavior on the Internet that may interfere with the ability to create a community.<sup>128</sup> Thus, Title IX enters cyberspace to restrict speech and association and to limit the contexts that lend meaning to speech. While it does not prescribe the basic nature of SOLO, it limits the field that SOLO's members can explore, leaving the SOLO community free to construct its identity as long as it is coeducational.

¶48 While this instrumentalist application of law to the Internet employs a very different method than the constitutive approach of Usenet custom, it is no less powerful in transforming individual identity and the meaning of cyberspace institutions.<sup>129</sup> Title IX contributes to the identity of every Santa Rosa College student by restricting his or her speech and proscribing membership in a single-sex SOLO community. Moreover, the invocation of Title IX redefines the meaning of the MOC and WOC. For Santa Rosa College students, these communities are no longer neutral social opportunities comparable to the Women or Men of the WELL. Instead, they are understood as sexually discriminatory practices.

## V. THE LAMBDA MOO COMMUNITY

### A. Introduction

¶49 As communities, the gender-specific discussion groups described above are both novel and conventional. Their accessibility via the Internet is, of course, a departure from traditional forms of community. Yet their norms of social interaction are largely the same as those familiar to the real world. The members join together to exchange information; they come to know one another; they build bonds of friendship and trust. (Such relationships, though the individuals have never met, are so common on the Internet as to be unremarkable.) The electronic medium, while an admittedly critical tool and even a catalyst,<sup>130</sup> is first and foremost a means of overcoming geographic obstacles.

¶50 Another kind of community blossoming on the Internet has no real-life analog: the Multi-User Domain, or MUD.<sup>131</sup> Members pointedly do not know one another, and never intend to pierce the veil of pseudonymity. They are players in a game that invites them to assume characters of their own making and provides an often whimsical "place" in which they can develop their characters through real-time social interaction. At least, that is how the games began. One of the most popular MUDs has evolved into a virtual society. In the process, it has had to confront internal struggles over issues of membership and the nature of its own identity. It has had to convert and press into service the rules of the

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<sup>128</sup> Trubeck & Esser, *supra* note 126, at 25.

<sup>129</sup> Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 L. & POL'Y 97 (1988).

<sup>130</sup> See *supra* part II.

<sup>131</sup> On MUDs in general, see RHEINGOLD, *supra* note 40, at Ch. 5.; TURKLE, *supra* note 23, at 9-14, 180-208, 250-54; Amy Bruckman, *Identity Workshop: Emergent Social and Psychological Phenomena in Text-Based Virtual Reality* (Mar. 29, 1992) (unpublished manuscript) <[http://www.oise.on.ca/~jnolan/muds/about\\_muds/asb/identity-workshop](http://www.oise.on.ca/~jnolan/muds/about_muds/asb/identity-workshop)>; Reid, *supra* note 29.

game as a form of virtual law capable of defining a community. Thus, it has had to address issues that have never loomed nearly as large for the discussion groups that have adopted the social conventions of the physical world. The law that LambdaMOO has developed suggests that law in general has a more subtle relationship to the governed than that espoused by the instrumental or constitutive schools. To treat this point clearly, I shall first explain in fairly rich detail the LambdaMOO community itself.

¶51 The first MUDs were computerized, Internet-accessible versions of Dungeons and Dragons, a popular role-playing game featuring various fantastic medieval worlds.<sup>132</sup> (“MUD” originally stood for Multi-User Dungeon.)<sup>133</sup> Some recreated Camelot, ancient Egypt,<sup>134</sup> or the worlds depicted by popular science fiction.<sup>135</sup> Over the past fifteen years, the growing Internet has made MUDs accessible to a clientele with a greater diversity of interests. Thus in many new MUDs, “hack and slash” themes have given way to social interaction for its own sake:<sup>136</sup> chatting,<sup>137</sup> computer-mediated sex,<sup>138</sup> cooperative expansion of the game-space,<sup>139</sup> and the like. By some estimates, the Internet now hosts more than 1000 MUDs.<sup>140</sup>

¶52 LambdaMOO<sup>141</sup> is one of the most popular of the “social” MUDs. It depicts a rambling mansion and grounds though textual descriptions, eschewing both sound and graphics. For example, users who enter LambdaMOO through the Living Room are greeted with the following description:

The Living Room.

It is very bright, open, and airy here, with large plate-glass windows looking southward over the pool to the gardens beyond. On the north

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<sup>132</sup> For a history of the development of MUDs, see Reid, *supra* note 29.

<sup>133</sup> TURKLE, *supra* note 23, at 11.

<sup>134</sup> Katie Hafner, *Get in the MOOd*, NEWSWEEK, Nov. 7, 1994, at 58.

<sup>135</sup> See, e.g., *TrekMUSE* (visited Apr. 19, 1998) <telnet://tos.net:1701/ or http://tos-www.tos.net/> (based on Star Trek); *DuneMUSH*, (visited Apr. 19, 1998) <telnet://mindport.net:4201 or http://www.nakednuns.com/regent/ix.html> (based on Frank Herbert's Dune).

<sup>136</sup> See TURKLE, *supra* note 23, at 181.

<sup>137</sup> *Id.*, at 181.

<sup>138</sup> Reid, *supra* note 29.

<sup>139</sup> TURKLE, *supra* note 23, at 181.

<sup>140</sup> See *The MUD Connector* (last modified Mar. 14, 1998) <http://www.mudconnect.com>.

<sup>141</sup> A MOO (MUD, Object-Oriented) is a type of MUD. Pavel Curtis created LambdaMOO in 1990 on a server at the Xerox Parc research facility in Palo Alto, California, during a lull in his research. Hafner, *supra* note 134, at 58. It evolved into the foundation of his research focus- the next generation of MUDs, “social virtual systems” that will provide complete graphical and audio environments for Internet-based business and scientific conferences. See Pavel Curtis & David A. Nichols, *MUDs Grow Up: Social Virtual Reality in the Real World* (visited Apr. 19, 1998) <ftp://ftp.lambda.moo.mud.org/pub/MOO/papers/MUDs-GrowUp.txt>. LambdaMOO is accessible on the Internet through Telnet at: <telnet://lambda.moo.mud.org:8888/>. The technical aspects of the MUDs depend on the structure of the underlying software. Suffixes denote the kind of software employed. TURKLE, *supra* note 23, at 181.

wall, there is a rough stonework fireplace. The east and west walls are almost completely covered with large, well-stocked bookcases. An exit in the northwest corner leads to the kitchen and, in a more northerly direction, to the entrance hall. . . .<sup>142</sup>

¶53 As the description implies, the player can type any one of a variety of compass points to move to another “room,” each offering its own description upon entry. There are hundreds of rooms, from the prosaic (The Kitchen), to the adolescent (Punk Heaven), to the fanciful (the little Red Hotel, inside the Monopoly Board, inside the Dining Room). There are also any number of objects scattered throughout the rooms that players can manipulate in variously defined ways: a map, a radio, a pair of ruby slippers. Most importantly, LambdaMOO allows interaction between players in real-time through simple commands like “say.” Words spoken to another player appear on, and only on, the other player’s screen. Words spoken to all players in a room, or actions taken there, appear on, and only on, the screens of the players in the room.<sup>143</sup> The LambdaMOO program enforces a rough approximation of the laws of physics. For example, a player cannot hear or see the goings-on in another room or exit a room in the direction of a wall instead of a door. This creates a surprisingly compelling impression of physical space. But in reality, LambdaMOO is just a descriptive database through which the players comb, text scrolling across their screens.

¶54 In another sense, LambdaMOO gives mere lip service to reality and physics. In a recent session, after shooting hoops with the player Hot\_Tuna, I went back to his pad for a beer by squeezing, like Alice in Wonderland, through the valve of his basketball and into its “roomy and tastefully decorated interior.” The room would shake every time his friends, on the outside, attempted a basket.

#### *B. Individual and Community Identity in LambdaMOO*

¶55 To the extent that anything is known about the members of LambdaMOO, most are probably college grads and undergrads.<sup>144</sup> Some data suggest that approximately 75% of the members are male.<sup>145</sup> But in LambdaMOO, players know one another only in terms of the character description each has written and the content of the conversation. This control allows players to leave any vestige of their real-world identities behind. Most characters are as fanciful as the LambdaMOO mansion. StarDancer describes herself (himself?) as “a human-sized, cyber-punk Tinkerbelle” with skin resembling “the dull side of a piece of aluminum foil.” Splattergrll wears “army fatigues and is armed to the teeth” but is two-dimensional—“she appears to be drawn on paper.” Lizard is, of course, “a petite reptile with tasteful pale purple scales.” In addition, the software program prompts each player to define his or her gender. Possibilities include male, fe-

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<sup>142</sup> Search of LambdaMOO Database, Xerox Corp., Palo Alto, Cal. (Oct. 6, 1996).

<sup>143</sup> For a further discussion of the rules of player interaction, see the @tutorial function in LambdaMOO, *supra* note 141.

<sup>144</sup> Curtis, *supra* note 29.

<sup>145</sup> Reid, *supra* note 29, at App. 6.

male, both, neuter, and indeterminate, among others.<sup>146</sup> Gender-guessing is a common pastime, even an art. The most ambitious gender-bender stunt pilots must be nimble, such as a man who plays a woman pretending to be a man.<sup>147</sup>

¶56 Thus, LambdaMOO players engage in a postmodern construction of individual identity in the sense that they ignore normative standards. Players create and recreate themselves from the fleeting figments of their imagination. They make no distinction between the “realistic” and the “impossible.” “You are who you pretend to be,” says one participant.<sup>148</sup> Players do not legitimize their identities by reference to the traditional cultural narratives of race, gender and class (in fact, these characteristics are treated as commodities which players can alter with ease) or by conformance to moderator-imposed restrictions on speech. Instead, legitimacy is derived from the expression of self-exploration.

¶57 Reality in LambdaMOO, then, is an entirely social construction. Moreover, the electronic medium allows players to shape their reality with unprecedented immediacy. While this feature confers a heady freedom on the players, it has also been at the root of tremendous conflict within their virtual social discourse: players cannot always agree on the characteristics of the virtual reality that they are sharing. Two stylized examples illustrate the problems that can arise. One player’s freedom to identify as a homicidal maniac can victimize the identities of his targets by eliminating them from the game. A player’s desire to remove all the virtual walls by altering the software would undermine another player’s illusion of physical space. LambdaMOO does not allow either activity.

¶58 From one perspective, such restrictions preserve the fixed, functional, programmatic aspects of LambdaMOO that facilitate experimentation with identity in the first place. Alternatively, the sum of such restrictions may be viewed as a boundary that defines the community and distinguishes it from others. LambdaMOO players construct their community in part by encoding in the software rules that make walls inviolate and prevent the elimination of other players. Users who prefer a different kind of community are excluded; they cannot “play.” By contrast, the *object* of some of the “hack and slash” MUDs is to eliminate the other players, and the software is written accordingly. These ground rules characterize and differentiate MUD communities. Thus, the LambdaMOO community itself is self-constructed.

¶59 But LambdaMOO is self-constructed to a greater extent than most other MUDs. In other MUDs, players typically do not control the ground rules. Instead, the authoring programmer establishes a MUD’s defining characteristics before making it available over the Internet. The theme, restrictions on character, and the rules of engagement are received by the community of players. Moreover, most authors participate in their MUD as “wizards,” i.e., as system adminis-

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<sup>146</sup> For a further discussion of gender indicators, see the @tutorial function in LambdaMOO, *supra* note 141.

<sup>147</sup> TURKLE, *supra* note 23, at 10.

<sup>148</sup> *Id.* at 12.

trators that prevent hackers from undermining the rules and as arbitrators empowered to settle player disputes dictatorially.<sup>149</sup> Thus, the MUD is both the creation and the domain of the author. The LambdaMOO community is strikingly different in this respect because its author has relinquished to the players control over the ground rules.<sup>150</sup> The players have been arguing ever since over the shape that their community should take.

### C. The Mr. Bungle Affair

¶60 The crisis was triggered by an incident now known as “the Mr. Bungle affair.”<sup>151</sup> A Mr. Bungle, a “down-at-the-heels harlequin,” surreptitiously inserted a little extra code into LambdaMOO’s server. He then seized control of two other characters, Legba, a “Haitian trickster spirit,” and Starsinger, a “tall, stout female.”<sup>152</sup> In front of an enraged but helpless crowd, Mr. Bungle raped Legba and forced Starsinger to enact a ritual of self-mutilation.<sup>153</sup> The outrage continued until the players managed to summon a “wizard” powerful enough to disarm the perpetrator.<sup>154</sup>

¶61 As the dust settled, many players began calling heatedly for revenge, for Mr. Bungle’s virtual head.<sup>155</sup> Everyone understood that in real life the incident amounted to no more than an exchange of words and a breach of civility.<sup>156</sup> But the emotional impact on the victims was real - the Seattle woman playing Legba confessed that later, as she discussed the incident online, her (real) faced streamed

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<sup>149</sup> See Pavel Curtis, *LambdaMOO Takes a New Direction* (visited Apr. 19, 1998) <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/newdirection](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/newdirection)>.

<sup>150</sup> *Id.*

<sup>151</sup> For a full and now classic account of the Mr. Bungle Affair, see Julian Dibbell, *A Rape in Cyberspace*, THE VILLAGE VOICE, Dec. 21, 1993, at 36-42, (visited Nov. 22, 1997) <<http://www.cis.ufl.edu/~dtc/istudy/freedom/DibbelRapeInCyberspace.html>>.

<sup>152</sup> *Id.* For a demonstration of how one character can control another, see Josh Quittner, *Johnny Manhattan Meets the Fury Muckers*, HOTWIRED MAGAZINE 2.03 (visited Nov. 22, 1997) <<http://www.wired.com/wired/2.03/features/muds.html>>.

<sup>153</sup> Dibbell, *supra* note 151, at 38. See also Quittner, *supra* note 152; Sherry Turkle, *Virtuality and Its Discontents: Searching for Community in Cyberspace*, THE AMERICAN PROSPECT, Winter 1996, at 50-57 (visited Nov. 22, 1997) <<http://epn.org/prospect/24/24turk.html>>.

<sup>154</sup> Dibbell, *supra* note 151, at 38. See also email message from Zippy to \*social-issues entitled *Why Mr. Bungle Was Caged* (Mar. 29, 1993) (message 213 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>).

<sup>155</sup> See, e.g., email message from legba to \*Wizard-List & \*social-issues entitled *Bungle* (Mar. 31, 1993) (message 236 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>); email message from Bakunin to \*Wizard-List & \*social-issues entitled *I Agree* (Mar. 31, 1993) (message 239 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>); email message from Arracun to \*social-issues entitled *Mr\_Bungle* (Mar. 31, 1993) (message 241 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>); email message from Grump to \*social-issues & \*Wizard-List entitled *My Hand Is Tired . . . “ -- Mr. Bungle* (Mar. 31, 1993) (message 246 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>); email message from Polo to \*social-issues entitled *Mr\_Bungle, Rape et al.* (Apr. 1, 1993) (message 255 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>); email message from Cyberfox to \*social-issues entitled *Bungle, Manners, and Taking a Stand . . .* (Apr. 1, 1993) (message 278 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>).

<sup>156</sup> Dibbell, *supra* note 151, at 38. See also email message from Starsinger to \*social-issues entitled *Um* (Mar. 31, 1993) (message 235 at <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>>).

with post-traumatic tears.<sup>157</sup> Moreover, in the virtual context, this was rape, plain and simple, and it was the community that had been injured. The act threatened the very fabric of the players' society. Legba fumed: "Mostly, [this type of thing] doesn't happen here. Mostly, perhaps I thought it wouldn't happen to me. Mostly, I trust people to conduct themselves with some veneer of civility."<sup>158</sup>

¶62 For weeks, the players argued over the proper course of action. While all agreed that the rape had been reprehensible, some argued that there was no rule against it.<sup>159</sup> Others feared to bind their free and open society with new restrictions.<sup>160</sup> However, the lack of consensus was moot because the players remained impotent. Only "wizards" had the authority to impose the virtual equivalent of the death penalty -- closure of the perpetrator's account. Eventually, after one such wizard had had enough of the debate, he took it upon himself to lower the boom.<sup>161</sup> Mr. Bungle died unceremoniously.<sup>162</sup>

#### D. LambdaMOO Adopts Law

¶63 The Mr. Bungle Affair was a turning point for LambdaMOO. In having to address such a difficult crisis of self-definition, players and wizards alike realized that LambdaMOO could no longer satisfactorily rely solely upon the wizards. The community needed to take responsibility for defining itself. LambdaMOO's creator and archwizard Pavel Curtis decided to "[pull] out of the disci-

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<sup>157</sup> Dibbell, *supra* note 151, at 38.

<sup>158</sup> Email message from Legba to Jander & \*social-issues entitled *Nice Work* (Mar. 30, 1993) (message 224 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); *see also* Dibbell, *supra* note 151, at 39.

<sup>159</sup> *See, e.g.*, email message from e to \*social-issues entitled *The Rapist* (Apr. 1, 1993) (message 254 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); email message from Networker to \*social-issues entitled *Let's Make a Law . . .* (Apr. 1, 1993) (message 261 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); email message from Gilmore to \*social-issues entitled *It's a Zippy Kinda Thing, Zippy Thing* (Apr. 6, 1993) (message 439 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>).

<sup>160</sup> *See, e.g.*, email message from Bakunin to JoeFeedback & \*social-issues entitled *Anarchy, @toading, Juristic Apparatus* (Apr. 2, 1993) (message 352 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); email message from Mack-the-Knife to \*social-issues entitled *Hmmm . . . Solutions? Weaker Invis? Zippy Paradox?* (Apr. 5, 1993) (message 420 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); email message from Gilmore to \*social-issues entitled *Volume! Volume! Volume!* (Apr. 6, 1993) (message 438 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>).

<sup>161</sup> Dibbell, *supra* note 151, at 40; *see also* email message from Pertinax to \*social-issues entitled *This Is Unprecedented* (Apr. 1, 1993) (message 318 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930407>); email message from Bakunin to JoeFeedback & \*social-issues, *supra* note 160.

<sup>162</sup> Within a few days, a new but hauntingly familiar character arrived in LambdaMOO, a Dr. Jest. "And when he developed the annoying habit of stuffing fellow players into a jar containing a tiny simulacrum of a certain deceased rapist, the source of this familiarity became obvious: Mr. Bungle had risen from the grave . . . To be sure, many residents were appalled by the brazenness of Mr. Bungle's return . . . [But they recognized] the truism (repeated many times throughout the debate over Mr. Bungle's fate) that his punishment, ultimately, had been no more or less symbolic than his crime." Dibbell, *supra* note 151, at 41-42. *See also* email message from Cun to \*social-issues entitled *Mr. Bungle's Back* (Apr. 29, 1993) (message 736 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930713>); email message from Cun to \*social-issues entitled *Dr. Jest* (Apr. 30, 1993) (message 765 at <ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/social.930713>).

pline/manners/arbitration business [and transfer] the burden and freedom of that role to the society at large.”<sup>163</sup> In the new LambdaMOO, the wizards are still the system administrators. Only they have the authority to close an account or make a change to the program code that would alter the community’s ground rules.<sup>164</sup> But the wizards no longer act by fiat. They must have a mandate from the players, as expressed through a system of petitions and ballots.<sup>165</sup> The mechanism allows any player to propose rule changes and put them to a popular vote. If a proposal is approved, the wizards must implement it.

¶64 To date, players have approved forty-eight ballots.<sup>166</sup> Laws have addressed freedom of speech, harassment, slander, rape, privacy, tragedies of the commons, overpopulation, homophobia, and the governance mechanism itself.<sup>167</sup> An early ballot instituted a virtual court as a dispute resolution mechanism, and it is used frequently.<sup>168</sup> Some disputes arise over rights to property, the manipulable objects that exist in LambdaMOO separately from the players. The level of sophistication can be striking, as evidenced by one dispute over control of the “air rights” which are essential to operating LambdaMOO’s many virtual aircraft.<sup>169</sup> The use of property has also raised the issue of whether players can devise their creations in the event that they voluntarily or involuntarily lose their account.<sup>170</sup>

¶65 These first attempts at self-governance illustrate that the relationship between LambdaMOO and its law that is more subtle than the instrumental or constitutive views of law might suggest. The “local rules” that participants have developed are not merely a natural and necessary reflection of an internalized self-conception, as the constitutive view of law would have it. But neither do the rules stand wholly outside of LambdaMOO, operating merely by modifying behavior, as instrumentalism would suggest. Rather, law in LambdaMOO has emerged as an institution in symbiosis with the community that it governs. That is, while law in the form of ground rules defines the nature of LambdaMOO, the players in turn define the law. Not only do they draft, vote on, and implement the law, but the degree to which they abide by and enforce it determines what, if anything, the law means

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<sup>163</sup> Email message from Haakon the Technician & Lambda the Lazy Proletarian Slob to \*social-issues entitled *On to the Next Stage* . . . (Dec. 9, 1992) (message 537 at <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/newdirection](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/newdirection)>).

<sup>164</sup> Jennifer L. Mnookin, *Virtual(y) Law: The Emergence of Law in LambdaMOO*, 2 J. COMPUTER-MEDIATED COMM. 1 (June 1996) <<http://www.ascusc.org/jcmc/vol2/issue1/lambda.html>>.

<sup>165</sup> *Id.*

<sup>166</sup> For the texts of these ballots, see *The Ballots Which Have Passed* (visited Nov. 22, 1997) <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/ballots.html](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/ballots.html)>. See also, *Directory of /pub/MOO/contrib/mail/Ballots*, (visited Nov. 22, 1997) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/Ballots>>.

<sup>167</sup> *The Ballots Which Have Passed*, *supra* note 166; *Directory of /pub/MOO/contrib/mail/Ballots*, *supra* note 166.

<sup>168</sup> Grump, *Arbitration* (visited Nov. 22, 1997) <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/arbitration](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/arbitration)>. Complete transcripts of some nineteen disputes settled in 1995 are available at *Directory of /pub/MOO/contrib/mail/Disputes* (visited Nov. 22, 1997) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/Disputes>>. Virtual lawyers have yet to emerge, but how far behind can they be?

<sup>169</sup> *Margeaux vs. Yib* (visited Nov. 22, 1997) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/Disputes/Margeaux.vs.Yib>>.

<sup>170</sup> Mnookin, *supra* note 164.

(i.e., how it affects the play). In the words of Austin Sarat and Thomas Kearns, the community that “law seeks to affect has its own normative direction and momentum, even when it is obliged to accommodate law’s presence.”<sup>171</sup> In the real world, real people obviously have an analogous relationship to real law. Social practice and identity give rise to law, which in turn affirms and redefines social practice and identity. Perhaps it is ironic that such a wildly fantastic virtual community so closely mirrors the operation of law in the real world. However, if in both instances there is an interdependence between the code and the codifiers (in both senses of the phrase), it is because each functions as a closed, hence self-defining, system.

### *E. A Conflicted Community*

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LambdaMOO’s ballot initiatives further reveal that at least two factions are competing for the heart and soul of LambdaMOO. The larger faction favors the rule of law and the arbitrator’s decree, and has carried most of the votes. This faction contends that as an increasingly complex society, LambdaMOO’s only hope of survival in the face of multiple social issues lies with an increased social order.<sup>172</sup> By contrast, a large minority of players have advocated, more or less unsuccessfully, for the complete abandonment of the emerging “legalistic” system.<sup>173</sup> They are not necessarily anarchists, although there are self-described anarchists among them. This minority views LambdaMOO primarily as a grand experiment and game. Its members believe that dispute mechanisms for resolving conflicts between players should reflect LambdaMOO’s fanciful spirit. (For example, one ballot proposed that players be given “wiffle-ball-style bats” with which they could summarily “whap” offensive players.<sup>174</sup> After a certain number of whaps, the target would lose access to LambdaMOO for twenty-four hours.)<sup>175</sup>

¶67

This dispute can be characterized in a number of ways. One description is that the players in the game disagree about the rules. Another takes the view that members in the community are fighting over their speech code and about what constitutes appropriate speech. Yet a third portrayal is that the factions have different normative visions of the community identity -- that is, the long-time players

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<sup>171</sup> Sarat & Kearns, *supra* note 87 at 56.

<sup>172</sup> Petitions made in this spirit include proposed guidelines for player decorum. See Humbert Humbert, *Crime and Manners* (last modified Mar. 22, 1995) <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/crime\\_and\\_manners](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/crime_and_manners)>. For a formal method for temporarily removing disruptive players, see Lambda, *A System of Collective Empowerment*, (last modified May 12, 1993) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/LambdaPetition.txt>>; and for a means to control LambdaMOO’s burgeoning population, see *Zero Population Growth* (last modified May 12, 1993) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/LambdaPetition.txt>>.

<sup>173</sup> Petitions that reflect this view include a proposal to suspend all rules for a day each April 1. See Jaime, *April Fools!* (last modified Feb. 7, 1996) <[http://vesta.physics.ucla.edu/~smolin/lambda/laws\\_and\\_history/aprilfools](http://vesta.physics.ucla.edu/~smolin/lambda/laws_and_history/aprilfools)>. For a proposal to repeal the arbitration system, see Sunny, *Petition: RA [Rescind Arbitration]* (Oct. 18, 1994) <<ftp://parcftp.parc.xerox.com/pub/MOO/contrib/mail/Ballots/RA>>.

<sup>174</sup> *Choosing Justice*, cited in Mnookin, *supra* note 164.

<sup>175</sup> *Id.*

that comprise each faction, and identify closely with the LambdaMOO experience, have different conceptions of what LambdaMOO fundamentally represents, and should represent. Not only are these characterizations of the dispute equally valid, but all suggest that the boundaries which define the community are among the sites through which identity can be explored.

¶68 Previously this article has described how law in cyberspace can shape identity constitutively, instrumentally, and symbiotically. The conflict within LambdaMOO suggests another perspective -- that identity defines law, rather than the reverse. In fact, LambdaMOO's factionalism illustrates that in some cases law, rather than defining identity, is merely an expression of identity -- a reification of innate community sensibilities. To clarify this point, consider how a LambdaMOO'er might argue for one vision of LambdaMOO over another. How can he justify the laws which implement his vision? It is immediately clear that an appeal to "first principles" like fairness or freedom is nonsensical. Take, for example, the assault and battery issue: was Mr. Bungle out of line? The legalistic faction might argue that he was because it is unfair to allow one character to control another. Therefore, it follows that a just law would prohibit such behavior.

¶69 Can our hypothetical debater invoke fairness so easily? "Fairness" has many meanings in the real world. But a definition of "fairness" in LambdaMOO really depends on what type of game it is. Assault and battery that is patently "unfair" in a social MUD might be the epitome of "fairness" in a hack-and-slash MUD. This unmasking of our debater's appeal to the principle of fairness as merely a political statement: expel the likes of Bungle because I want a "social" kind of game, not a slasher one. Similar arguments debunk appeals to any number of first principles (freedom, rights, merit, etc.).<sup>176</sup> From this perspective, the law of LambdaMOO is a creature of the community's sensibilities. The law represents a political compromise among players who hope to create a game that all are willing to play. In other words, rules are tools that the players use to realize the kind of community with which they wish to identify. As an expression of the community's sensibilities, law defines rather than derives from these so-called first principles.

¶70 Antifoundationalists make this same argument with respect to real world law.<sup>177</sup> Stanley Fish, for one, argues that all law is fundamentally ideological.<sup>178</sup> Law has no foundation in fundamental principles.<sup>179</sup> It merely represents an in-

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<sup>176</sup> See *infra* note 177.

<sup>177</sup> Antifoundationalism holds that all forms of interpretive discourse, whether legal, historical, literary, or scientific, are necessarily rhetorically, that is, without foundation in any universal norm. Stanley Fish has collected his essays discussing the theoretical bases of antifoundationalism and is explaining its application to a variety of issues. See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* (1994). Other expositions associated with this school of thought include: PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS* (1987); JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); Robert Post, *The Constitutional Concept of Public Discourse*, 103 HARV. L. REV. 603 (1990) (examining the ideological basis of the "marketplace of ideas").

<sup>178</sup> "[R]ather than a formal mechanism applying determinate rules to self-declaring fact situations, the law is 'preeminently the discourse of power', that is, a discourse whose categories, distinctions, and revered formulas are extensions of some political program that does not announce itself as such." FISH, *supra* note 177, at 175 (footnote omitted) (quoting PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS* (1987)).

<sup>179</sup> *Id.*

tuition, a viewpoint, or an agenda. For example, both opponents and supporters of affirmative action argue that their respective positions are right because they are “fair.”<sup>180</sup> Opponents argue that only race-blind policies treat people fairly.<sup>181</sup> Conversely, supporters argue that affirmative action is fair because it compensates for past discrimination.<sup>182</sup> Antifoundationalists claim that appeals to principles like fairness are empty because they are tautological.<sup>183</sup> Implicitly, both camps define fairness in terms of their respective ideologies. Thus, an appeal to “fairness” merely restates an ideology without requisite justification.

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Those who disagree with the antifoundationalist viewpoint, and there are many,<sup>184</sup> might reconsider LambdaMOO. In the context of a game, ideological arguments are much more transparent. Suppose LambdaMOO’s wizards resolved to create a second, duplicate LambdaMOO so that its warring factions could pursue their visions of community separately.<sup>185</sup> Should we label one ver-

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<sup>180</sup> The debate over Proposition 209 provides one recent example. The proposition, titled the California Civil Rights Initiative, proposed a California constitutional amendment prohibiting state discrimination or any preferential treatment based on “race, sex, color, ethnicity or national origin” in public employment, public education and public contracting, effectively undermining California’s affirmative action programs. Ballot Measure 6, California Reg. Sess., 1995 CA. V. 6. See also CAL. CONST. art I, § 31. California voters approved Proposition 209 in November, 1996. Bill Stall & Dan Morain, *Prop. 209 Wins, Bars Affirmative Action*, L.A. TIMES, Nov. 6, 1996, at A1. But a federal district court has granted opponents of the measure an injunction pending resolution of claims that the measure is unconstitutional. Michael S. Greve, *Prop. 209: A Graceful Exit for the Courts*, L.A. TIMES, Feb. 14, 1997, at B9.

<sup>181</sup> See, e.g. Stall & Morain, *supra* note 180 (“[Prop. 209 seeks] to undo a terrible unfairness so that opportunity is offered not just to some Californians, but to all Californians.”) (quoting Governor Pete Wilson).

<sup>182</sup> See, e.g. John Balzar, *Perspectives on Prop. 209: Blacks Fear Being Left at the Curb*, L.A. TIMES, Oct. 30, 1996, at A3 (“[F]airness necessitates affirmative action to open doors of opportunity for minorities and women, who have been excluded by law and practice.”)

<sup>183</sup> For antifoundational analysis of the debate over antidiscrimination policy, see FISH, *supra* note 177, at 70-79. In Fish’s view, a tautological argument constructed to conceal its own circularity is the hallmark of foundationalist philosophy. “The law, in short, is continually engaged in effacing the ideological content of its mechanism so that it can present itself as a discourse which is context independent in its claims to universality and reason.” *Id.* at 175 (footnote omitted) (quoting PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC, AND LEGAL ANALYSIS* (1987)). As Fish describes, the strategy can have considerable political potency. “[F]irst detach your agenda from its partisan origins, from its history, and then present it as a universal imperative, as a call to moral arms so perspicuous that only the irrational or the godless (two categories often conflated) could refuse it. You can do this . . . [by appropriating] a vocabulary that is already an honored one and then ‘spin’ it so that it will generate the conclusions - the marching orders - that are the content of your politics.” *Id.* at 8.

<sup>184</sup> Critiques of antifoundationalism include Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359-88 (Michael Brint & William Weaver eds., 1991); Sotirios A. Barber, *Correspondence: Stanley Fish and the Future of Pragmatism in Legal Theory*, 58 U. CHI. L. REV. 1033(1991) (critiquing Fish’s pragmatism from the perspective of a legal realist); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993) (criticizing the centrality of interpretation in the antifoundational view of jurisprudence); Kathryn Abrams, *The Unbearable Lightness of Being Stanley Fish: There’s No Such Thing as Free Speech and It’s a Good Thing, Too*, 47 STAN. L. REV. 595 (1995) (book review) (disputing the conclusion that there is no normative value to be derived from the antifoundationalist insight); Geoffrey W. Castello, *Almost A Pragmatist*, 26 SETON HALL L. REV. 967 (1996) (book review) (exposing Fish as a pragmatist); John E. Morrison, *Doing Fish*, 43 U.C.L.A. L. REV. 521 (1995) (book review) (claiming that antifoundationalism as a general principle is self-contradictory); Daryl J. Levinson, *The Consequences of Fish on the Consequences of Theory*, 80 VA. L. REV. 1653 (1994) (book review) (critiquing the inconsequentiality of antifoundationalism and challenging the claim that the legal system is independent from and indifferent to legal theory).

<sup>185</sup> Perhaps for some, factionalized struggle is LambdaMOO’s main attraction. That is, the debate over the community’s identity has become the object, transforming LambdaMOO into the first metaphysical hack

sion of the game right and the other wrong? Is one game inherently superior to the other? In the context of a virtual game, it seems nonsensical to claim that there are universal principles that dictate “correct” law. Instead, we should ask whether each game satisfies the desires of its players. These desires should dictate the laws that govern each game.

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The real world is of course not a game. But this distinction does not defeat the antifoundationalist rationale. Rather, this analysis applies equally to law in the real world and law in LambdaMOO because both communities are self-contained in the sense that they are self-governing. Consider LambdaMOO as originally conceived. The authoring wizard set the ground rules by which everyone else played.<sup>186</sup> The ground rules themselves were “off limits” to the players. Hence, Starsinger and Legba could argue non-tautologically that a virtual law against rape was “fair.” Their appeal to fairness invoked not their own definition of fairness, but one inherent in the game as designed by the author. However, invoking fairness becomes self-referential once LambdaMOO internalized the entire rule making process.<sup>187</sup> Defining the game has become part of the game itself. There is no single “fair” set of rules nor an authorial standard by which rules might be evaluated. Different rules merely create a different kind of game. If a variation on the game is to be judged at all, the only meaningful criteria is the degree to which the rules create a game that its participants want to play. The rule making process in the real world is likewise internal to the community governed. There is nothing external to the real world by which to judge the laws that we create. The meaning of a “first principle” like fairness depends on the nature of the community which people build for themselves, just as virtual fairness depends on the game participants choose to play. In this context, a law is justified when it conforms to the sensibilities of those who must live under it. Where those sensibilities clash, when visions of the world conflict, disputes must be resolved politically.<sup>188</sup> In this view, law, both in LambdaMOO and the real world, merely effectuates the sensibilities of the community identity. It is a tool in this endeavor rather than an external normative source of identity.

## VI. CONCLUSION: A THREAT TO IDENTITY

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While the Internet is commonly portrayed as a lawless frontier, in many ways law is as prevalent in cyberspace as it is in real space. It takes many forms, including customary Internet usage rules enforced by Usenet moderators, rules established by access providers like the WELL, the virtual laws adopted by LambdaMOO, and external real-world constraints such as Title IX of the Educational

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and slash MUD. From this perspective, bifurcation of LambdaMOO would undermine the defining element of the community.

<sup>186</sup> See notes 148-149 and accompanying text.

<sup>187</sup> See notes 162-165 and accompanying text.

<sup>188</sup> There is “no locus of judgment to which disputants can appeal for an authoritative announcement. But this doesn’t mean that they must throw up their hands or toss the dice; it means that they must argue, thrash it out, present bodies of evidence to one another and to relevant audiences, try to change one another’s mind. . . . That is to say, authority does not preside over the debate from a position outside it but is the prize for which the debaters vie.” FISH, *supra* note 177, at 10-11 (emphasis in original).

Amendments of 1972. These legal and quasi-legal institutions not only organize electronic speech and association, but in so doing they have a profound impact on how community identity forms and the extent to which a community can or cannot explore its identity.

¶74 On one level, law in cyberspace determines who can speak and what can be said. This is particularly evident in the Usenet newsgroups, where each community conditions participation on adherence to a specific subject matter. The customs and local rules that these communities use to allocate rights to speak and associate constitute the newsgroups' identities. These quasi-legal institutions construct separate communities by differentiating one from another; they also underpin individual identity by elevating electronic speech from mere utterance to an act that secures membership. Furthermore, law contributes to the meaning of what is said because it forms the context in which speech is communicated. Thus in cyberspace, law can be an important, if inconspicuous, element in defining the community, the speaker, and the meaning of what is said.

¶75 By contrast, law in its instrumental guise is anything but inconspicuous. It is perceived as intrusive because it has not been internalized by those that it governs. As this article has described, the federal government imposed Title IX on the gender-specific online communities at Santa Rosa College. In doing so, the federal government applied law as a tool for reconfiguring the identity of the SOLO community to conform to a coeducational mandate. Unlike the Usenet newsgroups, which have accepted customary law as a constituent part of their identity, the SOLO students have resisted application of Title IX. For the students, Title IX is an external force that destroys single-sex identities even as it creates a coeducational community. Rather than a seemingly natural part of who they are, Title IX appears to them as a much more explicit use of power. Thus, where Usenet custom appears to offer an identity to its members, Title IX imposes one. Instead of inviting an exploration of identity, Title IX enters cyberspace to limit identity.

¶76 The history of LambdaMOO illustrates, however, that the relationship between law and identity is more complex than either the constitutive or instrumental views suggest. LambdaMOO exemplifies the concept that law and identity can engage in a sustained process of mutual reflection and redefinition. In part because of a crisis of identity, LambdaMOO took responsibility for making its own rules. As the community became self-governing, it became more political. Two factions with different visions of the game polarized the community. Each has attempted to use the democratic rule-making mechanism to reshape the law in pursuit of its own ends. Yet as the more formalistic faction has won out, its laws shape the players' attitudes and self-conceptions as members of a more formal community. Thus, law constructs identity even while identity molds the law. It remains to be seen whether the formalist camp will consolidate its control as law and identity reinforce one another, or whether a backlash will result. The process of mutual reflection and redefinition, however, seems established. As Sarat and

Kearns observe, “law’s story [is] an ongoing one, it [has] more the feel of a narrative account” than of a static order.<sup>189</sup>

¶77 The LambdaMOO experience can be reinterpreted, however, from an antifoundationalist perspective. This analysis shifts the focus from the descriptive to the normative. Instead of inquiring into the relationship between law and identity, it asks whether the law inherently sets any normative standard for identity. LambdaMOO demonstrates the futility of seeking normative standards, whether in virtual or physical reality. Along with the other virtual communities, it illustrates with wonderful transparency that human communities are social constructions. As such, each community merely serves the purposes of its membership, to the degree that the membership can agree on its needs. Thus, the identity of the community should reflect members’ sensibilities, not some universal norm. From this perspective, members use law as a tool for constructing a community that fulfills their needs rather than as a means of adhering to normative standards. To do otherwise would defeat the purpose of forming the community in the first place.

¶78 While the constitutive, instrumental, interrelational, and antifoundational views of law may not be compatible, neither is a reconciliation particularly important. Each view provides a useful description of one aspect of the nuanced and dynamic relationship between law and identity. It is sufficient to recognize that a relationship exists, that in one form or another it is integral to communities throughout the Internet, and that legal issues in cyberspace therefore raise fundamental questions of identity for Netizens.

¶79 The relationship between law and identity helps to explain why Netizens have so passionately opposed the Communications Decency Act, Germany’s censorship of CompuServe, and the censure of Santa Rosa College, as described at the beginning of this article. The Netizens are not just resisting attempts by “outsiders” to impose speech norms. They are not just attempting to preserve cyberspace as an unregulated electronic frontier in the face of attempts to reconstitute its meaning as a civilized locale. They are defending the identities of their communities, and hence their sense of themselves as individuals. When Netizens speak of their “right to free speech,” they are really fighting for a more expansive freedom: the right to construct, to define, and to experiment with their online identities and communities without interference. Government proposals to regulate the Internet threaten to encroach not just upon electronic speech, but upon the quasi-legal institutions that define community and identity online. The act of resistance itself reaffirms the lines that divide Netizens from the Internet illiterate, the lines that construct two communities by emphasizing their differences.

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<sup>189</sup> Sarat & Kearns, *supra* note 87 at 56-57.