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By Jonathon W. Penney[*]

I. INTRODUCTION

¶1   Freedom, liberty, and autonomy were the ideals heralded by cyberspace's first generation of thinkers—the cyber-libertarians like John Parry Barlow—who helped forge the early technological and intellectual foundations for "cyberspace."[1] These ideas were, says Lawrence Lessig, the "founding values of the Net."[2] Not surprisingly, these foundational values have received much attention from scholars. In his famous *Declaration of the Independence of Cyberspace*, Barlow proclaims to speak with "no

[1] Like other articles, this Article uses "cyberspace" to refer not just to the Internet, but to all related computer systems, networks, and wireless communications. *Cf.* RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT 70 (2010); Duncan B. Hollis, *An e-SOS for Cyberspace*, 52 HARV. INT'L L.J. 373, 374 n.1 (2011). As for first-generation thinkers, see, for example, John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://w2.eff.org/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration.txt, *as reprinted in* CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS 27 (Peter Ludlow ed., 2001); *see also* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD 10, 13 (2006) (writing that Dibbell and Barlow promoted "a new frontier, where people lived in peace, under their own rules, liberated from the constraints of an oppressive society and free from government meddling," a vision shared by other cyberspace pioneers who "believed that the Internet might transcend territorial law and render the nation-state obsolete"); FRED TURNER, FROM COUNTERCULTURE TO CYBERCULTURE: STEWART BRAND, THE WHOLE EARTH NETWORK, AND THE RISE OF DIGITAL UTOPIANISM 261 (2006); Julian Dibbell, *A Rape in Cyberspace or How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society*, VILLAGE VOICE, Dec. 21, 1993, *as reprinted in* 1994 ANN. SURV. AM. L. 471 (describing how a virtual Internet community reacted to an unruly participant by creating a self-governance scheme).

[2] Wen Stephenson, *The Values of Code (and* Code*): An E-mail Exchange with Lawrence Lessig, the Author of* Code and Other Laws of Cyberspace, ATLANTIC ONLINE (Dec. 13, 1999), http://www.theatlantic.com/past/docs/unbound/digicult/lessig.htm ("I don't think it is an issue of values. I like the values of John Perry Barlow and Esther Dyson (emphasizing the freedom and creativity of the Net). I think the difference between us comes from a difference in experience. I've spent my professional life learning how law learns to regulate; I'm therefore skeptical of arguments that presume law can't learn. I view my work as building on the values Barlow and Dyson spoke of—as well as the insights of people like Mitch Kapor ('architecture is politics') and William Mitchell (author of *City of Bits*)—to tell a story that more realistically captures the threats that should make one work harder to defend the founding values of the Net, as well as the values from our tradition that the Net might threaten.") (quoting Lawrence Lessig).

greater authority than that with which liberty itself always speaks."[3] Lessig's deeply influential text, *Code: Version 2.0*, explains that the "challenge for our generation" is to "protect liberty" in cyberspace in the face of "architectures of control."[4] Likewise, Yochai Benkler centers his influential work, *The Wealth of Networks*, almost entirely on concepts of human freedom.[5] He begins with the solemn pronouncement: "Information, knowledge, and culture are central to human freedom and human development."[6] The first generation of legal scholarship about the Internet—or "cyberlaw scholarship"—was deeply influenced by such cyber-libertarian ideas and, thus, often explored innovative ways to preserve liberty, self-government, and autonomy in cyberspace from coercion.[7]

¶2   Few scholars today focus on equality as a founding value of the Internet that ought to be achieved or preserved. It is indeed doubtful that many scholars ever acknowledged its existence. As Anupam Chander has noted, "[c]oncerns for equality and distributive justice [in cyberlaw scholarship] are greatly neglected."[8] But neglect devolves to downright omission in the emerging body of scholarship addressing the unique legal complexities of virtual worlds.[9] Given the prominence of liberty in cyberlaw scholarship and the neglect of distributive justice concerns, one might infer that liberty is (in Lessig's terms) the only founding value of the Internet. Thus, Jack Balkin offers a persuasive account of liberty in this context,[10] but no one has focused on virtual equality.

¶3   This Article aims to fill the void, tackling equality justice issues in the cyberlaw context. Parts II and III of this Article offer an account of equality and its importance to

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[3] Barlow, *supra* note 1, at 28.

[4] LAWRENCE LESSIG, CODE: VERSION 2.0, at xv (2006).

[5] YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006).

[6] *Id.* at 1.

[7] *See, e.g.*, I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1019–25 (1994) (advocating self-help, custom, and contract to regulate cyberspace); David R. Johnson & David G. Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law*, *in* COORDINATING THE INTERNET 62, 65 (Brian Kahin & James H. Keller eds., 2d prtg. 2000) (arguing for a decentralized system of Internet governance); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367–75 (1996) (noting possibilities of internal regulation of Internet through competing rule sets); Henry H. Perritt, Jr., *Cyberspace Self-Government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413, 419 (1997) (contending that, as a general rule, "self-governance is desirable for electronic communities"); David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 159–161 (1996) (arguing for a metaphor of cyberspace as separate space); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 912 (1996) (arguing that "attempts to define new rules for the development of [cyberspace] rely on disintegrating concepts of territory and sector, while ignoring the new network and technological borders that transcend national boundaries"); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) (arguing for a "Lex Informatica" which would regulate cyberspace through technological devices).

[8] Anupam Chander, *The New, New Property*, 81 TEX. L. REV. 715, 718–19 (2003). Those who have addressed concerns about equality in cyberspace usually give it passing importance, at least in comparison to the attention given to ideas of freedom and liberty. For example, Benkler discusses equality only in relation to its importance to liberal theories of justice; but not as something inherent to the "wealth" of networks. *See* BENKLER, *supra* note 5.

[9] Elsewhere, this author has referred to this body of scholarship as "New Virtualism." *See* Jonathon W. Penney, *Privacy and the New Virtualism*, 10 YALE J.L. & TECH. 194, 195–200 (2008).

[10] Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004).

cyberspace, including online communities, arguing that equality ought to be understood as a founding value of cyberspace as much as liberty and freedom. Part III then offers a wide-ranging account of the different forms of inequality in cyberspace, particularly in online communities. Part IV offers proposals to address this inequality. Among other things, this Article argues that unlike other founding values such as liberty and autonomy, which are usually defined by the amount of freedom from coercion a person might have in cyberspace, equality is relative—it is measured against the relationships among people, rather than against an abstract ideal. This Article also argues that when inequities arise in online communities, it may be a foundational cyberspace value that ought to be dealt with within those communities, rather than imposed from without.

¶4   Of course, this Article recognizes that these ideas hearken back, somewhat, to first generation cyberlaw scholarship, which advocated the autonomy of virtual worlds. But the difference is that this Article does not suggest that online communities be fully autonomous or that real-space laws are inapplicable. Rather, it suggests that equality might be best left to citizens of online communities to define and defend. Thus, an ideal legal regime might include real-space laws that require virtual worlds to simply promote equality, but leave the definition of equality, and its defense, to members of online communities.

II. THE HISTORY OF A LOST FOUNDATIONAL VALUE OF CYBERSPACE

A. Equality in the Beginning

¶5   Not surprisingly, scholars often begin a discussion of cyberspace values with John Perry Barlow's 1996 *Declaration of the Independence of Cyberspace*.[11] Barlow was, after all, speaking in the name of "liberty"[12] at an important moment in the development of cyberspace (Julie Cohen calls it "the dawn of the Internet age"[13]). He was also speaking as a founding member of the Electronic Frontier Foundation—one of the first organizations to promote and defend online civil liberties. His words thus echoed, perhaps better than those of anyone else, the sentiment of many of the Internet's founders about the importance of freedom and liberty to cyberspace.[14] Cohen's words resonated to the extent that Barlow's ideas influenced an entire generation of lawyers who were themselves pioneering something new: an emerging body of cyberlaw scholarship,

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[11] Barlow, *supra* note 1, at 27.

[12] *Id.* at 28.

[13] Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210, 216 (2007).

[14] RICHARD S. ROSENBERG, THE SOCIAL IMPACT OF COMPUTERS 600 (3d ed. 2004) ("John Perry Barlow, a founding member of the Electronic Freedom [sic] Foundation, a leading online civil liberties organization published, online of course, 'A Declaration of the Independence of Cyberspace.' It captures much of the strong feeling that the early founders and aficionados of the Internet had about that new technology."); *see also* GOLDSMITH & WU, *supra* note 1, at 10, 13 (writing that Dibbell and Barlow promoted "a new frontier, where people lived in peace, under their own rules, liberated from the constraints of an oppressive society and free from government meddling," a vision shared by other pioneers of cyberspace who "believed that the Internet might transcend territorial law and render the nation-state obsolete"); TURNER, *supra* note 1, at 261 (writing that the "techno-utopians" had "conjured up visions of a disembodied, peer-to-peer utopia . . . a return to a more natural, more intimate state of being").

which, like Barlow's *Declaration*, aimed to preserve liberty and autonomy in cyberspace.[15]

¶6   Few would quibble with Lessig's statement that liberty and freedom were foundational values of cyberspace[16] or blame him and other cyberlaw scholars, such as Yochai Benkler and David Post, for doing their best to promote these ideals.[17]   This Article argues there is more to it than that.   Equality was also a founding value of cyberspace.   Though scholars now only occasionally speak its name, it was there in the beginning, heralded—just like freedom and liberty—in many of the early foundational texts that have helped to shape, define, and understand cyberspace.[18]

¶7   Take Barlow's *Declaration*.   Though it proclaimed the importance of "liberty" and became a "rallying call" to a certain libertarian ethic for an entire generation of "computer enthusiasts, hackers, and cypherpunks,"[19] his *Declaration* also envisioned equality as a part of cyberspace's idealized project: "We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth."[20]   In fact, notions of universalism and equality run throughout the *Declaration*, as elsewhere Barlow declares cyberspace a home for "all the sentiments and expressions of humanity"—no matter if "debasing" or "angelic"—where "anyone, anywhere" is entitled to speak freely.[21]   Barlow even rejects traditional concepts, such as property, that contribute to inequities, promising cyberspace to be more "fair" than the "world" created by real-space governments.[22]   Barlow's celebration of cyberspace's potential for complete equality even prompted one of the *Declaration*'s first critics to accuse him of implicitly invoking Marxist ideology.[23]

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[15] *See generally* sources cited *supra* note 7. *See also* Penney, *supra* note 9, at 196 ("The simplicity and revolutionary character of [Barlow's] ideas was appealing—so appealing that many early 'cyberlaw' scholars followed Barlow to argue that traditional laws ought not apply to the virtual worlds of cyberspace, that they be left alone to formulate their own legal rules and norms.") (footnotes omitted).

[16] *See* Stephenson, *supra* note 2 (quoting Lawrence Lessig).

[17] *See generally* BENKLER, *supra* note 5; LESSIG, *supra* note 4; DAVID G. POST, IN SEARCH OF JEFFERSON'S MOOSE: NOTES ON THE STATE OF CYBERSPACE (2009).

[18] Does it make any sense to say that cyberspace has "foundational" texts that have helped define it, like the *Federalist Papers* helped define the U.S. Constitution? Lessig, for example, has spoken explicitly of "cyberspace's Constitution." Lawrence Lessig, Lecture at the American Academy in Berlin, Germany: Cyberspace's Constitution (Feb. 10, 2000), *available at* http://www.lessig.org/content/articles/works/AmAcd1.pdf. So might there also be influential texts, like Lessig's own *Code as Law*, essential to understanding that constitution's meaning and scope? Aimée Hope Morrison has recently expressed a similar sentiment about Barlow's *Declaration*. Aimée Hope Morrison, *An Impossible Future: John Perry Barlow's 'Declaration of the Independence of Cyberspace,'* 11 NEW MEDIA & SOC'Y 53, 54 (2009) (describing Barlow's declaration as "one document among many that attempts at once to define and delimit the arena of electronic interaction, commerce and information popularly designated as 'cyberspace'").

[19] COLIN J. BENNETT, THE PRIVACY ADVOCATES: RESISTING THE SPREAD OF SURVEILLANCE 49 (2008) ("Barlow's 'A Declaration of the Independence of Cyberspace' became a rallying call for a generation of young computer enthusiasts, hackers, and cypherpunks . . . . [T]his philosophy is deeply rooted in a particular interpretation of the American political tradition and an absolutist reading of the First Amendment to the U.S. Constitution.").

[20] Barlow, *supra* note 1, at 29.

[21] *Id.*

[22] *Id.* at 29–30.

[23] Reilly Jones, *A Critique of Barlow's "A Declaration of the Independence of Cyberspace,"* 8 EXTROPY, no. 2, 1996, *available at* http://sociology.morrisville.edu/readings/cyberculture/Barlow-Declaration-

¶8   But equality and egalitarian aims were claimed as part of cyberspace's cultural fabric even before the *Declaration*. Another early cyberspace manifesto is "Cyberspace and the American Dream: A Magna Carta for the Knowledge Age," published in 1994[24] and "coauthored by information-age luminaries such as [Alvin] Toffler, George Gilder, and Esther Dyson."[25] Dyson, an early cyber-libertarian like Barlow, is today described as "one of the most influential and powerful women in the high-tech sector."[26] Similarly influential and widely quoted,[27] the cyber "Magna Carta" heralded the "egalitarian explosion" promoted by cyberspace and the value of "universal access to personal computing."[28] Even William Gibson's fictional novel *Neuromancer*, which coined the term cyberspace to help describe a dystopian future, held out some promise for greater equality in the disembodied world of cyberspace.[29]

¶9   But equality was also a concern among some early cyberlaw scholars. Dan Burk, for example, was writing about inequalities between "information-rich" and "information-poor" countries in 1993, three years before Barlow first declared cyberspace's independence.[30] Lessig noted the importance of equality in his widely influential text *Code and Other Laws of Cyberspace*:

> We stand on the edge of an era that demands we make fundamental choices about what life in [cyberspace] . . . will be like. These choices will be made; there is no nature here to discover. And when they are made, the values we hold sacred will either influence our choices or be ignored. The values of free speech, privacy, due process, and equality define who we are. If there is no government to insist on these values, who will do it?[31]

Lessig's campaign against a *laissez-faire* approach to cyberspace governance included a concern for equality. Similarly, over half a decade before *The Wealth of Networks*, Yochai Benkler argued that the dynamism of the "digital environment" offered a means

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Critique_by_Jones.pdf ("If cyberspace is institutionalized as its own *unlimited* sovereign, then its jurisdiction will grow at the expense first of other institutions, and if successful, at the expense of everyone outside of cyberspace. Hence Barlow initiates a new version of Marx's class struggle.").

[24] Esther Dyson, George Gilder, George Keyworth & Alvin Toffler, *Cyberspace and the American Dream: A Magna Carta for the Knowledge Age*, PROGRESS & FREEDOM FOUND. (Aug. 1994), http://www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html.

[25] NICK DYER-WITHEFORD, CYBER-MARX: CYCLES AND CIRCUITS OF STRUGGLE IN HIGH-TECHNOLOGY CAPITALISM 34 (1999).

[26] LAURA LAMBERT, THE INTERNET: A HISTORICAL ENCYCLOPEDIA, BIOGRAPHIES 88 (Hilary W. Poole ed., 2005).

[27] MARGARET WERTHEIM, THE PEARLY GATES OF CYBERSPACE: A HISTORY OF SPACE FROM DANTE TO THE INTERNET 296 (1999) (noting that the manifesto was "widely quoted" and "based on the ideas of a group that included Esther Dyson and Alvin Toffler").

[28] Dyson, Gilder, Keyworth & Toffler, *supra* note 24.

[29] *See* CHRIS WOODFORD, THE INTERNET: A HISTORICAL ENCYCLOPEDIA, ISSUES 255 (Hilary W. Poole ed., 2005) ("When writer William Gibson coined the word cyberspace in his 1984 novel *Neuromancer*, he promised disabled people a brave new world of equality, a 'bodiless exultation' free from the 'prison of flesh.'").

[30] Dan L. Burk, *Patents in Cyberspace: Territoriality and Infringement on Global Computer Networks*, 68 TUL. L. REV. 1, 50–51 (1993) (demonstrating concern about "neo-colonization" and the "disparity between 'information-rich' and 'information-poor' nations").

[31] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 220 (1999).

to reconcile economic productivity with social equality.[32]   Though not as frequently proclaimed as freedom or liberty, these texts show equality was an important—even foundational—value to cyberspace and its future.

B. Equality's Unequal Treatment

¶10   So how did concerns for "equality and distributive justice" in cyberlaw scholarship become "greatly neglected"?[33]   This is a difficult question to answer, though there are a few potential explanations. The first is the emergence of concern over the "digital divide" in the late 1990s. The term was popularized by several reports of the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) in 1999. The digital divide refers to the gap between those who have access to information and technology, and those who do not.[34]   By the late 1990s, the digital divide was the most debated equality issue for cyberspace and information technology.[35]   Ironically, the U.S. government's interest in the digital divide and egalitarian concerns about access to information technology likely turned cyber-libertarians and first generation cyberlaw scholars off equality issues. The NTIA was central to the Clinton administration's policy initiative on the issue.[36]   Cyber-libertarians deeply disliked the agency because it pushed hard for the Telecommunications Act of 1996, which included the Communications Decency Act. These actions prompted

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[32] Yochai Benkler, *The Battle over the Institutional Ecosystem in the Digital Environment*, COMM. ACM, Feb. 2001, at 84, 88 ("The point is that simply copying the settlement from the economy of stuff to the economy of information is unnecessary. In that portion of our lives increasingly occupied by information, we can be free in a richer sense and more egalitarian in the distribution of wealth while maintaining or increasing productivity.").

[33] Chander, *supra* note 8, at 718–19.

[34] DAVID TREND, WELCOME TO CYBERSCHOOL: EDUCATION AT THE CROSSROADS IN THE INFORMATION AGE 10 (Henry A. Giroux ed., 2001) ("As increasing amounts of commercial and cultural activity are shifting to the Internet, the distance between the connected and the unconnected may well be creating a new global information proletariat. That unconnected world knows little about modems, satellites, computer laptops, or the Internet. Although it is rarely, if ever, discussed in the discourse of digital culture, more than half the people in the world do not even have telephone service. Indeed, on many levels the vast expansion of information technology has created what the U.S. Commerce Department has termed a *digital divide*."); *see also* David J. Gunkel, *Second Thoughts: Toward a Critique of the Digital Divide*, 5 NEW MEDIA & SOC'Y 499, 501 (2003) ("The origin of the term 'digital divide' remains uncertain and ambiguous. Recent publications and studies routinely reference 'Falling Through the Net: Defining the Digital Divide,' the third in a series of reports published by the US Department of Commerce's National Telecommunications and Information Administration."); Brian D. Loader, *Introduction* to CYBERSPACE DIVIDE: EQUALITY, AGENCY, AND POLICY IN THE INFORMATION SOCIETY 3, 3–4 (Brian D. Loader ed., 1998).

[35] *See* Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 2 (2002) ("This gap between the information-haves and have-nots is commonly referred to as the *digital divide*. Since the mid-1990s, the digital divide has received considerable attention in international forums, in presidential debates, and among corporate leaders.") (footnotes omitted).

[36] *See* Gunkel, *supra* note 34, at 501 (noting the NTIA's role in authoring the U.S. government's key reports on the subject); Amy Lynne Bomse, Note, *The Dependence of Cyberspace*, 50 DUKE L.J. 1717, 1745–46 (2001) ("Despite its largely laissez-faire approach to technology, the Clinton administration in 1999 took an active role in addressing the issue of uneven access. At the behest of President Clinton, the Commerce Department held a Digital Divide Summit to address the problem through a government–private sector partnership.").

Barlow to issue the *Declaration*, calling President Clinton "that great invertebrate in the White House."[37] Though the cyber-libertarians *did* care about equal access, they saw the government's newfound interest in the digital divide as a foil for more intrusion into cyberspace. This certainly did not help the cause of equality in the eyes of cyberlaw writers.

¶11   A second, and perhaps more important, explanation is that egalitarian concerns simply did not align with the libertarian ethic that most first generation cyberlaw scholarship came to exemplify. As noted, this early work was deeply influenced by the ideals of influential cyber-libertarians like Barlow, Dibbell, and Dyson, preserving and promoting liberty as its primary object. Cyber-libertarians believed they were forging a new space, and their most urgent priority was to keep the government out.[38] Equality, in many cases, was overlooked as a secondary concern;[39] it was something that would flow naturally from the New World of cyberspace once liberty and freedom were guaranteed.[40] The Internet was a flattener, an equalizer.[41] Not surprisingly, cyber-libertarians simply did not take the digital divide seriously; for them, it was merely an "imperfection[]," a "passing phase[]" on cyberspace's inevitable march toward universality.[42] Thus, Louis Rossetto, founder of *Wired* magazine, called it "laughable" that there exists a problem of "info-haves and have nots"; properly understood, it was merely a question of haves and "have-laters."[43]

¶12   A third, and related, explanation concerns broader attitudes about technological neutrality. Internet is technology, and technology is often understood as neutral.[44] That is, as a technology, the Internet is value-neutral because it is instead infused with the values, and the social, political, and economic contexts, of those who use it.[45] Mirroring

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[37] Barlow, *supra* note 1, at 27.

[38] DAVID BELL ET AL., CYBERCULTURE: THE KEY CONCEPTS 45 (2004) ("The nation-state and government in general represent for cyberlibertarians the single biggest threat to liberty, self-expression, and individual prosperity.").

[39] *Id.* at 46 (noting the cyber-libertarians "seem unable to address significant questions about access, the digital divide and the distribution of power and economic resources."); TREND, *supra* note 34, at 10 ("While occasionally acknowledging that the Internet replicates existing relations of commerce, popular spokespeople for the electronic frontier, such as Mitch Kapor, John Perry Barlow, and Benjamin Wolley, generally overlook the imperialistic, logocentric implications of this new space, as well as the way the 'real' world continues to define who people are and what they can do.").

[40] For example, Toffler is famous for the argument that "technology would destroy inequality and hence make the redistributive arm of the state obsolete." Ashley Dawson, *Surveillance Sites: Digital Media and the Dual Society in Keith Piper's* Relocating the Remains, POSTMODERN CULTURE, Sept. 2001.

[41] *See* TURNER, *supra* note 1, at 1; Nicholas Negroponte, *Being Digital—A Book (P)review*, WIRED, Feb. 1995, *available at* http://www.wired.com/wired/archive/3.02/negroponte_pr.html (writing that the Internet would "flatten organizations, globalize society, decentralize control and help harmonize people").

[42] Bomse, *supra* note 36, at 1728–29 (noting the view of "digital libertarians").

[43] Louis Rossetto, *Responses to the Californian Ideology*, HYPERMEDIA RES. CENTER, http://www.hrc.wmin.ac.uk/theory-californianideology-responses1.html (last visited Nov. 27, 2011) ("The utterly laughable Marxist/Fabian kneejerk that there is such a thing as the info-haves and have-nots . . . displays a profound ignorance of how technology actually diffuses through society."); *see also* Bomse, *supra* note 36, at 1727.

[44] Philip T. Shepard, *Technological Neutrality and the Changing Normative Context of Applied Science Research*, *in* NEW DIRECTIONS IN THE PHILOSOPHY OF TECHNOLOGY 163, 164–65 (Joseph C. Pitt ed., 1995).

[45] Lori Gruen, *Technology*, *in* TECHNOLOGY AND VALUES: ESSENTIAL READINGS 423, 426 (Craig Hanks ed., 2010); Shepard, *supra* note 44, at 164–65.

neutrality in liberal theory,[46] equality advocacy in technology would require an abandonment of that inherent state of neutrality. Of course, technological neutrality is not an uncontroversial view, but it is nevertheless common.[47] Right or wrong, a belief in this kind of neutrality may have helped to marginalize any concerns about equality; or at least those concerns about distributive justice that went beyond traditional debates about access to the Internet and information technologies.

¶13   A final explanation for the neglect of equality issues in cyberlaw scholarship, or at least a neglect of in-depth analysis, concerns what Orin Kerr calls the problem of internal (or virtual) and external (or real) perspectives of cyberlaw.[48] A "virtual" perspective means approaching disputes from the perspective of a person "internal" to cyberspace.[49] With the virtual perspective, the person is often understood as a virtual person, or an avatar, inhabiting the contours of cyberspace. Likewise, a "real" perspective refers to the perspective of someone "external" to the virtual community—an ordinary computer-user sitting at her desk in real space, with cyberspace understood as a physical, external global communications network.[50] Interestingly, any cyberlaw scholars that have taken the time to address egalitarian concerns have stuck to externalist issues: concerns about the digital divide among rich and poor countries and the importance of universal access to computers, software, and connectivity to promoting equality.[51] Though some anthropologists have explored issues of inequality *within* virtual worlds,[52] cyberlaw scholars have offered no similar exploration. Few, if any, such scholars have written about inequality online or proposed any cyber-legal ideas to promote equality. And internal perspectives on equality in cyberspace have been entirely ignored in the cyberlaw literature.

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[46] Louis P. Pojman & Robert Westmoreland, *Introduction* to EQUALITY: SELECTED READINGS 1, 1 (Louis P. Pojman & Robert Westmoreland eds., 1997) (Equality "is one of the basic tenets of almost all contemporary moral and political theories that humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social, and political structures of society.").

[47] Gruen, *supra* note 45, at 426; Shepard, *supra* note 44, at 165 ("A great many people seem to go on taking some vague notion of technological neutrality for granted."); *see also* Tomas A. Lipinski, *The Myth of Technological Neutrality in Copyright and the Rights of Institutional Users: Recent Legal Challenges to the Information Organization as Mediator and the Impact of the DMCA, WIPO, and TEACH*, 54 J. AM. SOC'Y FOR INFO. SCI. & TECH. 824 (2003) (providing a legal context).

[48] Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 359–61 (2003).

[49] *Id.* at 357.

[50] *Id.*

[51] *See, e.g.*, Burk, *supra* note 30, at 50–51 (expressing concern about "neo-colonization" and the "disparity between 'information-rich' and 'information-poor' nations"); Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI.-KENT. L. REV. 1405, 1417 (1999) (discussing the importance of "universal standing" and equal access to software in the Open Source Movement, which produces what Lessig admits is a kind of "formal equality"—equality of access but not equality of result—but Lessig feels it is something nevertheless worth preserving).

[52] *See, e. g.*, TOM BOELLSTORFF, COMING OF AGE IN SECOND LIFE: AN ANTHROPOLOGIST EXPLORES THE VIRTUALLY HUMAN 225–30 (2008); Mikael Jakobsson & T.L. Taylor, *The Sopranos Meets* EverQuest*: Social Networking in Massively Multiplayer Online Games*, FINEART FORUM, Aug. 2003, *available at* http://mjson.se/doc/sopranos_meets_eq_faf_v2.pdf. Due to the fact that the virtual worlds of Second Life, EverQuest, and World of Warcraft have become more of cultures and virtual worlds than simply video games, this Article does not italicize the titles of the virtual worlds. *See* BOELLSTROFF, *supra*, at 255

C. Situating Equality: Some Preliminary Comments

A.   Equality, Distributive Justice, and Cyberspace

¶14   Before discussing equality in cyberspace further, it is helpful to explore the general concept of equality itself. Equality is a central, perhaps fundamental, value in contemporary moral, political, and legal thought. It is often used as a basic measure of what is just and legitimate, and helps define the baseline for fair treatment of individuals: "It is one of the basic tenets of almost all contemporary moral and political theories that humans are essentially equal, of equal worth, and should have this ideal reflected in the economic, social, and political structures of society."[53] Indeed, as Jeremy Waldron recently noted, the idea of equality has played an essential role in Western thought on social, political, legal, and economic organization for nearly two thousand years.[54] Contemporary legal and political theory is no different. The only theories of justice taken seriously today, as Will Kymlick points out, are egalitarian, meaning that they take equality as a foundation.[55]

¶15   But saying that equality is an important concept does little to help understand what it means in application. At the outset, the basic idea of equality should not be confused with equality as a political or legal objective; there is voluminous scholarship on the latter subject, but figuring out the basic idea of equality is often neglected.[56] This is unfortunate, as clear thinking about the basic idea of equality is necessary to think about equality as a policy aim. Part of the problem is the illusion that there is a consensus regarding the basic notion of equality. Kymlicka defines equality as requiring that citizens be entitled to "equal concern and respect."[57] Most people would probably agree with this highly abstract description of equality. But there is deeper disagreement about what equality requires in more concrete situations: re-distribution of wealth, acknowledgment of people's differences, adopting a difference-blind approach, and so on. Scholarship has gravitated toward equality as a policy goal, likely as a means to give some context to these questions.

¶16   But these seeming policy disagreements tend to elide a deeper dispute about two conceptions of equality: formal and substantive equality. Formal equality requires that all people be treated exactly the same—treat like cases alike.[58] This notion of equality is often associated with a libertarian political philosophy, emphasizing liberty and sameness

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[53] Pojman & Westmoreland, *supra* note 46, at 1.

[54] Jeremy Waldron, *Basic Equality* 1 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-61, 2008) ("That humans are all one another's equals, and that this makes a difference to how we ought to deal with each other and how we ought to organize ourselves legally, politically, socially and economically—this has been one of the enduring themes in Western thought for at least the past two thousand years.").

[55] WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION (1990).

[56] Waldron, *supra* note 54, at 1–2.

[57] KYMLICKA, *supra* note 55, at 4.

[58] ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 107 (2003) (discussing the "basic ideal of formal equality" as treating like cases alike in terms of Equal Protection jurisprudence).

of treatment.[59] Substantive equality generally requires equality of result rather than of treatment[60] and is closely linked to the idea of distributive equality, or distributive justice. Substantive equality recognizes that, to achieve equality of result, it may be necessary to address issues of distributive equality by redistributing resources to account for people's differences in ability and socioeconomic standing.[61] Perhaps the most famous work on distributive equality is John Rawls's *A Theory of Justice*.[62] Rawls aims to achieve true equality by constructing an entire theory of egalitarian justice based on distributive equality.[63] For many theorists, distributive equality is an essential component of achieving equality.[64]

D. Dimensions of Virtual Equality and Inequality

¶17   Though equality is a complex concept, forms of inequality in cyberspace are identifiable and have significant impact. This subsection discusses two dimensions of virtual equality, what this Article refers to as the Digital Divide 1.0 and the Digital Divide 2.0. The Digital Divide 1.0 is essentially the traditional account of global inequalities between technology haves and have-nots. The Digital Divide 2.0 involves inequalities online as well as inequalities caused by an interaction between real space and cyberspace. While the first dimension has received much scholarly treatment, both cyberlaw and otherwise, the second dimension has received little treatment, if any. These dimensions of inequality are by no means exhaustive, but provide a good starting point.

1. Digital Divide 1.0: National and Global Inequality

¶18   The term digital divide, as noted above, refers to the division between those who have access to information technology like the Internet and those who do not.[65] Concern regarding this issue grew in the 1990s, particularly as it became apparent that the utopian future described by advocates of information technology[66] was not going to materialize.

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[59] *Id.* at 134 (noting that "formal equality [has been] embraced by a wide range of liberal and libertarian commentators"); MICHEL ROSENFELD, JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS 157 (1998) (discussing formal equality as being consistent with libertarian theories of justice).

[60] There are different approaches to substantive equality, but this is a commonly cited standard. *See* ROSENFELD, *supra* note 59, at 157; Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 564 (2000) ("These limitations of the principle of formal or procedural equality have led to attempts to develop concepts of substantive equality. . . . Apparently consistent treatment infringes the goal of substantive equality if the results are unequal.").

[61] ROSENFELD, *supra* note 59, at 121 ("[S]ubstantive equality . . . properly incorporates differences."); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 61 (1990).

[62] JOHN RAWLS, A THEORY OF JUSTICE (1971).

[63] *See generally id. See also* AMY GUTMANN, LIBERAL EQUALITY 119 (1980) (discussing Rawls's work as "the most remarkable contemporary attempt to situate the concept of equality within a comprehensive theory of egalitarian justice").

[64] Richard J. Arneson, *Equality*, *in* THE BLACKWELL GUIDE TO SOCIAL AND POLITICAL PHILOSOPHY 85, 95– 97 (Robert L. Simon ed., 2002) (discussing many theorists of distributive equality, including both Ronald Dworkin and John Rawls).

[65] *See* BELL ET AL., *supra* note 38, at 61–63; *see also* Loader, *supra* note 34.

[66] *See, e.g.*, Barlow, *supra* note 1, at 28, 30 (declaring that people of cyberspace will "create a civilization of the Mind" that is "more humane and fair" than the physical world, and describing that world as free of

With the gap between information technology haves and have-nots growing, social scientists instead turned to more practical matters, such as the steps needed to narrow this digital divide.[67] The first step was to document the gap, which became a priority of the Clinton administration in the 1990s.[68]

¶19   The digital divide concerns socioeconomic inequality, both on a national and global level.[69] For example, the final report issued by the U.S. government under the Clinton administration in late 2000 showed that significant gaps remained in the digital divide, but there were improvements in terms of connectivity and Internet access among previously underrepresented groups.[70] Although the digital divide may be closing in America, in other countries, particularly poorer ones, it is not.[71]

¶20   Traditional discussion of the digital divide is entirely concerned with "external" matters from a cyberlaw perspective. That is, the digital divide debate is about physical global communications, particularly the Internet, and addressing the problem that some people have access to information technology while others do not. Since the 1990s, this

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the "Governments of the Industrial World"); Dyson, Gilder, Keyworth & Toffler, *supra* note 24 (writing of a new cyberspace "constituency-to-come" that will bring about the "creation of a new civilization, founded in the eternal truths of the American Idea"); *see also* GOLDSMITH & WU, *supra* note 1, at 10, 13 (discussing cyberlibertarian writers who spoke of "a new frontier, where people lived in peace, under their own rules, liberated from the constraints of an oppressive society and free from government meddling," a vision shared by other cyberspace pioneers who "believed that the Internet might transcend territorial law and render the nation-state obsolete").

[67] Alain Rallet & Fabrice Rochelandet, *ICTs and Inequalities: The Digital Divide*, *in* INTERNET AND DIGITAL ECONOMICS: PRINCIPLES, METHODS AND APPLICATIONS 693, 693 (Eric Brousseau & Nicolas Curien eds., 2007) (noting the digital divide debate arose in part out of criticisms of a common but "naïve" vision in the 1990s that "[v]irtual space" could be a "substitute for physical space"); Loader, *supra* note 34, at 3 ("Until fairly recently the euphoria surrounding the advent of the Internet as a means of enabling 'many-to-many' communication across the globe might easily have led one to believe that if people were not already 'online' then they very soon would be. . . . Talk amongst the technologically elite of advanced capitalist societies of joining the Information Superhighway is a discourse which has little meaning in many regions of the globe where even intermediate telecommunications are underdeveloped."). *See generally* Gunkel, *supra* note 34 (for a discussion of inception and evolution of the debate about the digital divide).

[68] Bomse, *supra* note 36, at 1745–46; Yu, *supra* note 35, at 3 ("During the Clinton Administration, the Department of Commerce conducted four detailed surveys on the digital divide in the United States.").

[69] Gunkel, *supra* note 34, at 503 ("It is not until 1999 that the term appears in NTIA's 'Falling Through the Net.' In this report, 'digital divide' is defined as 'the divide between those with access to new technologies and those without.' In this way, 'digital divide' names a form of socioeconomic inequality demarcated by the level of *access* that one has to IT.") (citation omitted).

[70] U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION (2000), *available at* http://search.ntia.doc.gov/pdf/fttn00.pdf; Yu, *supra* note 35, at 3 ("The final report, which was released shortly before the end of the Administration, showed an increasing number of Americans using computers and the Internet. . . . The report also found a rapid increase in Internet access 'among most groups of Americans, regardless of income, education, race or ethnicity, location, age, or gender.'"); *see also* Andrew Leigh & Robert D. Atkinson, *Clear Thinking on the Digital Divide*, POL'Y REP. (Progressive Policy Inst., Washington, D.C.), June 2001, at 1 ("Historical comparisons suggest that while the current gaps in computer ownership and Net access have risen over the past few years, they will soon begin to narrow as most Americans adopt these technologies.").

[71] Yu, *supra* note 35, at 4 ("Although the report showed that the digital divide in the United States is closing, the same is not true for the less developed countries.") (footnote omitted). *See generally* JAN A.G.M. VAN DIJK, THE DEEPENING DIVIDE: INEQUALITY IN THE INFORMATION SOCIETY (2005); INFORMATION TECHNOLOGY POLICY AND THE DIGITAL DIVIDE: LESSONS FOR DEVELOPING COUNTRIES (Mitsuhiro Kagami et al. eds., 2004).

perspective on the digital divide has been the focal point of sustained public debate, which continues today.[72] Yet, something new still might be said.

2. Digital Divide 2.0: Virtual Inequality

¶21   The digital divide is certainly about equality in virtual worlds, but only insofar as they are aspects of the Internet and other communications networks with global reach. The digital divide does not only concern the *physical* aspects of cyberspace.   One innovation of "New Virtualist" scholarship[73] is its understanding that the virtual and external perspectives in cyberlaw are both relevant and interdependent, providing for more thorough and nuanced analysis. This subsection explores how the digital divide and virtual worlds interact in terms of inequality by setting out how the digital divide creates significant inequalities within cyberspace. In other words, a complete picture of virtual equality requires an interdependent approach to this perspective.

¶22   One way of thinking about this interdependency is to consider how real-world capacities impact the virtual-world experience. Take time lag, for instance. Lag occurs when the technological capacity of hardware, software architectures, models, Internet connectivity, and computing hardware significantly limits the capacity of virtual worlds to deliver real-time experiences. Often, this means delays in loading graphics, user-interface, application program interfaces; in the case of virtual worlds, it means delays in loading landscapes, avatars, terrain, and architecture.[74] Lag is a synchronization problem which can seriously impact the quality of an online experience, reducing not only the "sense of realism" but even basic usability.[75] According to Richard Bartle, lag is a hardware issue as well as a geographical one.[76] Simply put, people with slower computers or unreliable Internet connectivity will experience more lag; but even with the fastest, most modern hardware, a user will still experience significant lag if there are

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[72] Yu, *supra* note 35, at 2 ("Since the mid-1990s, the digital divide has received considerable attention in international forums, in presidential debates, and among corporate leaders.") (footnotes omitted). *See generally* BARBARA MONROE, CROSSING THE DIGITAL DIVIDE: RACE, WRITING, AND TECHNOLOGY IN THE CLASSROOM (2004); KAREN MOSSBERGER ET AL., VIRTUAL INEQUALITY: BEYOND THE DIGITAL DIVIDE (2003); United Nations Conference on Trade and Development, New York and Geneva, 2006, *The Digital Divide Report: ICT Diffusion Index 2005*, U.N. Doc. UNCTAD/ITE/IPC/2006/5 (May 10, 2006) (detailing the continued global digital divide); KAREN MOSSBERGER ET AL., *From the Digital Divide to Digital Citizenship*, *in* DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY, AND PARTICIPATION 95 (2008); Arik Hesseldahl, *The U.N. Will Not Bridge the Digital Divide*, FORBES (Feb. 25, 2005, 10:00 AM), http://www.forbes.com/2005/02/25/cx_ah_0225tentech.html (discussing a United Nations world summit attended by 1,700 information technology experts and the United Nation's efforts and "plan of action" to bridge the information and communications technology digital divide); sources cited *supra* note 71.
[73] *See infra* note 82 and accompanying text.
[74] *See, e.g.*, BOELLSTORFF, *supra* note 52, at 103–04 (discussing the client–server architectural limits of Second Life's technology which causes significant lag problems).
[75] WILLIAM R. SHERMAN & ALAN B. CRAIG, UNDERSTANDING VIRTUAL REALITY: INTERFACE, APPLICATION, AND DESIGN 243 (2003); *see also* RICHARD A. BARTLE, DESIGNING VIRTUAL WORLDS 105 (2003); BOELLSTORFF, *supra* note 52, at 102–03 (discussing the frequency of complaints about in-world lag among Second Life users).
[76] BARTLE, *supra* note 75, at 105; *see also* SHERMAN & CRAIG, *supra* note 75, at 243 ("[T]wo primary ways to reduce latency [or lag] are to (1) send information from the input devices to the computer as quickly as possible and (2) reduce the amount of time it takes to generate the computer graphics image.").

great distances between the user and a virtual world (such as a user in Australia connecting to a server located in the United States).[77]

¶23   This is where the digital divide comes in. As noted, it has both a national and global dimension. Part of this layering, however, is social rather than just geographical.[78] In global terms, the developed world retains a vast majority of the access to information technology, while Internet connectivity is variable and "very limited in sub-Saharan Africa, the Middle East, Latin America, and South Asia."[79] Given these realities, the digital divide is a source of significant inequalities of virtual-world experience. This inequality applies not only to individuals with no connectivity, but also to those who have some connectivity but experience significant lag due to geographical or technological factors. Finally, technological limits in poorer regions can create inequalities *between* virtual worlds. While virtual worlds located on American servers are generally stable, those located in parts of Asia suffer from significant server insecurities, where hacking and theft of virtual property are common.[80] In this way, the digital divide contributes a kind of virtual-world inequality—of experience—caused by real-world factors.

¶24   Mapping out these points gives a sense of the different layers of equality and makes it easier to identify inequalities. It also links the basic idea of equality—which was an important founding value to cyberspace—to the more policy-laden idea of distributive equality.[81] Concerns of distributive justice largely figure into the discussion of virtual inequalities. Virtual inequalities refer to forms of inequality that have emerged in virtual communities. Though some virtual inequalities have primarily virtual causes, many are linked to real-world challenges of distributive justice, both on a regional and global level.

III. EQUALITY AND DISTRIBUTIVE JUSTICE IN CYBERSPACE

¶25   This Part explores the dimensions of virtual inequality, the forms of inequalities that have emerged in cyberspace. The approach here is paradigmatic of an emerging body of second-generation scholarship that addresses the unique legal problems posed by modern virtual worlds. This body of work, referred to elsewhere as the New Virtualism,[82] examines, among other things, how the influences of real space—be it

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[77] BARTLE, *supra* note 75, at 105 ("Lag happens.").

[78] Rallet & Rochelandet, *supra* note 67, at 693 ("The digital divide has not only a geographical dimension but also an important social side."); *see also* ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD 405–06 (Karen Christensen & David Levinson eds., 2003).

[79] Yu, *supra* note 35, at 4; *see also* PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 41, 233 (3d prtg. 2003) (noting that developed countries constitute roughly eighty percent of the world's information technology market and that there is a lack of Internet access in the noted regions).

[80] *See* EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES 2 (2005) (noting that in Asia people have "lost virtual items because of game-server insecurities and hacks" and that the police have even been called to deal with these problems).

[81] "Distributive justice" is used here in the same sense as used by John E. Roemer, who writes that the central question of distributive justice is "how a society or group should allocate its scarce resources or product among individuals with competing needs or claims." JOHN E. ROEMER, *Introduction* to THEORIES OF DISTRIBUTIVE JUSTICE 1, 1 (1996).

[82] *See* Penney, *supra* note 9, at 195–99; Jonathon W. Penney, *Understanding the New Virtualist Paradigm*, 12 J. INTERNET L. 3, 3–4 (2009) [hereinafter Penney, *New Virtualist*] (discussing the three "key innovations of the New Virtualist scholarship"). Examples of "New Virtualism" scholarship include James

governmental, commercial, or socioeconomic factors—impact law, code, and other aspects of virtual communities.

¶26   Essentially, first-generation cyberlaw scholarship, as discussed above, primarily focuses on preserving liberty, autonomy, and self-government in cyberspace.[83] However, one of the assumptions upon which this early work rests is the idea that virtual worlds embody separate and unique spaces with defined borders that set off virtual worlds from real space of the real world.[84] Important changes in the years since have shown this assumption to be incorrect.[85] Popularization brought with it increased interest from regulators and e-commerce as corporate interests proliferated online and states around the world proposed laws to control the Internet and its virtual spaces.[86] In other words, there are no immutable borders that kept the outside world from influencing cyberspace and virtual worlds.

¶27   By contrast, rather than conceiving of cyberspace and virtual worlds as separate and distinct solitudes, New Virtualist scholarship approaches cyberlaw problems—like equality and distributive justice—from both an internal perspective and an external one. Virtual communities are interconnected with real-world challenges; so, understanding the former requires studying the latter. This Article's discussion of virtual inequalities follows this approach by examining how both real-world and virtual-world distributive justice issues create and influence inequalities in virtual communities.

Grimmelmann, *Virtual Power Politics*, *in* THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 146 (Jack M. Balkin & Beth Simone Noveck eds., 2006) (exploring software design through lens of virtual world politics); Balkin, *supra* note 10 (discussing "virtual liberty" in virtual worlds and the boundaries between cyberspace and real space); Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19 (2004); James Grimmelmann, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147 (2004) (approaching the law within virtual worlds as comparative legal study); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003) [hereinafter Hunter, *Cyberspace as Place*] (arguing that the metaphor of cyberspace legitimizes the imposition of private property-like regimes on virtual spaces, precluding their common use and enjoyment); Kerr, *supra* note 48 (exploring the "problem of perspective" in cyberlaw); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1 (2004) [hereinafter Lastowka & Hunter, *Virtual Worlds*] (arguing that items in virtual worlds ought to have property protection as much as items in non-virtual worlds); F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293 (2004) (exploring whether destruction of virtual property can or ought to be conceived as criminal activity); Tal Z. Zarsky, *Information Privacy in Virtual Worlds: Identifying Unique Concerns Beyond the Online and Offline Worlds*, 49 N.Y.L. SCH. L. REV. 231 (2004) (discussing possible questions raised by virtual worlds for real-world laws).

[83] *See generally* sources cited *supra* note 7.

[84] Penney, *New Virtualist*, *supra* note 82, at 3.

[85] *Id.* at 4 ("As it turned out, the original virtualists were wrong. The developments of the ensuing decade would show that the borders between real space and cyberspace were neither clear nor impermeable.").

[86] *Id.* ("Increasing public use and popularity of the Internet and its cyberspaces and virtual worlds brought more attention and scrutiny from real space state regulators and law enforcement officials. New laws were proposed, and new means of controlling this supposed new frontier of cyberspace were propagated and enforced, reaching into the presumably impenetrable borders of cyberspace. Increasing electronic commerce and commodification also played a role in blurring borders between cyber and real space.") (footnotes omitted).

A. Virtual Economies and the Emergence of Class Inequality

1. Technology, Wealth, and Virtual Class Disparity

¶28   Virtual worlds are supposed to be distinct from real space.[87] That is what Barlow's *Declaration* envisioned. Yet, those who have studied virtual worlds often note what Ed Castronova calls a "blurring," where real-world tendencies bleed into the realm of virtual worlds.[88] One such form of blurring is the emergence of monetary systems within virtual worlds. EverQuest's platinum pieces and Second Life's "Linden dollars," which are convertible from U.S. dollars, are two prominent examples.[89] Such in-world currencies are not only a big reason for the popularity of these virtual worlds, but also promote in-world creation, expression, and innovation through financial incentive.[90] In Boellstorff's terms, Second Life's ethic of "creationist capitalism" fuses creativity to labor, production, and consumption.[91]

¶29   But with the introduction of monetary systems (including labor, production, and consumption) comes forms of inequality—particularly class status. This is no different in virtual worlds.[92] Again, Second Life offers a good example, with the emergence of an "elite" class—the property owners and "content creators" who embodied the ideal of Second Life's "creationist capitalism" political economy.[93] This class of users was "treated differently by other[s]," not only by other virtual world residents, but by the operators of the world itself—they often were given more opportunities to influence virtual world design, and sometimes were offered jobs.[94]

¶30   Most interestingly, not only do these privileged classes exist in virtual worlds, but other users have developed a kind of class consciousness about their inequality of status.[95] Sandra, a Second Life resident, expresses an almost class consciousness about this state of affairs:

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[87] BOELLSTORFF, *supra* note 52, at 225 (noting how virtual worlds are often inaccurately seen as places of "untrammeled freedom" where people are free to re-invent themselves at will); FRIEDRICH VON BORRIES ET AL., SPACE TIME PLAY: COMPUTER GAMES, ARCHITECTURE AND URBANISM: THE NEXT LEVEL 148 (2007) ("Those unfamiliar with the workings of virtual worlds are often tempted to regard them merely as collective hallucinations. But their inhabitants' fictional actions have real consequences . . . .").

[88] CASTRONOVA, *supra* note 80, at 149 (noting the appearance of monetary systems and commodities in virtual worlds to be an example of blurring the distinction between the virtual and the real).

[89] *Id.* at 19 (discussing "real money" system in EverQuest); BOELLSTORFF, *supra* note 52, at 211–15 (discussing "money and labor" in Second Life, in terms of "creationist capitalism," an ethic the author says best describes Second Life's political economy).

[90] CASTRONOVA, *supra* note 80, at 64 (discussing EverQuest's "reward structures"); JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 124 (2008) (discussing the case of Anshe Chung, a Second Life land baroness, and the role of financial incentives in fostering UCC or "digital creativity").

[91] BOELLSTORFF, *supra* note 52, at 209.

[92] Mikael Jakobsson, *Rest in Peace, Bill the Bot: Death and Life in Virtual Worlds*, *in* THE SOCIAL LIFE OF AVATARS: PRESENCE AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 63, 73 (Ralph Schroeder ed., 2002) ("The concept of social status can thus also be used in virtual worlds, and it is as important in understanding a virtual society as it is in any ordinary society.").

[93] BOELLSTORFF, *supra* note 52, at 226.

[94] *Id.* at 226–27 (internal quotation mark omitted).

[95] *Id.* at 227.

> They need to upgrade the platform so that people like me have more things to play with. But instead they say fuck the people who don't own businesses and tons of land in [Second Life]. They give those people everything they want because they feed [Linden Lab] tons of cash every month. . . . They don't care about us . . . . Second Life is no different from real life. The rich get richer while the poor stay poor.[96]

So as with world economies, virtual economies can lead to disparities of wealth, power, and distribution of property and privilege. Yet Sandra's comments also reveal something about the root causes of these disparities, speaking to the ability of Second Life members who are privileged in real space to perpetuate their wealth and power in virtual space.

2. Open and Closed Virtual Economies and Real-Space Wealth

¶31   Indeed, the emergence of such class inequalities in a virtual world like Second Life is not entirely unforeseeable. One unique aspect of Second Life is its virtual economy, an in-world economy which involves exchange among community members in Linden dollars. Also known as an "open" virtual economy, Second Life members can convert actual U.S. dollars into Lindens for in-world use.[97] Though Second Life defines Linden dollars as a fictional in-world currency, it is fully exchangeable in U.S. dollars and therefore accessible to anyone with any real-world currency.[98] And a currency exchange, called the LindenX, measures the fluctuating Linden-to-USD exchange rate.[99] Though this "openness" allows real-world wealth to facilitate virtual commerce, it also allows that same wealth to carry real-world inequalities of power and privilege into the virtual community.

¶32   Sandra's comment about a privileged class of community members speaks to the emergence of these virtual inequalities. This privileged class "feeds" Linden Labs by investing real money into Second Life, in return for preferential treatment. Central to the way real-world wealth translates into wealth and power in Second Life is virtual landownership. Second Life's economy is centered on property, and land sales are a key source of income for many residents.[100] But to own land, a member must not only purchase a "premium account," but also pay a monthly landowning fee to Linden Labs that increases with the size and character of the member's virtual parcel.[101] These are not necessarily paltry sums—though Boellstorff notes a basic land usage fee of $10, further blocks of land can be purchased for an additional range of land fees from $5 for small

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[96] *Id.* (third alteration in original) (quoting Sandra, a Second Life resident).

[97] *See id.* at 211–12 (noting that Second Life activities could be financed by real-world money and labor with credit card purchases of Linden dollars, and that Second Life was unique among virtual worlds as permitting work for wages, free exchange, and intellectual property rights); Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 Nw. U. L. Rev. 1775, 1789 (2006).

[98] *See* BOELLSTORFF, *supra* note 52, at 212.

[99] *See id.*; Mayer-Schönberger & Crowley, *supra* note 97, at 1789.

[100] BOELLSTORFF, *supra* note 52, at 215–16 (noting "[t]he economic system of Second Life, however, was predicated on property" and noting that real estate transactions are the most "lucrative" form of work in Second Life).

[101] *Id.* at 216.

blocks to $195 for larger ones.[102] The impact of real-world wealth is clear: Second Life members with sufficient real-world wealth can cover the costs to finance large-scale virtual land purchases. In other words, Second Life members can easily leverage real-world wealth into virtual world wealth, power, and privilege. In fact, real estate in Second Life is concentrated in a small group of wealthy landowners, known as land barons.[103]

¶33   Though Second Life is unique in that it is an open virtual economy, real-world wealth can create inequality even in those virtual worlds with closed economies. Closed economies refers to virtual worlds that allow for exchange but do not have a currency that is exchangeable into real-world dollars. Sony's EverQuest is a massive multiplayer online game (MMOG) with a virtual economy that includes the exchange of virtual items without a real-money conversion.[104] Despite being closed to currency exchange, real-world wealth nevertheless has an important impact. In particular, EverQuest members can use real-world markets to exchange virtual items. Despite Sony's "bitter opposition,"[105] people were actually purchasing, exchanging, and auctioning virtual objects and weapons used in EverQuest on real-world e-commerce sites like eBay and Yahoo.[106] Castronova's groundbreaking work on "virtual economies," such as EverQuest, illustrates the significance and volume of exchange—sometimes greater than the GNP of many actual countries.[107] The volume of real-money transactions for virtual items was so significant that Sony changed its mind, and founded its own online exchange forum to make money off the trades.[108]

¶34   Such real-world exchange of wealth can lead to in-world disparities among users. Most apparent is the notion of "cheating" the rules of the virtual world by using real-world wealth to gain virtual world power and prestige.[109] For example, normally it takes

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[102] *Id.*

[103] David Kirkpatrick, *Coldwell Banker's Second Life*, FORTUNE (Mar. 23, 2007, 3:48 AM), http://money.cnn.com/2007/03/22/technology/fastforward_secondlife.fortune/index.htm ("A small number of land barons mostly control real estate in Second Life . . . and we thought we could bring real estate to the masses.") (quoting a vice president of Second Life) (internal quotation marks omitted); BOELLSTORFF, *supra* note 52, at 216–17 (discussing a group of successful land barons who have purchased whole islands).

[104] Mayer-Schönberger & Crowley, *supra* note 97, at 1787 & n.55.

[105] *Id.* at 1807.

[106] *Id.* at 1788.

[107] Edward Castronova, *On Virtual Economies* 3 n.2 (Ctr. for Econ. Studies Ifo. Inst. for Econ. Research, Working Paper No. 752, 2002) (discussing the notion of virtual world GDP); Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 31–33 (Ctr. for Econ. Studies Ifo. Inst. for Econ. Reseach, Working Paper No. 618, 2001) (discussing virtual world GNP and noting that "[a]ccording to GNP data from the World Bank[,] Norrath is the 77th richest country in the world, roughly equal to Russia").

[108] Mayer-Schönberger & Crowley, *supra* note 97, at 1807 ("Sony Online Entertainment has already had to reverse its negative stance towards player-to-player auctions of virtual objects. After long and bitter opposition to the sale of *EverQuest* objects on eBay and IGE, Sony Online Entertainment saw that market demand and revenue opportunities of virtual object sales were too great to ignore. In July 2005, Sony launched Station Exchange, a site which its Senior Vice President and CFO, John Needham, characterized as 'SOE-bay.'") (footnotes omitted).

[109] JULIAN DIBBELL, PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT 14–15 (2006) (discussing how regular members of the *Dark Ages of Camelot* MMOG "hate[d]" real-world purchase of virtual objects, which is akin to "pulling out a real twenty-dollar bill in the middle of a

time and experience to amass special virtual items, but those with enough disposable wealth could acquire those items effortlessly through real-world purchases allowing them to "level up" in power and prestige faster. Moreover, purchase of such items confers a measure of power—using their privileged virtual status in EverQuest acquired via real-world transactions, players have new powers to confer similar wealth and status on others of a lower level (a status similar to being of a lower class), those they feel are worthy to move up the *EverQuest* socioeconomic hierarchy.[110]

3. Virtual Class Disparities

¶35   Real-world wealth and distributive inequality can bleed into virtual worlds, bringing those very same inequalities in virtual contexts. And, like the real world, those class disparities can become entrenched. This is certainly apparent in Second Life. Boellstorff observes that many residents of Second Life complain about the "preferential treatment" given to this class of virtual world residents.[111] A group of wealthy property owners—who invested the most real money and, through exchange, created the most virtual world wealth—receive special status in the governance of the virtual world (often being directly consulted by Linden Labs).[112] Further, as landowners, this elite class had additional means to perpetuate their wealth—in Second Life, the only way to create permanent objects is to own land.[113] Real-world wealth is consolidated and perpetuated by the creation of virtual world disparities. The result is not insignificant: the creation of elites with privilege and influence not held by other virtual world members; a permanently stratified virtual class system.

¶36   There is also the emergence of a privileged class in virtual worlds with a competitive orientation like EverQuest. Here, real-world wealth can confer special status in a way that undermines the "rules" of the game, as well as the labors of regular users. This privileged gaming class also has advantages beyond a competitive advantage—it can confer status and wealth on other players by transferring virtual world currency or scarce items.

¶37   A final interesting dimension to these virtual inequalities is how they re-entrench real-world disparities of wealth. As Julian Dibbell notes, outgoing World of Warcraft players can make money by selling off high-demand virtual items on real-world markets.[114] And presumably, many of these items can be purchased from those very same real-world e-commerce markets. Virtual-world economies, like the real-world economies that influence them, lead to social and economic classes with disparities of wealth, power, and privilege.

Monopoly game and giving it to another player in exchange for Boardwalk and Park Place"); *see also* Mayer-Schönberger & Crowley, *supra* note 97, at 1787.

[110] *See* Jakobsson & Taylor, *supra* note 52 (describing how author Taylor, a more experienced EverQuest user, had amassed enough in-world money, or "platinum pieces," to be able to confer on Jakobsson higher status, by sharing some wealth and more powerful weapons).

[111] BOELLSTORFF, *supra* note 52, at 227.

[112] *Id.*

[113] *Id.* at 215 ("The economic system of Second Life, however, was predicated on property. Only by owning property could residents build objects with permanence: this was an economic model in which property made the virtual 'real.'").

[114] DIBBELL, *supra* note 109, at 12–13.

B. *Inequality of Virtual Expression*

¶38   Real-world problems of distributive justice (unequal distribution of wealth and resources) also play a role in creating inequalities in virtual expression. There is an emerging recognition that virtual worlds can play a unique role in fostering cultural expression and diversity. A key, if not central, part of this contribution is user-created content (UCC).[115] The idea that virtual game worlds constitute a form of cultural expression is not new,[116] but UCC takes the creative expression in virtual worlds to a new level because, often, such content is created not to "win" the game, but for its own sake.[117] That is, creativity and expression for the sake of creativity and expression. Second Life, for example, is Linden Lab's virtual world built by Second Life members. The community offers the complete "architecture of modern societies" with "clothing, buildings, vehicles, and opportunities for starting online businesses."[118] According to Second Life's website, an average of one million members log into the virtual community from around the globe.[119] A big part of Second Life's attraction is its incentives for user creativity—its terms of service and end-user agreements confer intellectual property on users for their virtual world creations.[120]

¶39   UCC offers some hope for those who believed, like Barlow and Benkler had, that virtual worlds will offer a dynamic new frontier for creative expression.[121] UCC in

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[115] Mira Burri-Nenova, *User Created Content in Virtual Worlds and Cultural Diversity*, *in* GOVERNANCE OF DIGITAL GAME ENVIRONMENTS AND CULTURAL DIVERSITY: TRANSDISCIPLINARY ENQUIRIES 74, 75–78 (Christoph Beat Graber & Mira Burri-Nenova eds., 2010), *available at* http://ssrn.com/abstract=1316847 (discussing how some user-generated content falls within the United Nations' definition of "cultural expression"); PALFREY & GASSER, *supra* note 90, at 114–15; JONATHAN L. ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 146–47 (2008).

[116] *See* Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 69 (2004) ("Should we understand the developing technologies and social practices of designing and playing games, including the cooperative features of play that I have called the freedom to design together, as a new medium for the communication of ideas? I think the arguments are quite compelling. Courts already recognize much simpler games—so-called first person shooter games—as artistic creations entitled to First Amendment protection.").

[117] *See* John Baldrica, *Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects*, 8 MINN. J.L. SCI. & TECH. 681, 687 (2007); Burri-Nenova, *supra* note 115, at 76.

[118] Mayer-Schönberger & Crowley, *supra* note 97, at 1787.

[119] Linden Lab, *The Second Life Economy in Q3 2011*, SECOND LIFE (Oct. 14, 2011, 2:38 PM), http://community.secondlife.com/t5/Featured-News/The-Second-Life-Economy-in-Q3-2011/ba-p/1166705.

[120] Burri-Nenova, *supra* note 115, at 80–81 ("In other games, content creation may very well be possible but is not allowed. In yet a third category of games, UCC is not only allowed but builds the core of the game—its very mission and function is to facilitate the creation of content within the game environment, as well as to enhance the possibilities of sharing (including trading) the created content. The infamous example of this in fact rather small category of games, is Linden Lab's *Second Life*, which is a 'world created by its Residents,' where players can build basically anything from scratch through the process of atomistic construction.") (footnotes omitted); BOELLSTORFF, *supra* note 52, at 212 ("At the time of my fieldwork, Second Life was known as one of the only virtual worlds that freely allowed one to work for wages inworld, as well as permitting free currency exchange and full intellectual property rights . . . .").

[121] Barlow, *supra* note 1, at 27; BENKLER, *supra* note 5, at 297 ("As online games like Second Life provide users with new tools and platforms to tell and retell their own stories, or their own versions of well-trodden paths, as digital multimedia tools do the same for individuals outside of the collaborative storytelling platforms, we can begin to see a reemergence of folk stories and songs as widespread cultural practices. And as network connections become ubiquitous, and search engines and filters improve, we can begin to

virtual worlds, for example, can provide a means for the limitless expression Barlow pronounced in his *Declaration*. UCC is available to all members of a virtual community equally, at least in theory. It thus helps to render cyberspace—or a given virtual world—a home for equality of expression, welcome to "all the sentiments and expressions of humanity," no matter if "debasing" or "angelic."[122] Though again, this depends on the virtual world itself. If the virtual world is wired by way of the Internet (or some other global communications network), there is also universal access to UCC in that virtual world and, thus, universality of expression.

1. Intellectual Property and User-Created Content

¶40   Of course, the real picture is not nearly that rosy. Though UCC may hold out some promise for complete equality of expression in virtual form, in reality, several factors contribute to inequalities. The first, and most often cited, is inequality of treatment of virtual expression. That is, virtual worlds, and their designers and operators, tend to incentivize certain forms of virtual expression, while deterring—or even censoring—others. Some kinds of discrimination between forms of virtual expression is expected, particularly in MMOGs, where UCC related to game advancement will be privileged in comparison to other players.[123] However, in less game-oriented virtual worlds, like Second Life, the differential treatment seems less warranted. In fact, scholars like Jack Balkin have analyzed such discrimination of speech in terms of free expression, proposing regulation that might help preserve speech in certain kinds of more publicly oriented virtual worlds.[124] This Article takes a slightly different angle, exploring in more depth how real-space inequalities of wealth, property, and power play out in a virtual world context. The focus is on the creation of intellectual property rights for UCC. This is one of Second Life's unique features—its terms of service and end-user license agreement confer intellectual property to users for their virtual world creations.[125] In fact, this feature is often cited as a reason for Second Life's popularity and its users' creative drives.

¶41   Yet, there is another side to this coin. Recognition of such rights can lead to greater commodification of virtual-world expression, privileging certain kinds of commercial expression over more creative forms.[126] Additionally, intellectual property rights confer on owners a powerful means to potentially suppress expression. In other digital contexts, scholars view intellectual property rights as a serious threat to freedom of expression.[127] This is no different in virtual worlds. As Balkin notes:

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see this folk culture emerging to play a substantially greater role in the production of our cultural environment.").

[122] Barlow, *supra* note 1, at 29.

[123] Burri-Nenova, *supra* note 115, at 100 (discussing how UCC is often tied to gaming objectives in MMOGs and other game-oriented virtual worlds).

[124] *See generally* Balkin, *supra* note 10.

[125] *See* BOELLSTORFF, *supra* note 52, at 212.

[126] Balkin, *supra* note 10, at 2064 ("Letting players possess copyrights in virtual items significantly increases real-world commodification of virtual worlds, and makes it all the more likely that the law will regulate what goes on in virtual worlds. By allowing players intellectual property rights in virtual items, the makers of *Second Life* are essentially inviting the law into their virtual world.").

[127] Yochai Benkler and Lawrence Lessig provide two classic examples. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV.

> Strong intellectual property rights in real space are a burden on freedom of expression, although in many cases an acceptable burden. Strong intellectual property rights in virtual worlds, however, are a positive nuisance, and they may greatly inhibit the freedom to play as well as the freedom of players to design parts of the virtual world.[128]

This concern about restrictions of expression takes on a dimension of distributive inequality—and inequality of expression—when intellectual property rights become concentrated in the hands of a wealthy few. This is certainly the case in the real world, where large corporations hold the copyrights to vast amounts of commercial art and music, leveraging those rights to control expression by limiting use of copyrighted work.[129] Already, intellectual property claims are emerging in virtual worlds, as demonstrated by the suit Eros, an adult entertainment company in Second Life, brought against another community member for creating virtual adult sex toys that violate its copyright.[130] In many ways, Eros and similar entities embody the powerful creationist class Boellstorff talks about as the elite of Second Life.[131] Though this may not be a pervasive problem at present, users like Eros, particularly Second Life members who have real-world assets to finance their virtual world endeavors, constitute a privileged class of content creators who will create disparities of virtual expression by exerting greater control over the UCC of others and over the platforms for UCC.[132]

2. Expression, Distributive Justice, and the Digital Divide

¶42   A second way real-world distributive justice issues create inequality of virtual expression concerns the disparities in opportunity and technological capacity for UCC. Relevant here is the digital divide. The digital divide, as noted above, is concerned with equality and virtual worlds insofar as they are aspects of communications networks with global reach. It also impacts the equality of expression *within* virtual worlds on two levels. The first is on an individual level. Lack of proper access or connectivity seriously limits virtual world members' capacity for UCC. Of course, such connection problems may limit access to the virtual world altogether, but not necessarily. Often, UCC requires

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354, 394–400 (1999) (discussing copyright and other intellectual property as part of an "enclosure movement" that threatens freedom of speech and diversity of expression); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD (2001).

[128] Balkin, *supra* note 10, at 2064–65. *See generally* Hunter, *Cyberspace as Place*, *supra* note 82 (arguing that the metaphor of cyberspace legitimizes the imposition of private property-like regimes on virtual spaces, precluding their common use and enjoyment).

[129] LESSIG, *supra* note 127, at 183 ("The pattern here is extremely common. Copyright holders vaguely allege copyright violations; a hosting site, fearing liability and seeking safe harbor, immediately shuts down the site. The examples could be multiplied thousands of times over, and only then would you begin to have a sense of the regime of control that is slowly emerging over content posted by ordinary individuals in cyberspace. Yahoo!, MSN, and AOL have whole departments devoted to the task of taking down 'copyrighted' content from any Web site . . . .").

[130] First Amended Complaint—Injunctive Relief Sought and Demand for Jury Trial, Eros, LLC v. Leatherwood, No. 8:07-CV-01158-SCB-TGW (M.D. Fla. Oct. 24, 2007), http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv01158/202603/11/0.pdf.

[131] BOELLSTORFF, *supra* note 52, at 226.

[132] For another example of what Dan Hunter calls the problem of the "Digital Anticommons," see Hunter, *Cyberspace as Place*, *supra* note 82, at 500.

a more advanced level of technological capacity from users—put simply, a computer and an Internet connection that can support graphically intensive applications and scripting. In many regions, people simply do not have that capacity. Burri-Nenova has recognized this point in relation to UCC. The claim that UCC necessarily promotes cultural diversity

> is not true because of the barriers existing to entering the game space. As the usual hindrances, one can list here the access to infrastructure, broadband, hardware, media literacy and the costs related to playing a certain game (especially MMOGs), which should not be underestimated. These thresholds may be too high to overcome, in particular for players coming from developing countries or poor parts of society in developed countries, thus making the overall picture already one of discrimination and privileged access.[133]

By comparison, members of virtual worlds from western countries where connectivity is less of a problem, or where people typically have greater technological capacity, have likewise greater opportunities for virtual expression. This is inequality of virtual expression on an individual level.

¶43   There is also a broader concern about equality of cultural expression. UCC, as an independent or practical creative act, can help promote cultural expression and diversity, both in virtual worlds as well as real ones. Indeed, the Organisation for Economic Co-operation and Development Working Party has recognized UCC's potential to boost "availability and diversity of (local) content in diverse languages."[134] However, if UCC can promote cultural diversity by being an expression of a user's culture and there is a lack of diversity in the people using virtual worlds and creating content, then the full potential of UCC will never be realized. If the disparity of access and proper connectivity to virtual worlds does not change—and virtual world participation remains something solely for people from a handful of developed western nations—inequalities of cultural expression within virtual worlds will remain. UCC that arises from certain cultures, classes, and linguistic expressions will dominate in the virtual world, while other UCC will suffer. That is, the kind of world that Second Life, as a virtual community, invites its users to create may be like a virtual monoculture that remains unwelcoming and does not provide users of different backgrounds with many opportunities for expression. Here, lack of access to virtual world participation results in a number of forms of virtual inequality, both in terms of the ability to contribute UCC expression and in terms of the quality of in-world experience.

C. Cyber-security and Inequality

¶44   A final emerging aspect of virtual inequality concerns cyber-security. Cyberspace is increasingly being recognized as a "domain of military action;" so, focus on cyber-

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[133] Burri-Nenova, *supra* note 115, at 100.

[134] Org. for Econ. Co-operation & Dev. [OECD], Comm. for Info., Computer & Commc'ns Policy, *Participative Web: User-Created Content*, at 36, OECD Doc. DSTI/ICCP/IE(2006)7/FINAL (2007), *available at* http://www.oecd.org/dataoecd/57/14/38393115.pdf; *see also* Burri-Nenova, *supra* note 115, at 99.

security is growing.[135]   Responding to a range of new threats posed by cyberspace,[136] governments around the world have ramped up cyber-warfare and security capabilities, treating it like the traditional strategic zones of land, sea, and air.[137] Emerging threats in this domain range from lone hackers, to state-supported cyber-warfare, to organized cyber-crime and transnational terrorism.[138]   Thus, security threats can be low scale as well as well organized and well funded.[139]

¶45   Yet cyber-security, like other forms of security, is largely dependent upon resources. The capacity to secure cyberspace, or defend oneself in it, is not just a matter of technological capacity, but is a matter of other social, political, and economic factors too.[140]   On a national level, cyber-security requires, among other things, "collective action"; this involves not just awareness and action by governments, but broader "cyber cultur[al]" practices among populations that promote security.[141]   This, of course, requires stable access to Internet connectivity, information and communication technologies, and related resources, which not all countries have. This leaves certain regions at a greater risk to large-scale (even catastrophic) cyber-attack, economic exploitation, and weakened technological competitiveness.[142]

¶46   Similar factors cause inequalities on an individual level. Without stable Internet connectivity or access to related technologies, people are less likely to adopt best practices for proper cyber-security, such as purchasing firewalls and anti-virus software and keeping them up to date. This leaves them, like states, at the mercy of the aforementioned threats. But even where there is stable connectivity, there are other challenges. Indeed, even in wealthy countries like the United States where Internet and ICT access is not a widespread problem, there remains a significant knowledge gap on cyber-security matters.[143]   Moreover, where best practices have been adopted and entrenched, challenges emerge so quickly that gaps in awareness remain.[144] This leaves some individuals' personal information, located on the margins of these knowledge gaps by virtue of their own wealth, resources, and technical knowledge, highly vulnerable to data loss and exploitation.

¶47   And, finally, there is the matter of virtual world experience. This was discussed earlier in relation to other contexts like the digital divide and UCC, but cyber-security

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[135] Ronald Deibert & Rafal Rohozinski, *Control and Subversion in Russian Cyberspace*, *in* ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS, AND RULE IN CYBERSPACE 15, 31 (Ronald Deibert et al. eds., 2010) (discussing how advanced filtering systems and Internet controls have grown out of an increasing focus on cyber-security by governments and militaries).

[136] NAT'L RESEARCH COUNCIL & NAT'L ACAD. OF ENG'G, TOWARD A SAFER AND MORE SECURE CYBERSPACE 3 (Seymour E. Goodman & Herbert S. Lin eds., 2007) [hereinafter SAFER CYBERSPACE] ("A very broad spectrum of actors, ranging from lone hackers to major nation-states, poses security risks to the nation's IT infrastructure.").

[137] Deibert & Rohozinski, *supra* note 135, at 31. *See generally* SAFER CYBERSPACE, *supra* note 136.

[138] SAFER CYBERSPACE, *supra* note 136, at 3.

[139] *Id.*

[140] ZEINAB KARAKE SHALHOUB & SHEIKHA LUBNA AL QASIMI, CYBER LAW AND CYBER SECURITY IN DEVELOPING AND EMERGING ECONOMIES 214 (2010) (discussing how securing cyberspace is "not simply a technological question," but one involving many other factors).

[141] *Id.* at 214–15; *see also* SAFER CYBERSPACE, *supra* note 136, at 9.

[142] SAFER CYBERSPACE, *supra* note 136, at 3.

[143] *Id.* at 9.

[144] *Id.*

impacts virtual experience too. The rush to secure and, to a certain extent, militarize cyberspace has also encouraged the proliferation of tools for online censorship.[145] Often, those located in poorer, less democratic countries suffer greater levels of filtering, which obviously impacts the richness of online experience.

IV. ADDRESSING VIRTUAL INEQUALITIES

¶48   Accepting that equality is an important value to cyberspace, then the inevitable question is: what is the best way to address the inequalities previously discussed? Concerning the Digital Divide 1.0, as well as inequities in online communities due largely to real-world distributive justice challenges and lack of access to Internet and ICT, the solution is likely straightforward, but neither easy nor cheap: national and international access to Internet connectivity and information communication technologies can be improved by more engagement by international governmental and non-governmental organizations and greater foreign aid from wealthier countries.[146]

¶49   On the Digital Divide 2.0, inequalities largely arise in online communities, though real-world distributive justice challenges are often interconnected with these issues. This Article argues that addressing virtual inequalities is something that should be left to virtual communities themselves, both to their members and to their designers and operators, at least to the extent possible. This view harkens back somewhat to first generation cyberlaw scholarship—following the cyber-libertarians—which often argued, wrongly, that traditional laws could not and should not apply to cyberspaces.[147] Scholars like Lessig, Goldsmith, and Wu have since shown that this argument and its assumptions are deeply flawed.[148] Cyberspaces are not immune to control and regulation.

¶50   But it seems, in some ways, the pendulum has swung too far. Today, scholars feel free to ruefully dismiss the ideas of the cyber-libertarians—as Orin Kerr does when he says that nowadays few people take them "seriously"[149]—as if self-governance does not remain a live issue both in virtual and real space. Indeed, Goldsmith and Wu overstate their case when they say that "notions of a self-governing cyberspace are largely discredited."[150] The idea of cyber-libertarians that is discredited is not the notion of self-government, but the notion that the nature of cyberspace would render it resistant to any form of state control, making self-government inevitable. Conceding that self-

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[145] Deibert & Rohozinski, *supra* note 135, at 31.

[146] The United Nation's Special Rapporteur on free expression, in his recent report, makes a number of recommendations on point concerning access to Internet and "necessary infrastructure," including calling on all states to work to guarantee "universal" Internet access. Special Rapporteur on the Promotion & Protection of the Right to Freedom of Opinion & Expression, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, Human Rights Council, ¶ 85, U.N. Doc. A/HRC/17/27 (May 16, 2011), *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

[147] *See* sources cited *supra* note 7.

[148] GOLDSMITH & WU, *supra* note 1; Orin S. Kerr, *Enforcing Law Online*, 74 U. CHI. L. REV. 745, 751–52 (2007) (reviewing GOLDSMITH & WU, *supra* note 1); LESSIG, *supra* note 31, at 6 ("Values that we now consider fundamental will not necessarily remain. Freedoms that were foundational will slowly disappear.").

[149] Kerr, *supra* note 148, at 751.

[150] GOLDSMITH & WU, *supra* note 1, at 14.

government of cyberspace is not inevitable, as time has shown, is not to say that self-governance cannot or should not work in any part of cyberspace. Cyberspace governance is not an all-or-nothing proposition. The Internet and the virtual worlds it hosts are too diverse and dynamic to suggest otherwise.

¶51   Thus, a case-by-case approach is preferable to virtual world governance.[151] Since such issues are not all-or-nothing, some concerns need to be regulated by traditional real-world regulators; but other issues might be best addressed by virtual world communities themselves. In this case, there are good reasons for leaving concerns about virtual inequality to virtual world designers and community members. Part V sets out these reasons.

V. LEAVING VIRTUAL INEQUALITY IN CYBERSPACE

¶52   As the case-by-case method requires, this Article's argument that virtual inequalities should be left to virtual communities to address is *specific* to equality—both as an idea and how it works in virtual contexts—and is based on a number of contextual factors, including the nature and autonomy of virtual communities, the "power to leave," the persistence of real-world distributive inequality, and the problem of enforcement.

A. The Nature and Autonomy of Virtual Communities

¶53   A primary reason for leaving concerns about virtual inequalities to online communities to police is the nature and autonomy of the communities themselves. This point has two parts. First, aspects of virtual worlds themselves may render online communities incompatible at the outset with concerns about equality, whether formal or substantive. That is, virtual worlds come in a vast range of diverse forms, with different rules, objectives, and means of interaction with other members. And, in many cases, forms of inequality are *essential* to the very nature of the virtual world. Inequality, in some ways, has been "integral to virtual worlds."[152] From older text-based games with forms of status to more modern MMOG virtual worlds like World of Warcraft, inequalities and the ability for users to climb higher in the social hierarchy are often the warp and woof of what these virtual worlds are about.[153] But the same could also be said for less gaming-oriented worlds like Second Life. Boellstorff writes that Second Life's "ethic" is oriented around an ideology of "creationist capitalism," which fuses creativity to labor, production, and consumption.[154] If he is right, then the emergent class inequalities in Second Life were likely more than foreseeable—they may have even been intentional, as part of Linden Lab's aim to create a virtual world pervaded by social stratification, competition, and creative impulse.[155]

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[151] David Post appears to take a similar approach in his recent text, in giving reasons for forms of cyberlaw governance in each context he analyzes, including domain names and virtual worlds. *See* POST, *supra* note 17, at 142–86.

[152] BOELLSTORFF, *supra* note 52, at 226.

[153] *Id.*

[154] *Id.* at 209.

[155] *Id.* at 227 ("While there was no single criterion for becoming a more privileged resident, Linden Lab did structure the world so as to have social classes within it, and this structure became more elaborate as my fieldwork progressed.").

¶54   The point is that if lawmakers impose certain equality norms on virtual worlds, the result could be quite destructive; these foreign norms have the potential to destabilize the entire ethic and structure of the virtual communities that the equality protections would aim to serve. From this angle, if there are potentially intolerable forms of inequality in a virtual space, it is best to let communities address those in consultation with world designers and moderators.

¶55   A second related point concerns the complexities of equality. The basic idea, explained above, should not be confused with equality as a policy objective.[156] Nor should it be seen as simple, as there is much disagreement on the basic idea, once getting past trite statements like equality requires "equal concern and respect."[157] Indeed, these points of disagreement raise a fundamental issue about the concept of equality itself: the distinction between *formal* and *substantive* equality.

¶56   As explained above, formal equality requires that all people are treated equally in the sense that they are treated exactly the same—treat like cases alike.[158] This notion of equality pervades first generation cyberlaw scholarship, which believes cyberspace is supposed to deliver a kind of universalism where differences among people would not matter and all would be treated the same—creating a world where, in Barlow's words, "all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth."[159] The Internet would, said Negroponte, "flatten organizations, globalize society, decentralize control, and help harmonize people."[160] Indeed, formal equality is often associated with libertarian political philosophy to which Barlow, Dibbell, Dyson, and other cyber-libertarians subscribed.[161]

¶57   Substantive equality, by contrast, requires equality not of treatment, but result.[162] To achieve equality of result, a substantive equality approach takes into account people's differences.[163] Interestingly, many critics of first generation cyberlaw scholarship use notions of substantive equality in this way—particularly as concerns for distributive justice—to attack early ideas of cyberspace sovereignty and cyberspace's ability to promote democratic values.[164] Lessig, too, in advocating what he called "universal

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[156] Waldron, *supra* note 54, at 1–2.

[157] KYMLICKA, *supra* note 55, at 4.

[158] WEST, *supra* note 58, at 107 (discussing the "basic ideal of formal equality" as treating like cases alike in terms of Equal Protection jurisprudence).

[159] Barlow, *supra* note 1, at 27–28.

[160] Negroponte, *supra* note 41; *see also* TURNER, *supra* note 1, at 1.

[161] *See supra* note 59 and accompanying text.

[162] *See supra* note 60 and accompanying text.

[163] *See supra* note 61 and accompanying text.

[164] The most prominent of these critics is Neil Netanel. *See* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 406 (2000) ("[C]yberians give insufficient weight to the distributive function of liberal government. Liberal ideals can be realized only if the incidents of citizenship are distributed among all citizens. Yet opportunities to communicate, process information, and even gain access to cyberspace are vastly unequal. The cyberian vision lacks a vehicle to provide such citizenship resources to those who currently lack them. Without state intervention, therefore, cyberspace self-governance will, at best, resemble the Athenian democracy of the privileged few, not participatory liberalism."); *see also* Timothy Wu, *When Law & the Internet First Met*, 3 GREEN BAG 2D 171 (2000).

standing" offered by "open-evolution," which treats all people equally and is thus open to objection on substantive equality grounds.[165]

¶58   Libertarians would likely say the best approach is formal equality. Others would say substantive equality. The point is there is no right answer. *Choosing* which conception of equality to promote requires a fundamental choice about the kind of society an individual wants to promote. As Kent Greenawalt writes, "what counts" is not the concept of equality but "the standards one uses to decide . . . what treatment is appropriate."[166] Whether a community strives for equality of treatment (formal equality) or equality of result (substantive equality) is relevant to whether equality ought to be defined locally, as self-governance would allow in a virtual community. Since defining equality requires a choice between different visions of the fabric of the community, it seems much more prudent to leave this definition to the community itself.

B. The Power to Leave (and the Power to Re-enter)

¶59   A second reason why inequalities can be left to virtual communities to police is what this Article refers to as the power to leave: a unique component of choosing and exploring virtual worlds, it is the capacity for users to enter and exit freely, often anonymously.[167] Put another way, a member who feels that virtual inequalities are intolerable can opt to disconnect from the community.[168] The nature of virtual worlds magnifies the power to leave. Unlike countries of the real world, where laws and territoriality tie individuals to certain geographical regions and social strata, virtual worlds, with their ephemeral rules and anonymity, allow "ease of exit" if the circumstances in the world become intolerable.[169] Alternative virtual worlds—and the relatively low cost of establishing a virtual world—increase the freedom to leave in comparison to real space.[170] In other words, because a person generally chooses the virtual world they enter, there is an added level of *liberty* (for example, the liberty to leave that world) that is not available to those who suffer the effects of inequality in real space.

¶60   However, there are objections to this. First, as T.L. Taylor teaches, it is not easy to simply walk away from online communities: "What happens in virtual worlds often is just as real, just as meaningful, to participants" as offline interactions.[171] People form meaningful online relationships—with other individuals and entire communities—that, at times, can carry over into real space.[172] Sometimes virtual personas can be more

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[165] Lessig, *supra* note 51, at 1417.

[166] Kent Greenawalt, *How Empty Is the Idea of Equality*, 83 COLUM. L. REV. 1167, 1167 (1983).

[167] Netanel, *supra* note 164, at 425–26. The classic study of the power to leave political systems or voice dissent is Hirschman's 1970 text. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

[168] Netanel, *supra* note 164, at 425–26.

[169] *Id.* at 425.

[170] *Id.* at 425–26 ("[E]xit . . . is much easier and less costly in cyberspace than in real space. A cyberspace dissenter need only discontinue visiting a forum and find, or fairly cheaply establish, an alternative one more closely aligned with the dissenter's views or preferences. Losers in real world plebiscites, in contrast, can usually avoid the result only if they endure the cost and disruption of physically moving to another jurisdiction.").

[171] T.L. TAYLOR, PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE 19 (2006).

[172] *Id.* at 54.

important to people than their offline daily lives.[173] In other words, migration from world to world is not necessarily cost-free—community bonds are sundered and relationships are broken to exercise the power to leave.

¶61   There is certainly something to this point. People *do* form meaningful connections to virtual communities and get used to the norms of those spaces. But perhaps there is an empirical premise underlying this objection that is not entirely sound. Though Taylor is earnest about the meaningful nature of online life, she is also at pains to say that people still experience virtual worlds differently, in ways that make coming and going not only easy, but expected:

> That people can slip into and out of complex social networks that cross not only online and offline space, but genres within the online world is a fact often underacknowledged. The journalistic anecdotes that circulate, of identity deceptions for example, hide a much less sensational, even mundane, integration of technology into people's everyday lives. People are very adept at moving back and forth between on- and offline spaces and relationships, even while being ambivalent or unsure of how to frame the experience online life produces.[174]

The point seems to be that while people form connections in virtual communities just as they do in real space, there may be something different about virtual worlds (as opposed to reality) that makes entering and exiting those communities easier.

¶62   A possible response might be found in something related to the power to leave— the power to re-enter. Entering a virtual world often preserves a level of anonymity and allows a person transformative power of self-reinvention and creation. The traditional real-space bases for unequal treatment (such as race, gender, class, and identity politics) are all fluid in virtual worlds. As celebrated in many cyber-cultural works, cyberspaces can liberate a person from his offline persona and allow creative self-invention and transformation.[175] This power to change identities allows someone feeling marginalized and destined to remain within a fixed social class to leave and anonymously re-enter later, free of the stigma from the past identity. Put another way, virtual worlds can let people begin their virtual lives anew, with a fresh start. While this is not an ideal answer, it does show how someone whose ties to a virtual community are strong enough can leave, but later re-establish those ties albeit in different form. The power to leave and the power to re-enter mean there is less need for real-world authorities—governments and law-makers—to intervene, thus leaving virtual inequalities to virtual communities to address on their own.

C. Code, Real-Space Inequality, and the Problem of Enforcement

¶63   A final set of reasons for online community autonomy concerns the means of enforcing equality norms in this context. To begin with, if real-space laws are used to

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[173] *See* Lastowka & Hunter, *Virtual Worlds*, *supra* note 82, at 52 n.280 (describing the growing numbers of people who inhabit virtual worlds and the importance of these virtual communities to their lives).
[174] TAYLOR, *supra* note 171, at 18.
[175] *See, e.g.*, DAVID BELL, AN INTRODUCTION TO CYBERCULTURES 6–29 (2002); LISA NAKAMURA, CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET (2002).

enforce equality rights in virtual communities, such laws would almost certainly apply across multiple virtual communities. It would simply be impossible to pass an equality law for every virtual world where equality may or may not be a concern. Such general equality laws would have a hard time keeping up with the dynamism and innovative development of virtual worlds. Although courts could work this out on a case-by-case basis, it may be preferable to allow each community to formulate its own rules by itself or consult with virtual world operators and designers, given the newness of virtual law. Doing so certainly would provide more bright lines for virtual community members.

¶64   Second, even if equality norms are imposed by real-space regulators on virtual worlds to deal with problems of unequal treatment between emergent social classes, much of the problems would remain because real-world issues of distributive justice play a central role in perpetuating inequalities in virtual communities; they bleed from the real world to the virtual world. As long as real-world inequalities persist, so will virtual-world inequalities. A better approach, then, would be to let each virtual community address these problems as it sees fit with consensus and compromise, rather than passing laws to force them to eliminate a real-world problem they cannot possibly cure.

¶65   In the end, the most effective means to promote equality in virtual worlds is not necessarily any real-space law, contract, or constitutional norm; rather, as Lessig teaches, it is code.[176] It is application coders, virtual world designers, game world developers, and the members of online communities who best understand the code's impact on members in terms of inequality.

VI. DIRECTIONS FORWARD

¶66   Cyberlaw scholarship heralds the importance of freedom in cyberspace, but it has seriously neglected the issues of equality. This neglect is not justified—equality, as much as liberty and freedom, is an original foundational value of cyberspace. As such, it too should be studied and promoted. This Article aims to fill the void of scholarship on the issue of equality in cyberspace, in particular virtual worlds, by examining different forms of virtual inequality and their causes; here, most real-world issues of distributive inequality figured predominantly. It also argues that dealing with virtual inequalities is a challenge best left to virtual communities themselves.

¶67   This argument raises questions beyond the scope of this work. For example, this Article does not offer concrete proposals that would allow online communities to govern equality concerns. What such self-governance would look like should also be explored. Virtual inequalities cannot be battled in virtual worlds alone. The impact of real-world disparities in access to technology looms large and can only be defeated with hard work and advocacy offline to raise awareness about distributive justice and the digital divide. In terms of virtual communities, two possible models come to mind. First, virtual worlds could have complete autonomy to deal with issues like equality. For the reasons already discussed, this might be optimal depending on the circumstances. In practice, equality and other social concerns could be dealt with by a democratic formula.[177]

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[176] *See generally* LESSIG, *supra* note 31.

[177] POST, *supra* note 17, at 185 ("It doesn't seem so crazy to me because there's a 'place-ness' to these virtual places—not just in the way they look but in the way they persist through time, and in the way they present opportunities for an infinite variety of repeated interactions between individuals, for collective

¶68   A second possibility is a form of what this author calls cyberspace federalism, which incorporates the use of national laws to promote equality but respects the autonomy of virtual communities. Under such a system, legislatures would pass generally applicable equality laws, such as laws recognizing a general right to equality. Courts enforcing equality rights would be required to interpret these rights in accordance with the local norms of the virtual world.[178] The term cyberspace federalism is appropriate because the system incorporates two levels of government: national or state level (generating generally applicable laws) and virtual level (establishing local norms, customs, and rules). However such a governance structure is accomplished, the main point is that equality can no longer be neglected. As a foundational value of cyberspace, it should to be explored further. That is the task ahead. And the conversation is only now beginning.

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decision-making, and for common enterprise—that enables us to think about them and talk about them the way that the people who spend lots of time there often do: as true communities, with shared norms and customs and expectations characteristic of each and continually being created and re-created by the members within each. I don't see why they are somehow inherently less deserving of less respect [sic] than the other communities . . . within the international legal order.").

[178] This is something like what Joshua Fairfield has suggested concerning contractual interpretation. *See* Joshua A.T. Fairfield, *Anti-social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427 (2008) (arguing for, among other things, judicial deference to virtual community norms when interpreting contract provisions).