

ETHICS AND ELECTRONIC INFORMATION IN THE TWENTY-FIRST CENTURY:

REGULATION: MIND YOUR METAPHORS

AN EXAMINATION OF THE INEFFICACY ARGUMENT AS A REASON AGAINST REGULATING ON-LINE CONDUCT

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INTRODUCTION

The argument that I am about to offer is a *moral* argument. I mean by this that my argument stands in opposition to a different sort of argument – one that is *amoral*. I offer it because I believe that the amoral argument, which I oppose, is gaining momentum these days in certain discussions about regulating the Internet. Instead of arguing against Internet regulation on moral grounds, a number of authors have chosen to provide nonmoral reasons in support of their position.¹ Impressed by the so-called “ubiquity” of the Internet, these authors have argued that it has the power to render certain rights discourse – some court orders, even – obsolete. When one considers the decentralized nature of the Internet, they contend, one sees that it has the built-in ability to circumvent many of our fundamental normative commitments, thereby making those commitments irrelevant.² On this basis they conclude that no attempt should be made to regulate the Internet since the inefficacy of any such attempt is inevitable. I call this line of reasoning “the inefficacy argument”.

I remain unpersuaded by the inefficacy argument. Although I am perfectly willing to embrace the fact that our normative commitments to things like the right of an accused to a fair trial are often shaped by practical constraints, I am not prepared to accept that this new communications technology, albeit a most impressive one, has the power

to nullify such normative commitments. Such destruction, I shall argue, is not the inevitable result of computers or communications technologies. Rather, it is the product of human interference. In short, then, I do not believe that by embracing computer network technologies we subordinate our previous normative concerns to practical ones. Yet it is precisely this claim that is routinely advocated – via the inefficacy argument – as a reason against regulating on-line conduct.

In response to the inefficacy argument, I confront what Neil Postman has referred to as “the dominant metaphor of our age.”³ I do so because I believe that the adoption of this metaphor has been fundamental to the success of the inefficacy argument. According to Postman, our age is defined by “suggesting a new relationship to information, to work, to power, and to nature itself. That relationship can be best described by saying that the computer redefines humans as ‘information processors’ and nature as information to be processed.”⁴ Like Postman, I am concerned about our adoption of this metaphor and others derived from it. I am worried about the effect of its underlying rhetoric. As Justice Benjamin Cardozo once warned us, “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”⁵ Heeding Cardozo’s advice, I believe that it is useful to examine not only the human-machine metaphor but also some of its current derivatives in a critical manner, since those figures of speech are typically employed in the rhetoric against regulating on-line conduct. Such an examination will ultimately reveal that the inefficacy argument rests on rather specious grounds. To the extent that it does – and despite its ubiquity – the argument must be discarded.

LIVING IN A TECHNOLOGY

In *Technopoly*, Postman “attempts to describe when, how, and why technology became a particularly dangerous enemy.”⁶ As is evident in this and some of the passages to follow, Postman’s language is itself filled with drama and metaphor. Still, even for those of us who remain unconvinced that modern technology is “a particularly dangerous enemy,” his central thesis is instructive. According to Postman, our adoption of certain metaphors has facilitated the dangerous shift from technocracy to technopoly – *from viewing technology as a human instru-*

ment to viewing it as something valuable in itself. In the age of technocracy, he observes, human interest in technology was merely instrumental. Technology was valued only as a means of achieving certain desirable ends and was valuable only to the extent that it could achieve those ends. “The citizens of a technocracy knew that science and technology did not provide philosophies by which to live, and they clung to the philosophies of their fathers.”⁷ Thus, we no longer live in a technocracy.

With the shift to a technopoly, the value attached to technology has been transformed. Technology is no longer viewed as an instrument; instead, it has become an end in itself and is valued as such. And, as Postman urges, the social consequences resulting from this shift are staggering. By defining technology as an end and not merely as a means to achieving certain chosen ends,

[t]echnopoly eliminates alternatives to itself.... It does not make them illegal. It does not make them immoral. It does not even make them unpopular. It makes them invisible and therefore irrelevant.”⁸

Is Postman serious? Does anyone really view technology in such a way that its alternatives are rendered irrelevant? I have chosen to cite this last passage not simply because it seems outrageous but also because its message precisely embodies the views that several other authors have declared about our newest communications technology.

THE POTENTIAL DANGER OF METAPHORS

My argument does not require an adoption of Postman’s grand claim about the shift from a technocracy to a technopoly. In fact, there is a less controversial way of making the same basic point.⁹ Schopenhauer once spoke of the “law of preponderance of the means over the end.” As Hans Vaihinger later characterized this so-called law, “an original means working towards a definite end has the tendency to acquire independence and to become an end in itself.”¹⁰ R. A. Samek has made a similar claim more recently about the use of metaphors in legal discourse, what he called the *meta phenomenon*, which he characterizes as “the human propensity to displace ‘primary’ with ‘secondary’ concerns, that is, concerns about ends with concerns about

Mean. The latter becomes perceived as primary, and distort the former in their own image.”¹¹

The *meta phenomenon* can be observed in our use of metaphors. Often we employ a metaphor as a kind of “cognitive hook.”¹² The metaphor is used as an expository device to help us understand something unfamiliar by putting it into more familiar terms. Although the initial use of a particular metaphor is valuable only as an instrument of explanation, the continued use of that same metaphor is often subject to a peculiar linguistic phenomenon. What was once stated merely as a figure of speech is, over time, taken literally. Consider, for example, the structural elements that support a table top. We refer to them metaphorically as “legs.” This example reveals that if a particular metaphor is used often enough, it loses its pretense and acquires an independent meaning. Clearly, there are differences between table legs and human legs. Yet everyone knows what is meant to talk about tables as having legs. What we see with this example is that, once its pretense is lost, the figure of speech no longer functions as a metaphor. As H. W. Fowler once put it:

In all discussion of metaphors it must be borne in mind that some metaphors are living, i.e., are offered and accepted with a consciousness of their nature as substitutes for their literal equivalents, while others are dead, i.e., have been so often used that the speaker and the hearer have ceased to be aware that the words used are not literal.¹³

As with *meta phenomenon*, there lurks a potential for danger whenever a speaker and hearer have ceased to be aware that the words used are not literal. In the context of a particular metaphorical device known in law as the legal fiction, Lon Fuller has argued that the danger in using legal fictions varies inversely with the degree of our awareness that the words used are not literal.¹⁴ Thus, the use of legal fictions (and other types of metaphor) is “wholly safe only when it is used with a complete awareness of its falseness.”¹⁵ A legal fiction “taken seriously, i.e., ‘believed’, becomes dangerous and loses its utility.”¹⁶ Of course, as the “table leg” example makes clear, not all metaphors that are taken seriously become dangerous and lose their utility. Still, once the speaker and hearer cease to be aware that the words used are not literal, they are prone to confusion and perhaps even error. For this reason, one must take care not to engage in an uncritical use of metaphor.

THE DOMINANT METAPHOR OF OUR AGE

Recognizing- via the *meta phenomenon* -the potential for danger when speaker and hearer cease to be aware that the words used are not literal, I return briefly to Postman's concern about the human-machine metaphor. According to Postman, it is the ideology of the computer that gives rise to this "dominant metaphor of our age":¹⁷

The fundamental metaphorical message of the computer, in short, is that we are machines-thinking machines, to be sure, but machines nonetheless. It is for this reason that the computer is the quintessential, incomparable, near perfect machine for Technopoly. It subordinates the claims of our nature, our biology, our emotions, our spirituality. The computer claims sovereignty over the whole range of human experience, and supports its claim by showing that it "thinks" better than we can.¹⁸

Furthermore, says Postman, the metaphorical expression of computer ideology is not restricted to the "human as machine" - the metaphor has since been inverted:

[W]hat we have here is a case of metaphor gone mad. From the proposition that humans are in some respects like machines, we move to the proposition that humans are little else but machines and, finally, that humans are machines. And then, inevitably...to the proposition that machines are human beings.¹⁹

Postman considers numerous examples derived from the "machine as human" metaphor, including a discussion of the now commonplace computer "virus." This example and the others he cites illustrate that the human-machine metaphor is sufficiently powerful to have made serious inroads in our everyday language in ways that influence the way that we think about ourselves:

[t]his kind of language is not merely picturesque anthropomorphism. It reflects a profound shift in perception about the relationship of computers to humans. If computers can become ill, then they can become healthy. Once healthy, they can think clearly and make decisions. The computer, it is implied, has a will, has intentions, has reasons - *which means that humans are relieved of responsibility for the computer's decisions*. Through a curious form of grammatical alchemy, the sentence "We use the computer to calculate" comes to mean "the

computer calculates." If a computer calculates, then it may decide to miscalculate or not calculate at all. That is what bank tellers mean when they tell you that they cannot say how much money is in your account because "the computers are down." *Why blame people?* We may call this line of thinking an "agentic shift," a term I borrow from Stanley Milgram to name the process whereby humans transfer responsibility for an outcome from themselves to a more abstract agent. *When this happens, we have relinquished control, which in the case of the computer means that we may, without excessive remorse, pursue ill-advised or even inhuman goals because the computer can accomplish them or be imagined to accomplish them.*²⁰

Once again, one is tempted to ask: Is Postman serious? Has anyone really allowed the human-machine metaphor to skew his or her views about human responsibility and moral accountability? Has the way that we tend to talk about computers truly resulted in an "agentic shift," such that individuals have successfully convinced themselves that a more abstract agent has taken control?

Consider the following five quotations, which are, I think, fairly typical examples of the way that academics engaging these issues are speaking and writing about the Internet. Rather than choosing the five most bizarre postings to be found on the World Wide Web (and there are plenty of those to choose from), all of the examples which I have selected come from articles and chapters published in well-respected journals and books.

Cyberspace knows no boundaries²¹

I begin with this example because it appears to be the least dangerous of the five that I have chosen. After all, no one who says such things truly believes that cyberspace is an entity capable of acquiring knowledge. Speakers who adopt this phrase are not making an epistemological claim. They are simply trying to express, in a figurative way, the incredible potential of this new form of communication.

While this sort of response may accurately reflect an earlier use of this phrase, there has been a shift in its use in the current debates about Internet regulation. Recently, the phrase has been offered not merely to express the power of this new medium but rather as a reason against regulating on-line conduct. According to those who make the argument, it would be absurd to prohibit on-line conduct because the task of enforcement would be hopeless because "cyberspace knows

no boundaries."²² According to those who have taken this notion seriously, "[i]t cannot be overemphasized that it is impossible to censor the content of the Internet. The application of laws governing content in the non-electronic world to the content of the Internet is futile. The application of law to the Internet in areas of public interest is impossible, since censorship of the Internet at best, a Sisyphian task."²³

I am extremely skeptical of this sort of argument. While it is true that "recent technological advances have brought with them considerable difficulties for those who seek to enforce bans,"²⁴ it is simply untrue that cyberspace knows no boundaries.²⁵ Lest we forget, the term "cyberspace" is itself a metaphor coined by a science-fiction writer.²⁶ In its original use it referred to a computer-generated condition that only had the look and feel of the physical world. As one author has recently described its present use, "'cyberspace' has become a shorthand term for the consensual hallucination that has many aspects of physical space, but is merely computer-generated abstract data."²⁷ Thus cyberspace is not without bounds. It is bounded by the abstract data that is generated by computers. Computers are, in turn, bounded by the imagination and integrity of the people who design, program, and use them. Somehow, this obvious and important point is overlooked by those who have adopted the idea that "cyberspace knows no boundaries."

Of course, once there is talk about the "bounds" of cyberspace—even if the conclusion is that cyberspace *does* have boundaries—the following category-mistake is practically inevitable:

[O]ne must keep in mind the notion that cyberia is a sort of "cybernation," a separate place, wherever it may be. This place is large (some 20 million inhabitants), and it has a distinct culture which has evolved rapidly but is nonetheless firmly entrenched.... An attempt to impose real world laws on this cyber society would be akin to an attempt to impose a new legal system on a conquered or colonized nation.²⁸

This argument against Internet regulation demonstrates the confusion that is bound to ensue once the author ceases to be aware that his words are not literal. In this case the author, R. L. Dunne, has clearly forgotten that the term "cyberspace" merely designates a computer-generated abstraction. Whatever it may be, cyberspace is *not* the sort of "place" that Dunne imagines it to be. He would do well to remember that, in essence, it is nothing more than a communication medium

through which real people do real things. Although, at a certain level, the reification of network technologies makes discourse easier, it does not come without a cost. As soon as one begins to take seriously the idea that cyberspace "is a separate place" with a "distinct culture," the procreation of electronic persons becomes necessary in order to populate it:

I suggest that the extraordinary developments in technology, and specifically the information, or digital, revolution, gives rise to a new legal entity: the electronic persona.... At first, the notion of an electronic persona rises as a convenience, a shorthand; and in that spirit I offer the contraction "eperson" or "eper." Later, the term may be-come indispensable to ordinary discourse; we are at that point now.²⁹

Have we reached the point where "*epers*" are indispensable to ordinary discourse? According to Curtis Karnow, who coined the term, the need for epers stems from certain types of involuntary interactions we humans take part in as members of the information society. As Karnow puts it, "We have these electronic relationships with banks, insurance companies, vendors and credit bureaus, employers, government agencies including the courts, the Internal Revenue Service and law enforcement agencies . . . and they all mandate our incorporeal participation."³⁰

But what does it really mean to say that these sorts of transactions "mandate our incorporeal participation"? Whether one chooses to call it the "incorporeal participation" of "epers," "cyber-activity" between "knowbots," or something else, human interaction via the Internet is not fundamentally different from other sorts of human transactions. It is a more powerful and sometimes more automated medium of communication, but a medium nonetheless. As two law students recently warned their peers in an article on the so-called information super-highway, "Never forget that the Internet is simply a bunch of interconnected wires with computers at the ends of the wires and with people in front of the computers."³¹ This rather obvious point is lost once we start to conceive of cyberspace as a place inhabited by electronic persons.

Although originally introduced as a way to shield the anonymity of individual Internet users and thereby prevent economic discrimination and intrusion, the electronic person, if taken seriously, would operate as an electronic veil (to use a more accurate metaphor), thus

cloaking its human progenitor from all legal liability and moral accountability. This situation is precisely what Postman has warned us against with his rhetorical question: "why blame people?"³² With the advent of electronic persons, the door is open to Stanley Milgram's agentic shift: humans are able to circumvent responsibility and shift the blame to a more abstract agent. But the question remains: Does anyone *really* believe in electronic persons? Has this fictitious "shorthand" been taken seriously? Forget about epers. What about more abstract agents, such as "the Net"?

Information can take so many alternative routes when one of the nodes of the network is removed that the Net is almost immortally flexible.... The Net interprets censorship as damage and routes around it.³³

This often cited passage, from Howard Rheingold's *The Virtual Community*, shares certain affinities with the claim that "cyberspace knows no boundaries," which Rheingold attributes to CMC telecom pioneer John Gilmore.³⁴ Both claims offer an overt, hyperbolic personification of machinery and computer-generated data as a reason against regulating on-line conduct. According to Rheingold, all efforts aimed to "crack down on the free-wheeling, everything-is-permitted culture of cyberspace" are doomed to fail "because it's becoming technically impossible" to censor the Net.³⁵ Rheingold think that it is technically impossible because "the Net interprets censorship as damage and routes around it."

It is difficult to know precisely what this statement is supposed to mean. Rheingold offers a very thin explanation, claiming that the technological foundations of the Internet originally included "a thoroughly decentralized command-and-control communications system."³⁶ Luckily, Rheingold provides an additional clue by telling us that the ability to pass information "around a network as a distributed resource with no central control [is] manifested in the rapid growth of the anarchic global conversation known as Usenet."³⁷ According to Rheingold, "[t]his invention of distributed conversation that flows around obstacles . . . might turn out to be as important in the long run as the hardware and software inventions that made it possible."³⁸ Thus, for Rheingold, it is neither the hardware nor the software that makes it technically impossible to censor the Net (or to "regulate the

Net" in any other way). Rather, the difficulty is said to stem from the anarchic manner in which people have chosen to converse.

In one sense, Rheingold is right to say that it is impossible to regulate the Net. But he misleads when he characterizes the task as "technically impossible." It would have been more accurate to describe the task as *logically* impossible, because "regulating the Net" is in fact a misnomer. After all, it is not "the Net" that legislators and law enforcers are trying to regulate. Nor is it the individual machines that are used in the "anarchic global conversation" that constitute the Usenet. The fact of the matter is that we do not regulate computers at all. We regulate the conduct of the people using them. Regulation is a *normative* enterprise.

Computers - despite the way we tend to talk about them - are non-normative entities. Computers do not interpret censorship as damage and route around it. People do. Computers do not break the law. People do. At best, Gilmore's slogan is an interesting figure of speech; at worst, it is an alluring, dangerous sort of reification.

The metaphor of a boundless cyberspace is dangerous because its acceptance allows some people to avoid responsibility when they have chosen to disobey the law. Why not say it is "the Net" that interprets censorship as damage and routes around it? Again, *why blame people?* When we say that the Internet-and not its users-interprets censorship as damage and routes around it, we have, as Postman puts it, "relinquished control."³⁹ Recall Postman's prediction about what happens next: Once control is relinquished, "we may, without excessive remorse, pursue ill-advised or even inhuman goals because the computer can accomplish them or be imagined to accomplish them."⁴⁰ The following passage illustrates this point:

The very essence of the Internet is anarchy, a diametrical opposite of authority. To say that the two do not intermix well is to state the obvious, but what is perhaps not readily apparent is that the anarchy of the Internet is a powerful, cooperative, functional force that cannot be subjected to centralized control. Thus, while the existence of a normative basis for regulating the Internet would be an interesting subject for debate, the exercise has little practical application. Due to the nature of the Internet, including its history, culture, amorphousness, and universality, it is quite impossible to effectively regulate.

....

To repeat, it does not matter to an assessment of the information ban whether freedom of the press rights are superior or subordinate

to the rights of an accused person. This once legitimate and practical debate has been made obsolete by the ubiquity of the Internet.⁴¹

There we have it, the final straw. Once the Internet is conceived of as "a powerful, cooperative, functional force that cannot be subject to centralized control," as Dov Wisbrod does here, the rest is history. Rights discourse becomes obsolete. It is no longer the death of God - as Dostoevsky's Karamazov once thought - but "the ubiquity of the Internet" that makes everything permissible. This analogy does not exaggerate Wisbrod's position. He goes on to argue that

with respect to the Internet, debates must center not on whether a given policy initiative should be put into effect but rather whether the initiative can have any effect at all. *Normative concerns are subordinated to practical ones.*⁴²

THE ADOPTION OF THE INEFFICACY ARGUMENT BY THE SUPREME COURT OF CANADA

The above-cited passages reveal the danger inherent in a blind acceptance of the human-machine metaphor. Once human and machine are said to be indistinguishable, our previous moral commitments are easily cast aside in the name of progress. Conduct previously prohibited becomes permissible simply because technology makes it possible. A derivative of this point of view is what I call the inefficacy argument. As that argument goes, conduct is permissible if technology renders the attempt to prohibit it inefficacious.

The link between these two points is made clear by Wisbrod, C. Walker, and Ernest Easton, each of whom has used some version of the human-machine metaphor as the foundation for the claim that an assessment of the information ban issue no longer depends on whether the right to freedom of the press is superior or subordinate to the right of an accused person to a fair trial.⁴³ According to Wisbrod, this type of rights discourse is made obsolete by the powerful cooperative force of the Internet. Because he believes that the Net interprets censorship as damage and routes around it, Wisbrod concludes that Canadian court orders (which temporarily prohibit the publication of information that would prejudice an accused) are rendered totally irrelevant by virtue of the fact that such orders can be easily circumvented via

the Internet. Similarly, Walker has stated that "[a] national reappraisal of domestic audio-visual regulation in the light of new technologies might suggest, for the United Kingdom and for any other jurisdiction sharing its approach, that there may be a case for progress away from pre-trial legal censorship and cultural restraint, neither of which can discipline and punish in the decentred, multinational, multicultural society."⁴⁴ Easton makes a similar claim in the American context with his "futility principle," which he says "imposes a presumption of constitutional stature against the validity of government efforts to suppress speech . . . where suppression would be futile because that speech is accessible to the same audience through some other medium."⁴⁵

Thus far I have characterized the inefficacy argument as an amoral argument advanced to oppose to the regulation of on-line conduct. In other words, the argument offers practical reasons (as opposed to moral reasons) to support a policy that would leave on-line conduct unregulated. But it is important to note that the inefficacy argument has moved beyond the realm of mere policy debate. In fact, a version of the inefficacy argument similar to the policy arguments made by Wisbrod, Walker, and Easton was recently adopted by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corporation*.⁴⁶ The issue before the court in *Dagenais* was the regulation of pretrial publicity in criminal proceedings. Thus, rights were at stake. In particular, the court had to determine whether to vacate a court order that temporarily prohibited the public broadcast of a fictional film, *The Boys of Saint Vincent*, during the trial of a clergyman who was accused of sexual misconduct strikingly similar to that depicted in the film. The accused argued that broadcasting the controversial film prior to the conclusion of his trial would prejudice the proceedings in a manner inconsistent with his constitutional right to a fair trial. In its determination of the scope of the accused's right to a fair trial, the majority of the Supreme Court of Canada held, among other things, that

A publication ban should only be ordered when:...(b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.⁴⁷

Although this efficacy requirement may seem perfectly reasonable at first glance, it must be considered alongside the following additional

remarks made on behalf of the majority of the court by Chief Justice Antonio Lamer:

[R]ecent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and short-wave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore the actual effects of bans on jury impartiality is substantially diminishing.⁴⁸

Taken together, the efficacy requirement and the court's recognition of the ubiquitous flow of information in "this global ... age" would almost certainly result in the elimination of publication bans in Canada. Such a result is, I think, extremely unfortunate-but not because information bans are inherently good. They are not.⁴⁹ What I find unfortunate is the kind of reasons given for eliminating publication bans. If we allow our perception of the Internet (as a global, anarchical force that cannot be subject to centralized control) to render irrelevant our interest in the right of an accused to a fair trial, we will have allowed our use of metaphor to subordinate our normative concerns to practical ones. This is precisely what the majority of the Supreme Court of Canada has done in *Dagenais*.

It is worth noting that four members of the Supreme Court of Canada dissented from the majority position in *Dagenais*. In his dissenting opinion, Justice Charles Gonthier responded to the inefficacy argument with the claim that

On the salutary side of the equation, concerns have been expressed as to the efficacy of publication bans. It is said that the actual effect of bans on jury impartiality is increasingly negligible given technological advances which make the bans difficult to enforce. With all due respect, it is wrong to simply throw up our hands in the face of such difficulties. These difficulties simply demonstrate that we live in a rapidly changing global community where regulation in the public interest has not always been able to keep pace with change. Current national and international regulation may be inadequate, but fundamental principles have not changed nor have the value

and appropriateness of taking preventive measures in highly exceptional cases.⁵⁰

I share Gonthier's contention that recent advances in technology, though they shape a rapidly changing global community, do not alter our fundamental principles. Sometimes, it seems, we let our enthusiasm about the potential of new technologies trick us into thinking that technology itself permits social conduct to transcend regulation.

THE CB CRAZE

With these points in mind, let us reflect briefly on a relatively recent historical example—the citizens' band radio.⁵¹ I choose the CB for a number of reasons. Besides being recent enough for most of us to remember when it was all the rage, the CB provides a useful example because a number of immediate comparisons between it and the Internet can be made. As one humorist has suggested, the Internet is a CB radio . . . but with a whole lot more typing.⁵² CompuServe has even called its on-line chat rooms "Citizens' Band Simulators."⁵³ Presumably, CompuServe's reason for choosing this metaphor was to employ a cognitive hook that would help people understand the chat room by putting it into more familiar terms. Perhaps it was thought that this comparison might ease the public into the new electronic era by rekindling the sense of freedom of, and nostalgia for, the days when people "had their ears on."

Like the Internet, the CB radio was successful at linking strangers and friends alike, who could "chat" publicly but with the relative anonymity of distance. Here is an example of how the CB has been de-scribed by a proponent of the Internet:

Everybody who remembers CB radio, remembers it as a craze which swept first through the US and then the UK. For a while, CB radio spawned an entire sub-culture, which included books, magazines, its own jargon, at least one film, and even several records. . . . It was going to usher in a personal communications revolution, and create communities of interest, chatting away across the airwaves, and doing all manner of useful things for mankind in general.⁵⁴

If we substitute the words "CB radio" with the word "Web" in the paragraph above and tick off the items, "about the only thing we

haven't had so far on that list is a hit single about the Internet."⁵⁵ However, the author is adamant that such comparisons are "utterly specious," because the CB lacked content: "CB radio was a gateway to no-where. All it gave you was access to other users of CB radio."⁵⁶ The Internet, on the other hand, "is a gateway to anywhere and everywhere on the planet which can speak TCP/IP, and that community is expanding daily."⁵⁷

But the more instructive comparison, for our present purposes, is to consider how the CB radio was regarded during its craze. W. D. Dannefer and N. Poushinsky observe that a critical characteristic of the CB medium is

that the user can and most often does speak in privacy and anonymity. This factor actually has a liberating rather than constraining effect upon conversation. It means that fellow conversants cannot hold one accountable for his speech, and it makes the laws regarding the licensing and use of the CB medium generally unenforceable.⁵⁸

It was this characteristic of the CB that was said to facilitate the famous highway "shutdowns" by truckers, who were protesting the U.S. government's regulation of diesel prices and speed limits in the mid-seventies. As is evidenced by the rhetoric found in then popular trucking periodicals, such as *Overdrive* and *Owner Operator*, the CB was thought to be "the biggest thing to hit trucking since the advent of the diesel engine."⁵⁹ Truckers were optimistic that the CB would help them eliminate the regulation of their industry. Since regulation of the use of CB radio was itself said to be impossible, this new medium of communication would play a major role in the deregulation of gasoline prices by providing truckers with a means of bringing public transportation to an uncontrollable halt.⁶⁰ Likewise, it was thought that the CB would thwart the attempt to regulate a 55-mph speed limit by making enforcement utterly inefficacious. Consequently, CB radios were glamorized on television and in movies, with scenes depicting the clever evasion of police speed-patrols and roadblocks. An article in *Forbes* described this proliferation of the CB:

The oil embargo of 1973 changed things. "The fuel shortage, the 55-mph speed limit and the truckers' strike were the events that lit the fuse," claims Richard E. Horner, president and chief executive officer of E. F. Johnson Co., the leading US. manufacturer [of CB radios]. Truckers began to use CB radios to find out where they could get

gasoline and where police radar traps were located. The truckers' use of the CB radio received a lot of publicity, and Horner claims that got others interested.⁶¹

Perhaps even more interesting than the popular belief that CB technology would incapacitate any law that attempted to regulate conduct on the highway, it was argued at that time that the advent of the CB would actually transform the widely accepted highway-specific norms from an "impersonal and atomized experience" to an "interactional framework" whereby "other drivers are not defined vaguely as malevolent strangers but, quite literally, as 'good buddies' who can be relied on for information and aid."⁶² In this brave new world,

CB radio makes a social network of motorists possible. Indeed, a continuous ongoing ubiquitous network of motorists is precisely what has emerged.... [T]his network is anonymous but not impersonal. The interactions that sustain it are fleeting but the network itself is permanent. Membership is wide open and in continual flux, but the shared concerns and the willingness to help each other out appear genuine.

.....
This new situation is unprecedented and, more importantly, it is one which is irreversible. For the expanding ranks of motorists with CB units, there is no going back. Increasingly, the experience of driving in structural isolation from others is past history. *Nothing short of a wholesale jamming of the citizens' band can force this continuous ongoing social network to disappear.*⁶³

Of course, something well short of a wholesale jamming of the citizens' band did force this "continuous ongoing" social network to disappear. If it was not a little unit known as the radar detector, then it was the now ubiquitous cellular phone.⁶⁴

There are a number of similarities in the rhetoric surrounding the attempts to regulate conduct on the American highway in the 1970s and the Global superhighway in the 1990s. By its very nature, the CB was said to be beyond regulation. But it is important to remember that the technology of the citizens' band started out as a means to an end. Originally the CB was an instrument of protest. However, by the time that the CB craze had spread to the general population, the CB was no longer valued as an instrument-it became a kind of status symbol.⁶⁵ Evading speed traps was no longer a means of protest but merely a sport and valued as such. By those taken with the CB craze, highway

speeding and the evasion of law enforcement were thought to be socially permissible because they were possible. Moral reasons for obeying the speed limit (such as a concern for the safety of others or the duty to conserve natural resources) became invisible, or rendered irrelevant - to all parties. Not surprisingly, many of those caught up in the CB craze adopted the inefficacy argument: Since there is no effective way to regulate speed on the highways, they contended, there should be no speed limit.

On occasion, one still hears this kind of argument against the 55-mph speed limit today. Ironically the argument is becoming less and less persuasive, given recent developments in radar and infrared technology. In other words, because technology currently permits an efficacious enforcement of speed limits, the inefficacy argument no longer works. This example illustrates one of the main problems with the inefficacy argument as a reason against regulating social conduct. Whether the regulation of a particular social activity is justified should not depend solely on our current state of technology. It should depend, as Justice Gonthier put it, on fundamental principles. The reason we limit speed on our highways is not because we can do so effectively. It is because we take certain moral commitments seriously.

CONCLUSION

The claim that I have tried to advance in this essay is a modest one. I realize that it will frustrate anxious readers that I have said nothing about whether on-line conduct should be regulated and, if so, how we ought to go about it. The only claim that I am making is that the question about regulation is a moral question and not merely a question of efficacy. I think that this recognition is an important first step. It is important because the overwhelming rhetoric one hears on this subject is that Internet regulation is an attempt to "control the uncontrollable." By examining some of the typical metaphors employed in the arguments against regulating online conduct, I have tried to suggest that we are dangerously close to allowing ourselves to be hood-winked into thinking that the realm of regulation is beyond our control. To make this claim is to forget that what we are trying to regulate is not machinery but acceptable social conduct. Once this point is grasped, we realize that normative concerns are not subordinate to

practical ones, nor should they be. To say otherwise is to speak in the language of metaphor and excuse, a language that will ultimately suppress the importance of individual responsibility and moral accountability.

NOTES

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1. See, for example, D. Wisbrod, "Controlling the Uncontrollable: Regulating the Internet," *Media & Communications Law Review* 4 (1995); H. Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Reading, Mass.: Addison-Wesley Publishing, 1993); C. Walker, "Fundamental Rights, Fair Trials and the Audio-Visual Sector," *Modern Law Review* 59 (1996): 517; E. Easton, "Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a 'Futility Principle' in First Amendment Jurisprudence," *De Paul Law Review* 45 (1995):1.
2. See especially Wisbrod, "Controlling the Uncontrollable." See also <<http://www.CataLaw.com/dov/docs/dw-inet.htm>>.
3. N. Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Alfred A. Knopf, 1992), 111. Postman credits this notion to J. D. Bolter, citing his book *Turing's Man: Western Culture in the Computer Age* (Chapel Hill: University of North Carolina Press, 1984).
4. Ibid.
5. See *Berky v. Third Ave Ry.*, 155 N.E. 58, 61 (N.Y.1926).
6. Postman, *Technopoly*, xii.
7. Ibid., 47.
8. Ibid., 48.
9. It is less controversial because it does not require one to accept as an empirical fact that people today view technology as something valuable in itself.
10. H. Vaihinger, *The Philosophy of As-If* (London: Routledge & Kegan Paul, 1935), xxx.
11. R. A. Samek, "Legal Fictions and the Law," *U.T. Law Review* 31 (1981): 291.
12. This use of a metaphor to explain the nature of metaphors is borrowed from B. Laurel, *Computers as Theatre* (Reading, Mass.: Addison-Wesley, 1991), 128, cited by M. E. Katsch in "Rights, Camera, Action: Cybersettings and the

- First Amendment," *Yale Law Journal* 104 (1994): 1707. In a section titled "Ways of Thinking and Speaking: Metaphor and Language," Katsch discusses the metaphors that have been used to characterize, describe, and interpret First Amendment issues as a way of distinguishing between print and electronic culture.
13. H. W. Fowler, *Modern English Usage* (1926), 348, cited in Lon Fuller's *Legal Fictions* (Palo Alto, Calif.: Stanford University Press, 1967), 16.
 14. A legal fiction is a type of metaphor sometimes used by judges to reconcile a legal rule with a conflicting legal result. See Fuller, *Legal Fictions*; see also I. Kerr, "Pre-Natal Fictions and Post-Partum Actions," *Dalhousie Law Journal* 19 (1997); I. Kerr, "Legal Fictions" (Ph.D. dim., University of Western Ontario, 1995).
 15. Fuller, *Legal Fictions*, 10.
 16. *Ibid.*
 17. Postman, *Technopoly*, 111.
 18. *Ibid.*, 111.
 19. *Ibid.*, 112.
 20. *Ibid.*, 114 (emphasis added).
 21. A. Riehle, "Canada's 'Barbie and Ken' Murder Case: The Death Knell of Publication," *Indiana International & Comparative Law Review* 7 (1996): 193.
 22. *Ibid.*
 23. Wisbrod, "Controlling the Uncontrollable," 342.
 24. *Ibid.*
 25. Except, of course, in the literal sense. "Cyberspace knows no boundaries" is literally true, since cyberspace "knows" nothing whatsoever.
 26. See W. Gibson, *Neuromancer* (New York: Ace Books, 1984), 51.
 27. R. Zembeck, "Jurisdiction and the Internet: Fundamental Fairness in the Networked World of Cyberspace" *Alb. L.J. Sci. & Tech.* 6 (1996): 339.
 28. R. L. Dunne, "Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace through a Contract Law Paradigm," *Jurimetrics Journal* 35 (1994): 9.
 29. C. E. A. Karnow, "The Encrypted Self: Fleshing Out the Rights of Electronic Personalities," *John Marshall Journal of Computer & Information Law* 13 (1994): 1.
 30. *Ibid.*
 31. E. J. Heels and R.O. Klau, "Let's Make a Few Things Perfectly Clear: Cyberspace, the Internet, and That Superhighway," *Student Law*, May 1995, 17.
 32. Postman, *Technopoly*, 114 (emphasis added).
 33. Rheingold, *Virtual Community*, 7.
 34. The phrase has also been adopted by Dov Wisbrod.
 35. H. Rheingold, "Why Censoring Cyberspace Is Futile," *Computer Underground Digest*, May 1, 1994, 6.39.

36. Ibid.
37. Rheingold, *Virtual Community*, 8.
38. Ibid.
39. Postman, *Technopoly*, 114 (emphasis added).
40. Ibid.
41. Wisbrod, "Controlling the Uncontrollable," 332-33, 342.
42. See Wisbrod, <<http://www.CataLaw.com/dov/does/dw-inet.htm>> (emphasis added).
43. Wisbrod, "Controlling the Uncontrollable"; Walker, "Fundamental Rights"; Easton, "Closing the Barn Door." See also Riehle, "Canada's 'Barbie and Ken' Murder Case."
44. Walker, "Fundamental Rights," 533.
45. Easton, "Closing the Barn Door," 39.
46. [1994] 3 S.C.R. 835 (S.C.C.).
47. Ibid., 878.
48. Ibid., 886.
49. As bans limit freedom of the press and prevent open access to our justice system, they are, at best, a necessary evil. However, it must be noted that in Canada, the role played by pretrial publication bans is far more crucial to safeguarding the rights of both the victims of crime and those accused of committing them than in most American jurisdictions; the difference is a function of the very different procedural rules pertaining to the jury.
50. [1994] 3 S.C.R. 835 (S.C.C.), 930.
51. My point could just as easily be accomplished through an analysis of the advent of the telegraph, the radio, moving pictures, television, etc. See, e.g., R. E. Davis, *Response to Innovation: A Study of Popular Argument about New Mass Media* (New York: Arno Press, 1976); C. Marvin, *When Old Technologies Were New: Thinking about Electric Communication in the Late Nineteenth Century* (Oxford: Oxford University Press, 1988); D. J. Czitrom, *Media and the American Mind from Morse to McLuhan* (Chapel Hill: University of North Carolina Press, 1982),
52. See J. Joseph, "The Law at Your Fingertips: Practical Applications of the Law on the Internet," *Thomas Jefferson Law Review* 18 (1996): 55. See also the chapter "Comparing the Usenet to CB Radio, Without Astronomy," in Clifford Stoll, *Silicon Snake Oil: Second Thoughts on the Information Highway* (New York: Doubleday, 1995), 112.
53. See E. Jenson, "An Electronic Soapbox, Computer Bulletin Board and the First Amendment," *Federal Communications Law Journal* 39 (1987): 217, 258. See also V. Sorensen, "Thoughts of a Computer Artist," *Oregon Law Review* 75 (1996): 309, 314.
54. "Shall I Compare Thee to a CB radio? I Trow Not," *New Media Age* (Centaur Communications Ltd., 1996).

55. Ibid.
56. Ibid.
57. Ibid.
58. W. D. Dannefer and N. Poushinsky, "The C. B. Phenomenon, a Sociological Appraisal," *Journal of Popular Culture* 12 (1979): 612 (emphasis added).
59. *Owner Operator*, November-December 1974, 37.
60. Not only was it said to be impossible to hold conversants accountable for their speech; federal licensing requirements and officially sanctioned call numbers as a form of identification were also virtually unenforceable. Instead CBers usually identified themselves by way of their "handles," a code name the CBer used as a distinct identity that protected "real life" anonymity. One might therefore choose to regard the CB handle as the eper of the seventies.
61. "The Newest Hobby: Kibitzing by Radio ... ," *Forbes*, 15 July 1975, 16.
62. Dannefer and Poushinsky, "The C. B. Phenomenon," 615-16.
63. Ibid., 616 (emphasis added).
64. See, for example, C. Lapham, "Whatever Happened to CB Radios?" *Alb. Bus. Journal* 14 (1988): 15.
65. Recall, for example, that when home units became popular, there was an unspoken competition between neighbors to see who could erect the biggest antenna.