e-Legislation: Law-Making in the Digital Age

David Howes*

This article takes a communications approach to law. The author argues that the formulation, dissemination, and reception—as well as doctrinal notions—of legislation are shaped by the prevailing mode of communication. Three such modes are distinguished: oral, print (or typographic), and digital (or electronic). The doctrine of *legal positivism* is shown to derive from a text-based communications order. The legislative ideals associated with this doctrine, such as generality, promulgation, clarity and absence of contradiction, and top-down authority, all reflect the imprimatur of the printed text. In pre- and post-typographic (*i.e.* oral and digital) communications orders, the predominant legislative values are flexibility, participation and accessibility, contextuality, and multicentric authority. These tenets are summed up by the notion of *legal interactivism*. The author shows this notion to be motivated by the ubiquity, multisensoriality (or organicity), and instantaneous-interactive quality of communication in both the oral and digital modes. It is for this reason, the author argues, that the best way to envision the future of legislation is by recurring to the model of law in premodern oral societies. Two such models are presented—the corporeal model of the Inca Empire and the gastronomic (law as feast) model of the Witsuwit'en—and their implications for conceptualizing law-making in the digital age are discussed.

L'article examine le droit en adoptant une approche du champ des communications. L'auteur soutient que les modes de communication dominants modèlent la formulation, la dissémination, la réception ainsi que les notions doctrinales de la législation. Il distingue trois de ces modes de communication : l'oral, l'impression (ou la typographie), et le digital (ou l'électronique). La doctrine du positivisme juridique découle de l'ordre des communications fondé sur les textes. Les objectifs législatifs de cette doctrine telle la généralité, la promulgation, la clarté et l'absence de contradictions et l'autorité hiérarchisée représentent l'imprimatur des textes imprimés. Dans les ordres de communications pré et post-typographiques, c'est-à-dire l'oral et le digital, les valeurs législatives prédominantes sont la flexibilité, la participation et l'accessibilité, la contextualité et l'autorité multicentrique. L'auteur établit que la notion d'interactivisme juridique, résumé par ces doctrines, est justifiée par l'ubiquité, la multisensorialité (ou l'organicité) et la qualité instantanément interactive dans les formes de communications orale et digitale. L'auteur suggère ainsi que référer au modèle de la loi des sociétés orales pré-modernes constitue la meilleure façon d'envisager l'avenir de la législation. En présentant deux modèles de ces sociétés, soit le modèle corporel de l'Empire Inca et le modèle gastronomique des Witsuwit'en (la loi en tant que festin), l'auteur explicite leurs conséquences pour la conceptualisation de la législation à l'ère digitale.

* Of the Department of Sociology and Anthropology, Concordia University. I wish to thank the organizers of the Roundtable on Legislation for the invitation to participate, and my fellow participants for the inspiration I received from our discussions.

Revue de droit de McGill 2001
To be cited as: (2001) 47 McGill L.J. 39
Mode de référence : (2001) 47 R.D. McGill 39

Introduction

This article explores the iconic implications of the materiality of legislation, or law's "embodiment" as digital versus printed text in the network era. With Desmond Manderson, I am interested in how one can "illuminate both the meaning and force of law" by being "sensitive to the form and imagery of legal texts."[1] Framing the issue of law's expression in this way puts the medium through which legal norms are communicated before the articulation of the norms themselves in what can prove to be a highly instructive manner. As regards electronic communication, for example, digital texts may be seen to evoke a different understanding of authorship and authority from printed texts. Digital texts have the potential to be interactive, whereas there is no back and forth between sender and receiver with printed texts. This makes the former appear more collaborative than "authoritative" (in the conventional unidirectional sense that a printed text displays). How much does our common-sense notion of the (top-down) authority of legislative acts depend on their form as printed texts? Forget the doctrine of legal positivism. How will our understandings of the force of law have to change to accommodate the authorial and other implications of the digitization of legislation?

Most of the books and articles regarding law and cyberspace are concerned with how existing legal rules may be adapted to suit the particular features of the Internet.[2] The assumption throughout this literature is that standard forms of legislation will continue to hold in the "real world". Those who take this assumption for granted seriously overlook the influence that Internet use will likely have on ways of thinking about government and the law even *outside* cyberspace. Indeed, I want to argue that the implicit normative structure of Internet communication has already had a profound impact on the form in which legislative activity is conceptualized and received by those whose behaviour it is intended to govern. Moreover, I consider that the very distinction between cyberspace and "real" space will become less apparent and important as digital forms of expression come to pervade our lives and consciousness, and the whole world becomes a cyber-village.

It has been suggested that the network era, with its dynamic and instantaneous forms of communication, actually represents a return to the tribal era, for network so-

---

[1] D. Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (Berkeley: University of California Press, 2000) at ix. This essay may also be read as a companion piece to Nicholas Kasirer's paper on the successive material embodiments of Quebec's civil code entitled "If the Mona Lisa Is in the Louvre, Where Is the *Civil Code of Lower Canada*?" (Paper presented at Law Commission of Canada, First Roundtable on Legislation, McGill University, Montreal, 28 January 2000) [unpublished, archived at *McGill Law Journal*].

[2] See *e.g.* M. Racicot *et al.*, *The Cyberspace Is Not a "No Law Land": A Study of the Issues of Liability for Content Circulating on the Internet* (Ottawa: Industry Canada, 1997).

ciety displays many of the characteristics of preliterate oral societies.[3] Following up on this perceived resemblance, I want to examine how examples of law-making drawn from pre-modern societies may provide models for legislative activity in the cyber-village of postmodernity. As cyberspace becomes more interactive, more sensuous, and more ubiquitous through new developments in network technology, the way in which legislation is conceptualized and experienced may become less and less textual (*i.e.* informed by the icon of the statute book) and more like a song, a dance, or even a feast—all traditional forms of legal expression in oral societies.

The argument of this paper can be summed up as follows: both the construction and dissemination of legislation tend to be inflected by the implicit normative structure of the prevailing mode of communication (oral, print, or digital).[4] The paper begins by charting the distinctive features and dominant trends in the development of cyberspace, then traces the implications of these features and trends for the future shape of legislation, and concludes by finding confirmation for this analysis through an exploration of law-making in oral societies.

I. Charting Cyberspace

Cyberspace has been called a world of electrons in contrast to the physical world of atoms. In the world of atoms things exist as objects in three-dimensional space; in the world of electrons things exist as patterns of energy. This distinction is indicative of the unique nature of cyberspace. It is only metaphorically that it can be described in spatial terms at all.

Consider the example of a community of Internet users, or "virtual community", consisting of, say, all of the participants in the same Usenet discussion group or chat room. In the physical world communities have customarily consisted of people living in close proximity to each other. A virtual community, however, may consist of people

---

[3] See D. de Kerckhove, *The Skin of Culture: Investigating the New Electronic Reality*, ed. C. Dewdney (Toronto: Somerville House, 1995) especially at 99-112. See further the sources cited *infra* note 4.

[4] On the impact of the printing press, see E.L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe* (Cambridge: Cambridge University Press, 1979), and of print media generally, see B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991). On the impact of electronic communication, see J. Baudrillard, *Les stratégies fatales* (Paris: Bernard Grasset, 1983); de Kerckhove, *supra* note 3. The first to map this terrain in a comprehensive (if mosaical) way was, of course, Marshall McLuhan in *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962). It is his lead that I follow in this paper when I treat the modal medium of communication in a given culture as inflecting all other aspects of the culture with its biases. Or as McLuhan himself put it in *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964) at 8: "For the 'message' of any medium or technology is the change of scale or pace or pattern that it introduces into human affairs."

living in many different locations who never have any physical contact with each other. Even though the members of such a community are widely dispersed geographically, they can neverthless enjoy instantaneous communication due to what has been called "the collapsed space-time of the Web."[5]

Just as computer-generated cyberspace has created a parallel universe of virtual locations, so has it created a parallel realm of virtual selves—that is, a space in which "You are not your body", in Douglas Coupland's phrase.[6] Internet users cannot enter cyberspace with their physical bodies, but they can transmit body images, and the image that a user presents in cyberspace need in no way correspond to his or her actual physical body. A male user, for example, may present himself as female to his Internet companions; a child user may present herself or himself as an adult. Other aspects of personal identity, such as character, disability, or ethnicity may similarly be altered in Net communications. Users usually have little possibility to verify the actual identity of the persons with whom they communicate on the Internet—or even where they reside, since country codes (such as ".ca" for Canada or ".uk" for the United Kingdom) do not reveal a discrete physical location within the country concerned. Cyberspace is therefore a world of virtual selves with no fixed addresses.

Many proponents of Net society have taken this characteristic of cyberspace to be one of its most liberating features, arguing that the virtual identities of cyberspace allow people to escape the limits imposed by the particular physical and cultural conditions of their embodied realities and to present themselves as whomever and whatever they wish. In cyberspace everyone participates as equals, while at the same time an infinity of experiments with self-fashioning is possible. It has also been claimed that the Internet helps users to overcome the isolation of contemporary life, where many people do not interact with their neighbours in their own geographical communities. With the Internet, so the argument goes, it has become astoundingly easy to find a community of like-minded individuals no matter what one's personal interests may be.[7]

The peculiar characteristics of life on the Internet are likely to become increasingly normative as computer use becomes more integrated with everyday life, or part

---

[5] B. Vacker, "Global Village or World Bazaar?" in A.B. Albarran & D.H. Goff, eds., *Understanding the Web: Social, Political, and Economic Dimensions of the Internet* (Ames, Iowa: Iowa State University Press, 2000) 211 at 236. See further D. Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Cambridge, Mass.: Blackwell, 1990).

[6] D. Coupland, *Life After God* (New York: Pocket Books, 1994) dustjacket.

[7] See S. Rafaeli, M. McLaughlin & F. Sudweeks, "Introduction" in F. Sudweeks, M. McLaughlin & S. Rafaeli, eds., *Network and Netplay: Virtual Groups on the Internet* (Menlo Park, Cal. & Cambridge, Mass.: AAAI Press & MIT Press, 1998) xv; S. Turkle, *Life on the Screen: Identity in the Age of the Internet* (New York: Simon & Schuster, 1995); M. Willson, "Community in the Abstract: A Political and Ethical Dilemma?" in D. Holmes, ed., *Virtual Politics: Identity and Community in Cyberspace* (London: Sage, 1997) 145.

of a "seamless web". For instance, the last few decades witnessed the transition from mainframe to personal computers, and from computing as the preserve of technical experts to its figuring centrally in many peoples' everyday work and leisure activities. Continuing this trend, one of the major developments of the next decades will be the triumph of "ubiquitous computing". This term is used to mean that computing will take place not only within the personal computer as we know it today but in many objects of everyday life. A major Canadian communications company, for example, has already developed an interactive telephone device that comes with a small display screen and permits the residents of a model "wired" community to access a sort of "electronic mall" where they "can pay bills, do their banking, view advertisements, compare prices, order prescriptions, make purchases, and even read news headlines without ever leaving the house or turning on their personal computer."[8]

The next wave of home appliances to acquire computer functions will include objects that one would never expect to serve as instruments of informational and commercial exchange, such as the recently unveiled microwave oven that can support e-mail and electronic banking.[9] In this way the whole home is being transformed into a computing device, thereby completing the revolution that began with bringing the personal computer into the home. It is projected, for example, that thin holographic monitors placed on the wall or in windows will shortly allow the inhabitants of a dwelling to enter cyberspace from many different locations in the house, simply by means of a voice command or even a glance, as registered and interpreted by a sensing device.[10] Ubiquitous computing, then, seeks to make every physical surface into a potential electronic interface or Internet access node.

Like the drive for ubiquity, the history of computing has witnessed a drive for ever more intensive and engaging forms of interactivity. One of the earliest (and still among the most popular) embodiments of the interactive dimension of electronic communication is the network of online news and discussion groups known as Usenet. Here users are able to post, read, and respond to messages pertaining to a specific topic area, and a record (or "thread") of all past discussions on the topic is maintained that can be consulted by new or ongoing participants.

The Multi-User Domain ("MUD") and the MUD, Object-Oriented ("MOO") represent another early example of the new computer-mediated sociality. These consist of large-scale, collaboratively constructed, online environments, where

> participants enter textual descriptions of imaginary places that others can visit, and of ... characters that populate those places, awaiting scripted interaction

---

[8] D. Barney, *Prometheus Wired: The Hope for Democracy in the Age of Network Technology* (Vancouver: UBC Press, 2000) at 169-70.

[9] W.W. Gibbs, "As We May Live" *Scientific American* 283:5 (November 2000) 36.

[10] *Ibid.*

> with future visitors. The underlying software ties all the descriptions and scripts together to create a single, continually evolving environment and provides an opportunity for [the user] to meet and interact with other participants within that environment.[11]

MUDs and MOOs constitute virtual environments that are evidently quite literary, or text-based. Like a novel,

> they textually construct complex places where the lives of many characters simultaneously unfold and interact, but they are collaboratively authored rather than the work of one person, and they are indefinitely in progress and constantly being extended—not closed and complete like a novel. Instead of turning pages, [the user] explores them by typing commands or pointing-and-clicking to move around and evoke responses.[12]

The heavy dependence on text and typed commands of such early virtual environments has been augmented or supplanted by graphic interfaces, by sound and synchronization, and most recently by 3-D shared-space technology as the field of interactive digital entertainment has attracted increasing capital investment and development.[13] The many diverse projects on which engineers and programmers in this field are now working include developing "intelligent" virtual beings and creating interactive cyber-movies in which viewers can participate as actors and direct the plot.[14]

The dimension of interactivity, so crucial to the Internet experience, will be further enhanced by the integration of new sensory domains into cyberspace. Through a development known as convergence, digitization is facilitating the transformation of previously distinct media, such as music, movies, and video games, into a single medium that delivers high resolution audio and video content that is also interactive.[15] This transformation, which began in the mid-1990s, has enabled Internet users to construct and access virtual environments that are vastly more engaging than written texts because they encompass sound and graphics as well as moving-image applications.

Nor will the merging of media that is unfolding stop at audio and video content, for "digitization establishes the means for translating and reintegrating [all] the senses."[16] In other words, while cyberspace may be a multimedia environment today, it promises to become a multi-sensory surround tomorrow. Technology has already been developed that will allow the sensations of smell and touch to be transmitted elec-

---

[11] W.J. Mitchell, "Replacing Place" in P. Lunenfeld, ed., *The Digital Dialectic: New Essays on New Media* (Cambridge, Mass.: MIT Press, 1999) 112 at 114.

[12] *Ibid.*

[13] *Ibid.* at 115-27.

[14] G. Davenport, "Your Own Virtual Storyworld" *Scientific American* 283:5 (November 2000) 79.

[15] P. Forman & R.W. Saint John, "Creating Convergence" *Scientific American* 283:5 (November 2000) 50.

[16] C. Vasseleu, "Virtual Bodies/Virtual Worlds" in Holmes, *supra* note 7, 46 at 50.

tronically. An odour synthesizer, for example, has recently been put on the market that can be attached to computers to transmit odours. The synthesizer consists of a small black box with tiny vials of scent inside. When a message is received the machine blends a selection of basic essences and then blows the required scent out through an air vent. Such olfactory signals could accompany movies, advertisements, and electronic books, or could be sent by e-mail.[17]

A number of haptic devices being developed or currently in use make it possible to transform electronic messages into tactile sensations. A typical haptic device is a computer-controlled glove that, when worn, gives users the sensation of holding and feeling computer-generated objects. Researchers look ahead to the creation of a "haptic suit" that would enable users to feel computer-generated sensations all over their bodies.[18] Communication on the Internet will hence no longer be limited to disembodied, linear typed messages and responses but will consist of dynamic, multisensory interactions between "re-embodied" virtual beings.

All of these characteristics of cyber-life in the present and future depict a world that is universally accessible, immensely engaging, endlessly transformable, unfailingly responsive, and, while removed from most physical realities, completely connected within itself.

II. Legislation in a Digital Age

When we consider issues of legislation, the question that arises as a result of these computing trends is not only how is it possible to make laws for cyberspace, but how will the digitization of the word and the omnipresence of digital media transform the very notion and forms of law-making?

Significantly, in addition to the multiplication of physical devices and surfaces that can serve as Internet access points, there has been an extraordinary proliferation in the range and nature of sites Internet users can visit. Not only commercial institutions, but governmental and non-governmental organizations as well as countless individuals have created online identities in the form of Web pages that disseminate information and/or offer access to services. New norms of accessibility have emerged in the process and appear to be reshaping not only what it means to be a consumer (as in

[17] C. Platt, "You've Got Smell!" *Wired* 7:11 (November 1999) 257, online: Wired <http://www.wired.com/wired/archive/7.11/digiscent.html> (date accessed: 21 August 2001).

[18] D. Pescovitz, "Getting Real in Cyberspace" *Scientific American Presents* 10:3 (Fall 1999) 48 at 51. The development of such a suit gives new meaning to McLuhan's aphorism "the medium is the massage"; M. McLuhan & Q. Fiore, co-ordinated by J. Agel, *The Medium Is the Massage* (New York: Random House, 1967).

the "electronic mall" or e-commerce phenomenon), but also what it means to be a citizen in liberal democratic society.

For example, there is a growing demand for governments to ensure universal Internet access for their citizens, on the assumption that meaningful participation in public life is dependent on access to the informational resources of the Internet, and that enabling such access would of itself suffice to overcome the inequities in the distribution of information and income that currently stand in the way of full civic participation.[19]

One image of how the new norms of accessibility supported by network technology are fueling new forms of civic participation is that of the homeless man at a computer terminal in a public library writing an e-mail to his local member of Parliament. Another image is the model of "keypad democracy" that Lawrence Grossman champions. According to Grossman, the obstacles of scale that have tended to thwart strong democratic participation in the past are being overcome by recent developments in network technology: "Using a combination telephone-video screen computer, citizens will be capable of participating in audio- and videophone calls, teleconferences, tele-debates, tele-discussions, tele-forums, and electronic town meetings."[20] Time and distance will thus cease to figure as factors limiting political participation.

Of course, time and distance are not the only factors obstructing participation. Some legal theorists blame the interference of the public/private dichotomy, which is so fundamental to the whole architecture of liberal democratic society. They hold that there is a deep problem with the way liberalism defines the public sphere in a manner that excludes any particular "private" conceptions of the good, and hence cultural difference. This exclusion is consistent with liberalism's abstract definition of the self as a rights-bearing entity, rather than a member of a particular community. It is regressive, however, insofar as it results in an impoverished public discourse that can never give good reasons for why legislation should apply to cultural minorities in the same way as it applies to the majority, when the minorities themselves can never accede to the legislation because of the deep value differences that set them apart from the mainstream. This crisis of legitimacy can only be resolved by redrawing the public/private distinction so as to include aspects of the private in the public realm, thereby letting difference out rather than keeping it contained. This strategy, it is said, can only enhance citizen participation in the deliberative process, though it may also result in legislation that is flexible instead of universal, because of the need to resort to

---

[19] See generally Barney, *supra* note 8.

[20] L.K. Grossman, *The Electronic Republic: Reshaping Democracy in the Information Age* (New York: Viking, 1995) at 148.

compromise and accommodation in order to arrive at a norm that everyone concerned can accede to practically and rationally.[21]

The theory of deliberative democracy, with its definition of legislation as all-inclusive conversation, can be seen as motivated by the chief technological imperative of the network society, which is: "always connect". The critique of the conventional public/private distinction in this theory can also be read as technologically inspired in that the Internet has effectively undermined the demarcation of public from private insofar as users can connect from anywhere and electronic information flows have no respect for borders. Thus, while the theory of deliberative democracy has many precedents in European philosophy, it is the manner in which it maps onto the material infrastructure of Internet communication that accounts for its increasing salience today.

With the success of user-friendly software and Web sites, convenience has become another of the defining characteristics and thus one of the norms of Internet communication. People are drawn to the Internet not only because it is interactive or informative or engaging, but because it is easy. Pointing and clicking is much simpler and faster than going to the library and looking something up in a book. Writing an e-mail is much simpler than writing a letter. The very formality of a letter appears archaic within the informal, fast-paced give-and-take of cyberspace. Users familiar with informal, user-friendly cyber-formats may therefore come to reject the rigid, arcane format of conventional legal texts as inaccessible and irrelevant.

Furthermore, as non-linear, non-textual models for the organization of information become popular through Internet use, existing forms of inscribing and communicating legislation may come to seem as unwieldy and outdated as Moses' stone tablets. A case in point would be the fragmentary state of public access to primary legal materials in electronic form in Canada. This fragmentation is caused by the uneasy co-existence of print-based and digitized models of law. For example, Theresa Scassa clearly adopts a digitized conception of legislation when she argues that the federal and provincial governments should collaborate to make authoritative, up-to-date versions of statutes and regulations available online in a unified (or at least harmonized) searchable database which the public could access for free. What in fact exists, however, is an uneven patchwork of sites. Moreover, the sites that do exist are mostly

[21] This account of the political theory of deliberative democracy is based on my reading of L.B. Tremblay, "La justification de la législation comme jugement pratique" (2001) 47 McGill L.J. 59 and D. Kropp, "Legislating away Democracy: The Loss of Legitimacy and a Call for Renewal" (Paper presented at Law Commission of Canada, First Roundtable on Legislation, McGill University, Montreal, 28 January 2000) [unpublished]. See further the discussion of a "civil society model" in G. Segell, "A People's Electronic Democracy and an Establishment System of Government: The United Kingdom" in B. Ebo, ed., *Cyberimperialism? Global Relations in the New Electronic Frontier* (Westport, Conn.: Praeger, 2001) 111 at 112-13.

searchable only by the title of the statute (i.e. alphabetically) and in all cases contain disclaimers directing users to rely upon "official" print versions.[22] Not only is this hybrid (semi-digitized) "system" unwieldy, it is unworkable.

The idea that print versions are authoritative and their digital counterparts are not is one of the fictions that governments will have to abandon if they are to face up to the implications of digitization for the dissemination of legislation. The fluidity of digital text plays havoc with the standard notion of the letter of the law as stable or fixed. Digital text

> can always be reconfigured, reformatted, rewritten. Digital text hence is infinitely adaptable to different needs and uses, and since it consists of codes that other codes can search, rearrange, and otherwise manipulate, digital text is always open, unbordered, unfinished, and unfinishable, capable of infinite extension.[23]

Once a text has been digitized it can be metamorphosed endlessly. This is the difference between the law in books and the law in electrons. In the digital era, author and reader, legislator and legislatee, are equal participants in the text or statute's construction, since the reader (with the text on his or her computer screen) is able to "add to a text or subtract from it, rearrange it, revise it, suffuse it with commentary," introduce graphics, or transform it into music if he or she wants.[24] Plainly, the digitization of legislation spells the demise of the doctrine of legal positivism at the same time as it exposes how dependent that doctrine was for its force on a print-based communications order (and in particular on the idea of the top-down authority of the printed text). In view of the shared authority of the digital text, what is needed now is a doctrine of legal interactivism.

In order to conceptualize the new forms that legislation may take in a digital age, it may be necessary to stop thinking of statutes as bounded texts and to start thinking of them as "delivery systems" or exercises in "interactive fictionalized modeling".[25] On this model, a statute would be composed of a series of alternative scenarios that

---

[22] T. Scassa, "The Best Things in Law Are Free? Towards Quality Free Public Access to Primary Legal Materials in Canada" (2000) 23 Dal. L.J. 301. See also D. Alikat, "Cyberspace of the People, by the People, for the People: Predominant Use of the Web in the Public Seetor" in Albarran & Goff, *supra* note 5, 23.

[23] G.P. Landow, "Hypertext as Collage-Writing" in Lunenfeld, *supra* note 11, 150 at 166.

[24] R.A. Lanham, *The Electronic Word: Democracy, Technology, and the Arts* (Chicago: University of Chicago Press, 1993) at 6. Lanham is here describing how digital textbooks function, but his description is equally applicable to legislation in view of the pedagogical function of legislation brought out, for example, by Nicholas Kasirer in "Honour Bound" (2001) 47 McGill L.J. 237.

[25] Lanham, *ibid.* at 6, 126-29.

user-citizens could choose between and enact for themselves on a completely individualized basis.[26] This is law as acting out rather than as enactment.

The concern that such interactive forms of legislation might introduce too much indeterminacy into the law might well keep official legislative acts confined to the relatively stable form of printed texts for a long time to come. However, printed texts themselves only have the authority a society chooses to ascribe to them. In a culture that has already progressed so far down the path of digitization, this may be rather little. In such a culture the focus will likely be on dynamic, collaborative conflict resolution rather than on text-bound legislative enactments which, in a world of instant information and continuous change, would come to seem outdated as soon as they are published. Ethan Katsh writes that in a digital world "the focus on the past will be less emphasized. Process and dispute solving and reestablishing relationships may, for example, prove to be valued much more than determining what was intended at the time some contract was formed"[27]—or at the time some legislation was enacted.

III. The Cyber-Village

In some ways the world of cyberspace appears to be—and is—removed from any previously known form of social interaction. Yet in many ways it reproduces key traits of oral, preliterate societies.[28] One of the primary characteristics of oral societies is that communication between members is always direct and immediate due to dependence on speech. The Internet (like the telephone before it but to a far greater extent) enables people who are geographically distant to engage in a similar kind of immediate communication. Communication in oral societies is also highly interactive, being grounded in dialogue and ritual, which contrasts with print cultures where written messages are unidirectional. As Constance Classen notes: "One cannot engage a book

---

[26] This suggestion invites comparison with Rod Macdonald's discussion of legislation that takes the form of "examination hypotheticals" in "The Fridge-Door Statute" (2001) 47 McGill L.J. 11 at 30-31. It may also be compared with the "sense and respond" business model, a token example of which is the Levi Strauss clothing company's "Personal Pair" program, which enables customers to design and manufacture their own customized jeans using multimedia technology. See S.P. Bradley & R.L. Nolan, "Capturing Value in the Network Era" in S.P. Bradley & R.L. Nolan, eds., *Sense and Respond: Capturing Value in the Network Era* (Boston: Harvard Business School Press, 1998) 3 at 22. See further the discussion of "court kiosks" and other access mechanisms in R. Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Clarendon Press, 1996) at 212-15.

[27] M.E. Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995) at 123.

[28] For a general review of the literature on oral societies (or "performance cultures"), see B.J. Hibbitts, "'Coming to Our Senses': Communication and Legal Expression in Performance Cultures" (1992) 41 Emory L.J. 873.

in dialogue. A book never changes its mind, it always affirms what it affirms whether one agrees with it or refutes it."[29]

The textual basis of knowledge in literate Western society hence is radically different from that of oral societies where the absence of written documents allows for a more fluid and interactive mode of transmitting information. As Classen documents, one of the most striking aspects of the cultural encounter between Europe and the Americas in the sixteenth and seventeenth centuries was the clash between the European textual understanding of knowledge and authority and the Amerindian oral understanding of the same. From the latter's perspective, the European reliance on books appeared rigid, autocratic, and life-denying. The indigenous cosmos was conceptualized as dynamic and personal, ordered and animated by a continuous flow of oral interchange. The European cosmos, by contrast, appeared to be silent, still, and impersonal, ordered by a realm of written documents.

The advent of electronic communications has ushered in a new age of orality, for while electronic messages at present still primarily take written form, the interactive, dialogical character of Internet communication mimics the qualities of oral communication. Media theoretician Walter J. Ong has proposed the term "secondary orality" to describe the kinds of social conjunctures created by network technology.[30] Ong's mentor, Marshall McLuhan, evoked this same "re-tribalization" of society by means of the famous phrase "global village".[31] In the twenty-first century the global village has become the cyber-village.

Internet culture is thus in many ways an oral culture with a number of the distinct traits characterizing oral cultures: it is synthetic, personal, dynamic, reciprocal. The cultural clash of the future over modes of communication and the social models with which they are associated, therefore, is likely to take the form of a war between adherents to the old print-based models of social and legal order and participants in the new electronic model of social interaction and organization.

It might be argued that the social models of traditional oral societies could only work on a small, "tribal" scale and thus can have little relevance to the large-scale so-

---

[29] C. Classen, "Literacy as Anti-Culture: The Andean Experience of the Written Word" in C. Classen, *Worlds of Sense: Exploring the Senses in History and across Cultures* (London: Routledge, 1993) 106 at 110.

[30] "Secondary orality" is "secondary" because instead of being untouched by writing, the new orality is "based permanently on the use of writing and print, which are essential for the manufacture and operation of [electronic communications] equipment and for its use as well." See W.J. Ong, *Orality and Literacy: The Technologizing of the Word* (London: Methuen, 1982) at 136.

[31] M. McLuhan & Q. Fiore, co-ordinated by J. Agel, *War and Peace in the Global Village: An Inventory of Some of the Current Spastic Situations That Could Be Eliminated by More Feedforward* (New York: McGraw-Hill, 1968).

cieties of the "cyber-village". Yet not all oral societies were small-scale. The Inca Empire in South America, for example, consisted of some ten million people who were organized and governed without the aid of writing. In such cases each small community is integrated into the larger society through an extensive and dynamic network of oral communications. In the example of the Inca Empire, the empire (and also the cosmos) was conceptualized as a living body that required the participation and co-operation of all members in order to survive.[32]

Organic models, such as that of the body, may ironically also work well to organize and animate the ostensibly inorganic realm of cyberspace. Conceptualizing the Internet as a vast body or nervous system and computer terminals as its organs is, in fact, quite widespread in contemporary culture, as evidenced by the discourse about computer viruses. In oral societies individuals depend on the social network for their survival. In a networked society, users depend on their connection to the Net to pursue their cyber-lives. You cannot disconnect your computer and strike out on your own in cyberspace.

Employing corporeal models to order a system has the advantage of relating what might otherwise seem to be purely an abstract creation of bureaucracy or technology to the more personal and appealing notion of a living organism with natural structures and functions—an organism in which each individual plays a vital role and serves as a model for the whole. Among the Incas, for instance, employing body models meant that each person could relate to the structures and functions of society and the cosmos from the basis of his or her own personal corporeal experience.

Current developments in interactive computer technology point to possibilities for developing a range of organically-based models for ordering and interacting in cyberspace. One example is a program—currently in prototype—called Happenstance. This is described as an "ecological interface [that] translates common computer activities, such as conducting Internet searches, into movement through the landscape."[33] Happenstance uses the image of a garden as a model for accessing and conveying information:

---

[32] C. Classen, *Inca Cosmology and the Human Body* (Salt Lake City: University of Utah Press, 1993). The case of the Inca, a "traditional" society whose complexity rivalled that of most coeval European states, underlines the difficulty of classifying societies according to an evolutionary typology based solely on the presence of writing. The term "pre-literate" or "oral society" as used in this essay should not be understood to suggest a linear scheme of development, for it is not the case that contemporary oral societies like the Witsuwit'en or historical oral societies like the Inca can be assimilated to anterior stages in the development of Western civilization. Rather, they should be viewed as alternative regimes for the management of information and society, each with its own historical trajectory.

[33] Davenport, *supra* note 14 at 81.

> If you decide, for instance, that you're hungry for Chinese food, you could type a query that gets attached to an icon of a tree seed. You could then plant the seed in the cybergarden of Happenstance to begin a search for nearby restaurants. Today's Internet browsers would list the query results as hyperlinked blocks of text, but inside Happenstance the results appear as leaves sprouting on a tree.[34]

One obvious difference between the tribal village and the cyber-village is that the members of oral societies lead an ostensibly more embodied existence, being in constant bodily engagement with their environment and each other. Cyberspace, in comparison, is notoriously disembodied. As noted above, however, cyberspace is rapidly becoming "re-embodied" as a wide range of sensory phenomema, from touches to smells, is adapted for electronic transmission. If cyberspace is a world of secondary orality, it is also becoming a world of "secondary embodiment".

It will be appreciated how the sensory development of cyberspace will have the effect of restoring the corporeal dimension of the communication process (a dimension that writing and print have tended to exclude or suppress), and of evoking passions that were previously suppressed behind a facade of disembodied objectivity. The most dramatic transformation, however, has to do with the new potential for multimedia, non-verbal, non-linear communication.[35] In a cyber-world a text on a computer screen may suddenly burst into song, change colour, transform into a 3-D sculptural image, or start to dance, just as messages in oral societies may take many different sensory forms. Can the black letter of the law remain untouched by these transformations?

IV. Governing the Electronic Tribe or Feasting on the Law

Although the resemblance between primary and secondary oral cultures is far from total, it is still strong enough to indicate that, when considering the future of legislation in a digital age, it may be more fruitful to look at law-making in pre-modern oral societies than to dwell on its manifestations in the text-bound culture of modernity.

---

[34] *Ibid.*

[35] See Lanham, *supra* note 24 at 11. The digitization of the word has freed it from the reification to which it was subjected under the regime of print, with the result that

> [t]he historical evolution of two-dimensional, static letterforms arranged and fixed in a horizontal string is shifting course. Type is no longer restricted to the characteristics found in the medium of print such as typeface, point size, weight ... Letterforms with behavioral, anthropomorphic and otherwise kinetic characteristics; text that liquifies and flows; three-dimensional structures held together by lines, planes and volumes of text, *through* which a reader may travel—these are only a few examples of the impact digital technology is having on the once simple, humble letterform.

J. Bellantoni & M. Woolman, *Type in Motion: Innovations in Digital Graphics* (New York: Rizzoli, 1999) at 9.

In an oral society the law is personal: it is always conveyed by one person to another, and hence never has the depersonalized objective character of a written text. In oral societies law is also customarily shared. While the elders and leaders may have a greater store of legal experience, all members of the community will be familiar with the rules and regulations of their society. Law is "studied" not by reading books or attending university courses, but by a process of oral (and mimetic) instruction that forms an intimate part of daily life and ritual observance. As H.P. Glenn writes, "ideally the important information is learned by all, with the help of many, and all become able to assist in the ongoing process."[36]

Oral societies do not have the means to preserve vast quantities of legal or other information. What knowledge is to be retained by future generations must be relatively simple and memorable. Another key trait of oral law is that it is always current, for its only expression exists in the present. While oral traditions may certainly appear inflexible at times, the absence of written documents of past rule-making increases the potential for adapting customs to respond to contemporary needs. Oral laws are refashioned and presented anew every time they are stated or employed.

Both to ensure their transmission and to make them vital to daily experience, laws are communicated through many different means in oral societies. Thus in oral societies laws are not exclusively oral. In his contribution to this issue, Rod Macdonald suggests that in our own society the fridge door, with its plethora of diverse symbols and messages, might serve as a model for law-making.[37] In oral societies the messages on the fridge door (or whatever form the storehouse takes) provide not only a model for the formulation of legal codes, they are themselves an expression of legal codes, together with the food inside the fridge (storehouse). Laws may be painted in designs that cover house fronts, distilled into perfumes, or cooked into a meal. A flower or an animal, the course of a river, or the patterns of the stars may serve as crucial symbols for the social codes that regulate communal behaviour. Laws may be enacted through songs and dances or through ritual battles. Among the Desana Indians of the Colombian rain forest, for example, the shaman states that his role is to help people observe the laws through all of their senses: "to make one see, and act accordingly", "to make one hear, and act accordingly", "to make one smell, and act accordingly" and so on.[38]

When the law is a dance or a ritual meal it becomes something one can touch and taste and incorporate into one's own body as well as see and hear.[39] By dancing out or

---

[36] H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000) at 59.

[37] See Macdonald, *supra* note 26 at 29-36.

[38] Discussed in C. Classen, "Worlds of Sense" in Classen, *supra* note 29, 121 at 133.

[39] See Hibbitts, *supra* note 28. See further M.F. Guédon, "Dene Ways and the Ethnographer's Culture" in D.E. Young & J.-G. Goulet, eds., *Being Changed: The Anthropology of Extraordinary Expe-*

feasting on the law one both learns it and performs it, in conjunction with other members of one's community. This point may be illustrated by considering the example of how law is acted out among the Witsuwit'en, a First Nations people of the interior of British Columbia. Among the Witsuwit'en title to land and authority over it are held by particular named, hereditary chiefs on behalf of all the members of a house (or lineage). There is an intrinsic connection between the name of a chief, the songs (or oral histories) and crests associated with that name, and specific territories.

In the event of a succession, in the case of a boundary dispute, or to resolve any other issues, a house will hold a feast. At the feast, in order to validate his title to name and territory alike, the chief will either recite the history of his name and house, or act out his crest. (For example, a chief with "wolf" as his crest would enter the feast hall wearing a wolf mask or a blanket with a wolf design.) Next, the chief will chant the names of all the landmarks demarcating the traditional territory of his house, verbally walking the assembled company around the periphery of his house's territory. This link with the land is the main basis of his authority. Guests, consisting mainly of the chiefs of other houses, pay close attention to all the territorial and status claims made in the recitations or songs, and challenge any claims that they think do not ring true. In this way, the oral history of each house and its title to specific territories is "authenticated" (by being subject to contradiction, as appropriate) *each* time it is performed.

The vetting of competing histories and the floating of proposals to resolve disputed issues continues until a consensus is reached. The consensus is sealed by the chief's distribution of furs and meat secured on the house's territory to the assembled guests. By receiving these gifts, the guests acknowledge the chief's jurisdiction and accede to his history. They are agreeing literally to eat and wear his words. Finally, the whole gathering is sprinkled with eagle down, symbolizing closure and peace.[40]

Conclusion

It is instructive to consider how these characteristics of law-making in oral societies compare to the eight principles "of legal excellence toward which a system of rules may strive" put forward by Lon Fuller.[41] Fuller's eight principles, briefly stated, are: generality, promulgation, non-retroactivity, clarity, absence of contradiction, feasibility, constancy over time, and congruence. While these principles are not necessarily opposed to the character of law in oral societies, they are not entirely applicable.

---

rience (Peterborough, Ont.: Broadview Press, 1994) 39; J. Ryan, *Doing Things the Right Way: Dene Traditional Justice in Lac La Martre, N.W.T.* (Calgary: University of Calgary Press & Arctic Institute of North America, 1995).

[40] A. Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) especially at 43-55.

[41] L.L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) at 41, 46-91.

Fuller's model presumes a top-down, text-based model of law. It is based on a supposed alienation of law-subject from law-giver that is not unlike the separation of reader from writer in literate societies. The rule requiring the promulgation of laws, for example, is largely meaningless in a society such as the Witsuwit'en where the whole community participates in law-making events. Similarly, the principles promoting the clarity and congruence of laws lose importance when laws are not arcane textual creations to be interpreted and applied by legal specialists but expressions of daily life.

The principles concerning non-contradiction and constancy over time seem likewise to reside in a textual understanding of law. They point to a vision of law as ideally unchanging and therefore fundamentally different in nature from society itself, which is full of contradictions and inconstancies. In oral societies laws do not exist separately from the people who give voice to them or act them out. Variant understandings and presentations of laws need not seem contradictory or inconstant when there is no written text against which to compare them. Similarly, laws are unlikely to be retroactive where there is no reified, text-based understanding of the past. Consistency is important to oral societies, but not consistency within the law itself. What matters is that laws be consistent with general social norms and with the particular situation to which they are being applied.

Fuller's principles may be considered idealized expressions of a classic, textual (print-based) model of legislation. The shift in emphasis and interpretation that occurs when these principles are examined in the context of oral traditions of law-making suggests some of the ways in which conventional Western notions of legislation may change as we enter an age of electronic orality. The ideal of generality may be replaced by one of contextuality, promulgation may take second place to participation, striving for non-contradiction and constancy over time may be less important than making room for alternative norms and innovative solutions to social problems. Significantly, these new versions of Fuller's principles derived from the basics of oral law are not dissimilar to those formulated by Macdonald using the postmodern model of the montage of signifiers on the fridge door. This reinforces the notion that the social and legal life of postmodernity may resemble that of pre-modernity as much as it does that of modernity.

There are many crucial ways in which the cyber-village differs from the tribal village and presents its own unique social and legal concerns. The cyber-village is, of course, not really a village, just as the global village is not really a village. It can be likened rather to a network of villages with certain common interests and characteristics. This network cuts across national boundaries, as the cyberspace occupied by

Internet communities need not correspond to physical space.[42] Here again, however, it seems likely that the global character of the cyber-village would encourage the development of national and international legal systems with the flexibility to deal with cross-border conflicts. The authority of such legal systems may depend less on the threat of physical enforcement than on their ability to engage and persuade, to seduce through the senses, and to make sense within the new social order of the cyber-village.

Unlike oral societies, electronic societies have the means to store vast quantities of detailed information. However, the continual input of new information on the Net will make much of what is stored seem irrelevant and archaic. When the number of publications appears infinite and when texts can be electronically transmuted by readers, the traditional notion of the authority of the printed text will lose much of its influence. There will be an expectation in the postmodern cyber-village that legal knowledge will be accessible, and that it will be both communal and personal, or interactive. As in oral societies, the emphasis will be on conflict resolution that adapts standard laws to existing circumstances and norms.

As information is increasingly presented in non-linear, multisensory forms in cyberspace—such as employing a model of a tree or garden—there will also be a drive to make legal codes appear more dynamic and organic in nature. The rivers and flowers that may serve as natural embodiments of social codes in oral societies may have pseudo-organic counterparts in the virtual reality of cyberspace. Such radically new (from the perspective of late-modern print culture) ways of conceptualizing and presenting the law may well exist ouly on an unofficial, popular level. Yet, as noted above, if cyber-models and traits become sufficiently popular and influential they might de facto come to supersede more conventional forms of legislation. Indeed, the legislative assemblies of tomorrow may themselves well consist of more sophisticated versions of cyberspaces like Diamond Park, an "extensive, elaborately detailed, fully three-dimensional, mile-square virtual place" which users navigate by means of a stationary bicycle wired to a computer, and where they meet and converse with other (similarly ensconced) users who appear as three-dimensional animated avatars.[43] Or they might resemble a virtual version of the Witsuwit'en eagle down ceremony described above, making use of symbols and songs, and culminating in a digital feast.

---

[42] Though it is not within the scope of this paper to examine the questions of sovereignty and jurisdiction that arise when actions no longer occur within specific geographic locations, a number of authors have considered these complex issues. For a review, see E. Longworth, "The Possibilities of a Legal Framework for Cyberspace—Including a New Zealand Perspective" in T. Fuentes-Camacho, ed., *The International Dimensions of Cyberspace Law* (Aldershot, U.K.: Ashgate, 2000) 9.

[43] Mitchell, *supra* note 11 at 121-23, quotation at 121.