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BEING UNEXCEPTIONALIST OR EXCEPTIONALIST – THAT IS THE QUESTION

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Abstract

This article considers whether it is desirable and, if so, will be possible to regulate Cyberspace. It departs from the Goldsmith/Post-debate, dating back already to the 1990s, which introduced the juxtaposition of what became known as the *Unexceptionalists* (opting for some form of adapted real world regulation) and the *Exceptionalists* (opting for, if any, a specific form of regulation). With reference to societal developments which illustrate that through the ages it has appeared possible to invent new legal models for the regulation of no man's lands, the high seas, and international transborder trade, this article takes the *Unexceptionalists*-view, arguing that Cyberspace is best understood as a networked space, connected to the real world space and inhabited by natural persons as its users and understandable by experience. Albeit, that in doing so, it is desirable to follow a tailor-made approach.

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1. Introduction

This article is based on a presentation given at the Law in the Digital Area Conference earlier this year.¹ It served as a framework for the variety of issues that were presented during the conference.

In announcing this conference the organisers referred to the American scholarly debate between Jack Goldsmith and David Post – which started in the 1990s - concerning the fundamental question; does the real world law need to be adapted to fit Cyberspace? Goldsmith's *no* here opposes Post's *yes*.² In their track we find the respective positions of what became known as the *Unexceptionalists* and the *Exceptionalists*. Differently put, at the root of the Goldsmith/Post debate is the question regarding whether Cyberspace requires a system of rules which are quite distinct from the laws that regulate physical, geographically-defined territories, or whether it is necessary to develop for Cyberspace its own effective legal regulations. That question has kept its *momentum* and as a consequence is still very topical today.

Framed and phrased in the words of the organisers of this conference, at stake is whether our traditional real world law is digitalisation-proof. For indeed, where do we find ourselves and who are we at present, having surfed on *The Third Wave* (Toffler), *Being Digital* (Negroponte) on the *Internet*, communicating *commodified information* (Rifkin) in *Cyberspace* (Gipson) which for the one *can only be free* (Barlow) because of its *place-ness* (Post), but for the other should necessarily be reigned by physical world law (Goldsmith) or an adapted version thereof as a *Code* - no invisible hand (Lessig)?³

Looking for an answer to these questions, the first thing to do is to consider a range of sub-questions such as: 1. whether Cyberspace can be conceived as a space similar or at least akin to a space in the common sense of that word, and if so, whether it is lawless out there, and if not, which law and whose law that is; 2. no less important, we should ask ourselves who we are out there, carrying either our real world identity or a different virtual world identity or maybe both. Considering these questions and sub-questions and placing them in a historical context, I have asked myself: are these questions really new? For, if not so, possible answers which have already been given could maybe be helpful for us today. So, are there any analogies to be found? Looking at regulating Cyberspace from that perspective in my view may add something to the approaches so far taken in legal doctrine and legal practice.

¹ The conference was organised under the supervision of the Legal Research Master of Utrecht University, The Netherlands, on 9 March 2012.

² Jack L. Goldsmith, "Against Cyberanarchy" 65 *University of Chicago Law Review* (1998), 1199-1250; David G. Post, "Against Against Cyberanarchy" (2002) 7 *Berkeley Technology Law Journal* 1365-1383; David G. Post, "Governing Cyberspace: Law" (2008) 24(4) *Santa Clara Computer & High Technology Law Journal* 883-913 The indicated debate is analysed from a Western perspective only.

³ I use *space* and *place* as exchangeable terms. Equally, the terms *Cyberspace* (Term first coined by Gibson, *Burning Chrome* (1982) and popularised in Gibson, *Neuromancer* (1984), *Internet* (First coined in 1974) and *World Wide Web* (Coined by Berners-Lee in 1991 see, generally <http://info.cern.ch/> (accessed 3 Dec. 12)) for present purposes are used indiscriminately. Further, the term *virtual* is used in contrast to *actual*, *physical* and *real*, although the fist may be the more accurate.

2. Law and Space

2.1. Law, Space and the Real World

Let us start with the issue of space in relation to the traditional legal requirement of a well-defined and governed territory which is required for a legal system to exist.⁴ For that, reference should be made to the Treaty of Westphalia of 1648 and the system of nation states which it introduced.

In the treaty the European powers of the time agreed upon an organisational and legal framework that recognized their right to function as independent and sovereign entities, having undisputed political control, with the right to uphold freedom of religion, and to reach agreement between neighbouring states on territorial boundaries. Since then, the nation state has become ubiquitous on the land surfaces and the territorial seas of the earth.⁵

As an outcome of the described development, it became characteristic of a modern view of land and its locus in the nation state to make a connection between territory, exclusive jurisdiction and formal equality among individuals.⁶ But as will be seen in Section 2(3), in the course of time, it has appeared to be possible to extend the concept of territory, in its connection to law, to spaces that at first were considered to be no man's land. The same is true for what happened with respect to the regulation of the seas. No less revolutionary was the gradual recognition by states of non-state law for international commerce.

2.2. Law, Space and the Virtual World

How does all this apply with regard to the virtual world? If it is true, that for the law to rule, it needs a space, *i.e.* a relation to a territory, is that Cyberspace? Is the virtual world a space? In the words of Geist: *Is There a There There?*⁷ With this question we find ourselves right in the middle of the Goldsmith/Post debate. The answers to this question all - in my reading of the legal literature which comes to terms with the indicated debate - either implicitly or explicitly reflect upon the issue of space. In doing so, one of three approaches seems to be followed: *i.* contesting that Cyberspace is a space at all; *ii.* accepting Cyberspace as a space comparable to the physical world; *iii.* stipulating that Cyberspace is a space which is different from the physical world. Questions about regulating Cyberspace have given rise to a voluminous legal

⁴ M.A. Thomas, "The Changing Nature of Sovereignty and International Law since Westphalia", in R.A. Herr (ed.), *Sovereignty at Sea: From Westphalia to Madrid* (University of Wollongong, Australia: Centre for Maritime Policy 2000 – no. 11), p.28-37; Richard Mohr, "Law and Identity in Spatial Contests", (2003) 5(1) *National Identities* 53-66. But see for criticism already Max Weber, *Economy and Society: An Outline of Interpretative Sociology* (University California Press, 1978); further, Desmond Manderson, *Songs without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge University Press, 2001). Besides, it is of note that the concept of space is used in various environments. See on that L. Strate, R. Jacobson, and S. Gibson . (eds), *Communication and Cyberspace: social interaction in an electronic environment* (Hampton Press, 2003).

⁵ See on the difficulties in constructing an abstract articulation of the concept of the nation state H. Patrick Glenn, "The National Legal Tradition" , (2007) 11(3) *Electronic Journal of Comparative Law*.1-15 at 13 available at <http://www.ejcl.org/113/article113-1.pdf> (accessed 3 Dec 12)

⁶ Mohr, note 4 at p. 2.

⁷ Michael A. Geist, "Is There a There There? Toward Greater Certainty for Internet Jurisdiction", (2001) 16(3) *Berkeley Technology Law Journal* 1345-1406

literature of *pros* and *cons*. A distinction can here be made between the *Citizens approach* and the *Netizens approach*.⁸

In the second and third approach the application of the term space is qualified as metaphorical.⁹ However, applying this metaphor is not judged by everyone in the same way. Some, like Hunter, argue that viewing Cyberspace as s(pl)ace has mistaken the descriptive question of how we think about it, with the normative question of how we should regulate it. According to Hunter Cyberspace as a s(pla)ce metaphor has introduced property thinking with respect to a domain which was initially an endless expanse of space (open, free, replete with possibility). As a consequence an undesirable private control of the previous commons-like Cyberspace follows as well as the emergence of the digital anti-commons.¹⁰ Building on Hunter and exposing why, in his eyes, courts applying the place metaphor end up nowhere, Lemley adds the argument that even if one accepts this metaphor *in toto*, it also does not have to follow that everything in Cyberspace must be privately owned or that private ownership rights include complete rights of exclusion.¹¹

Others, like Cohen, take a stance against the Exceptionalists' theories about Cyberspace and space.¹² According to Cohen, Exceptionalists, when considering Cyberspace as a separate place, tend to overlook the fact that Cyberspace should be seen as both an extension and an evolution of everyday spatial practice, as a space is neither separate from real space nor simply a continuation thereof. Exceptionalists fail to appreciate the many and varied ways in which Cyberspace is connected to real space and alters the experience of people and communities whose lives and concerns are inextricably rooted in real space. Cyberspace should be considered as part of lived space, and it is through its connection to lived space that Cyberspace must be comprehended and, as necessary, regulated. Arguing that the Cyberspace metaphor captures a dimension of experience that should not be overlooked, in conclusion this leads Cohen to the following:

⁸ One may say that it all began with John Perry Barlow's, *A Declaration of Independence* (1996) available at http://w2.eff.org/Censorship/Internet_censorship_bills/barlow_0296.declaration (accessed 3 Dec 2012), referring to Stewart Brand's slogan 'Information wants to be free', which was invoked in the 1960s against limiting access to information by new technologies. See R. Polk Wagner, "Information wants to be free: Intellectual Property and the mythologies of control"(2003) 103 *Columbia Law Review* 995-1034 available at <http://www.law.upenn.edu/fac/pwagner/wagner.control.pdf> (accessed 3 Dec 12) right from the start criticised by amongst others; Reilly Jones, "A Critiques of Barlow's "A Declaration of the independence of Cyberspace" (1996) 8(2) *Extropy* # 17. See also, Joseph H. Sommer, "Against Cyber Law" (2000) 15 *Berkeley Technology Law Journal* 1145 available at <http://www.law.berkeley.edu/journals/btlj/articles/vol15/sommer/sommer.html> (accessed 3 Dec 12) (Most legal issues posed by the new technologies are not new at all and existing law is flexible enough to deal with such issues).

⁹ All three approaches also pay attention to the dilemma of the commons (liberty; underuse) and the anti-commons (enclosure; overuse), and the socio-economic effects thereof. See on that Michael Heller (ed.), *Commons and Anticommons* (Edward Elgar, 2009); James Boyle, *The Public Domain* (Yale University Press, 2008) at 47-53. I leave this issue aside here.

¹⁰ Dan Hunter, "Cyberspace as Place, and the Tragedy of the Digital Anticommons" (2003) 91(2) *California Law Review*, 439-519.

¹¹ Mark A. Lemley, "Place and Cyberspace" (2003) 91 *California Law Review* 521-542.

¹² Julie E. Cohen, "Cyberspace As/And Space"(2007) 107 *Columbia Law Review*. 210-256: *Even though conventional wisdom now rejects the initial exceptionalists' claim that cyberspace is inherently more free than "real" space, the belief that it is nonetheless inherently different has persisted. At the same time, however, court decisions in cases challenging unauthorized access to web-based information have invoked place- and space-based metaphors to serve a variety of far more pragmatic purposes relating to the demarcation of virtual "property"*.

““Cyberspace” is most usefully understood as connected to and subsumed within an emerging, networked space that is inhabited by real, embodied users and that is apprehended through experience.... If so, however, it becomes especially important to recognize that the design/regulation choices that we make are not just choices about “cyberspace” in isolation from “real space”.”¹³

Interim conclusion 1

For a first interim conclusion I can say that I share the approach of the second category. In my view, it is desirable (following from my assumptions about human societies and law) to legalise Cyberspace in a way which is comparable to the way in which this is done in the physical world. In doing so, as has been convincingly argued by Cohen, the Cyberspace metaphor should be understood as a conceptual tool, meant to refer to an emerging networked space that is inhabited by real, physical persons and that is understandable through experience. In addition, the extension of real world law to Cyberspace may be justified by reference to developments in the physical world that show how human societies through the ages have managed to cope with legally ordering what was considered as spare, unoccupied space. In doing so, successively the *Terra Nullius* concept, the *Mare Liberum* concept, and the *Lex Mercatoria* concept will be reviewed.

2.3. Terra Nullius concept, Mare Liberum concept, Lex Mercatoria concept

The so-called *terra nullius* concept was used during the time of Western colonization in order to justify the taking of what was seen as no man’s land, places either inhabited or not habited.¹⁴ Such occupation was also justified in cases where any prior sovereign had expressly or implicitly relinquished sovereignty over a certain place. Not being governed by a form of political organization similar to that of the colonisers made such places in their eyes lawless.

It is of note that the *terra nullius* concept could only develop after the introduction in European law of another Roman law-based concept: that of the *lex terrae*.¹⁵ According to that latter concept, law could be applied throughout a nation rather than to individuals as group members. Boaventura Sousa Santos refers to this development, marking the move from various special laws based on group membership to compulsory state membership, as the process of the homogenisation of law within a territory.¹⁶

According to the *terra nullius* concept, a space needed a (new) sovereign to transform it into a territory before it was possible to install a legal system. At first this *terra nullius* concept had no expressed legal basis. For that the world had to wait until, in the 18th Century, the Swiss

¹³ *Ibid* at 212-213; 225-226; 255-256 (quotation).

¹⁴ Mohr, note 4 above at 7: *The space of the colonies was (...) negated, seen as empty. This empty geographical space of the world beyond Europe was seen to be in need of ‘filling’ with cultivation. Christianity, law and white people. This emptiness derives from European notions of space as well as from the lack of comprehension of specific objects and events that were to be found in the new lands ‘discovered’ by Europeans.*

¹⁵ Mohr, note 4, at 53, referring to the law of the Norman Kings in England in the 11th Century. The *lex terrae*, codified in the Magna Carta of 1215, replaced the *lex regis* (the law of the King).

¹⁶ Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995), at 468.

legal philosopher and scholar De Vattel developed theories about the foundation of international law.¹⁷

Even more illuminating is to remember the international legal ordering of the international seas. The doctrine of *mare liberum*, as developed by Hugo Grotius, a Dutch legal philosopher and scholar, is world famous in this respect. Commissioned to do so by the Vereenigde Oostindische Compagnie (VOC - Dutch East India Company), which needed a free sea for its international trade, Grotius formulated, in 1609, as a new principle that all nations were free to use the sea for seafaring trade, since no state government could legally claim the sea as its property.¹⁸ No man's waters as an equivalent of no man's lands, so to say. Grotius's treatise was directed towards the Portuguese who promoted the concept of *mare claus(tr)um* in order to justify their monopoly claim on East Indian trade. The latter concept was already formulated around 1608 as an answer to Grotius by the British lawyer John Selden. Selden's work was also commissioned, this time in order to contest the claim of Dutch fishermen who fished the waters along the English coast.¹⁹ However, his study was only published in 1635 because King James I blocked an earlier publication for political reasons. In the end the *mare liberum* doctrine acquired international recognition.

After their introduction both the *terra nullius* and the *mare liberum* doctrines evolved throughout the 18th and the 19th Centuries, finally being incorporated in various international agreements and treaties. It is of note that this all was done by nation states which saw the interests of their peoples best served in that way. An important phenomenon in this respect became the flag which any nation state had chosen as the principal instrument to refer to its national identity. With regard to the no man's land doctrine, in the course of time it became strenuously discussed whether planting a nation state's flag on unoccupied places could vest state ownership thereover. Examples here are the legal status of the North Pole and the Arctic Region, and later on that of Outerspace places like the Moon and Mars. All this has now been dealt with by international agreements.²⁰

An intriguing story here is what happened with the Moon. In the mid-1960s the American President Johnson, being forced to take money from the space race to fund the Vietnam War, feared that if, as a consequence thereof, the Russians would win the race to the Moon, they were likely to claim ownership over it. So he instigated negotiations for what became known as the 1967 Outerspace Treaty.²¹ The treaty explicitly forbids any government from claiming

¹⁷ Emer de Vattel, *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Neuchatel, 1758).

¹⁸ Hugo Grotius, *Mare Liberum* (The Freedom of the Seas) (Oxford University Press, 1916), originally published by Elzevier in 1609.

¹⁹ John Selden, *Mare Clausum* (1608). He defended the existence of an *Oceanus Britannicus* which, like other seas, could be owned and possessed by means of a fleet. See on the Grotius/Selden dispute Wilhelm G. Greve, *The Epoches of International Law* (De Gruyter 2000), Part Two, Ch. 9, at 257.

²⁰ J.N.K. Mansell, *Flag State Responsibility – Historical Development and Contemporary Issues* (Springer, 2009) Chapter 2 at 13-24 What may be called space law can be described as the body of law applicable to and governing space-related activities. Today, it consists of five international treaties and five sets of principles governing Outer Space. Lyall Francis, Paul B. Larsen, *Space Law: A Treatise* (Ashgate, 2009); See generally, <http://www.oosa.unvienna.org/oosa/en/FAQ/splawfaq.html> (accessed 3 Dec 12)

²¹ The Outer Space Treaty, formally the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, entered into force on 10 October 1967 available at <http://www.oosa.unvienna.org/oosa/SpaceLaw/outerspt.html> (accessed 3 Dec. 2012). As of October 2011, 100 countries are state parties to the treaty, while another 26 have signed the treaty but have not completed ratification. The drafted Moon Treaty of 1979 was meant to be a follow-up to the Outer Space

ownership on a celestial resource such as the Moon or a planet, providing that these resources are the common heritage of mankind. Except for regulating the aspect of ownership claims no particular regulation has been agreed upon internationally.

Similar was the development that followed the introduction of the *mare liberum* doctrine. A gradually constructed distinction made between national seas and international seas (oceans), led in the 20th Century to the state-oriented international regulation of open seas, particularly the UN Conventions UNCLOS I (1956), II (1960) and III (1973).²² UNCLOS III offers a comprehensive contextual framework for the law of the sea, codifying and warranting the freedom of the high seas (Article 87).

A third and last example, taken from legal history, which may be helpful to answer the sub-question about state law, space and the open seas, is the development of what became known as the *Lex Mercatoria*.²³ This mediaeval merchant law developed between the 11th and 12th Century in Europe and consisted of a non-state legal regime for long-distance transborder trade over the open seas. The regime was operated by merchants and their agents and was adjudicated and enforced by special merchant courts. Some constitutive principles of the *Lex Mercatoria*, taken from accepted state law, were good faith, reciprocity, non-discrimination, and third-party dispute resolution. This led international traders to use standardized contracts and to submit themselves for enforcement by specialist merchant courts. But from the 18th Century onwards this merchant law came under severe pressure, since states tried to gain control over international trade from their countries. It is of note that this was not really opposed by long-distance merchants because it brought them enhanced security and the enforceability of their contracts in a world which was principally reigned by nation states.

So, by the end of the 19th Century, international trade was largely ruled by state law. In order to keep pace with the needs of international trade, between 1850 and 1950 states adapted their state regulations with respect to long-distance trade. To legally facilitate such transnationalism, in this period, internationally-agreed private international law (the law on the conflict of laws) emerged. Despite these adaptations, from the 1960s onwards it appears that international commerce became dissatisfied with national courts applying private international rules in dispute settlement and started to look for the extra-judicial regulation and enforcement of its activities. This tendency was supported by state governments by way of initiating the codification of uniform international contract law and dispute resolution. It is of note, however, that many vested legal instruments, taken from state regulations albeit in an adapted form, were part thereof. So it occurred that, with the help of independent private law institutions made up of academics and practitioners such as UNIDROIT, commercial codes of global and regional reach were drafted. Well known in this respect are the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNIDROIT Principles of International Commercial Contracts 1994. Today, the International Chamber of Commerce, together with a number of other institutions, is prominent on this front.

Treaty, but failed to be ratified by any space-faring nation. J. Hickman, E. Dolman, "Resurrecting the Space Age: A State-Centered Commentary on the Outer Space Regime" (2002) 21(1) *Comparative Strategy* 1-20

²² For discussion see generally, H. Caminos, *Law of the Sea* (Ashgate, 2001)

²³ F.W. Grosheide, "Legal Borrowing and Drafting International Commercial Contracts", in F. W. Grosheide, Ewoud Hondius, *Articles on Various Aspects of Transnational Contract Law*, (Intersentia, 2003) at . 221-238 ; Alec Stone Sweet, "The New *Lex Mercatoria* and Transnational Governance" (2006) 13(5) *Journal of European and Public Policy* at 627-646; Peer Zumbansen, "Transnational Law" in Jan M. Smits, *Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) chapter 68 at 740-743 with many references.

This, what became known as *Lex Mercatoria Moderna*, has raised hard questions about the legality and the enforcement of law and about the dependency of law on state powers.²⁴ Indeed, the emergence of such non-state law appears to pose a potential challenge to the predominance of an international legal order which is dominated by Western political and jurisdictional institutions. Since the mid-1960s, voluminous literature on these questions has been produced by academics and practitioners (lawyers, arbitrators) alike, without so far offering commonly accepted answers.²⁵ The divide here is between *Traditionalists* and *Non-Traditionalists*. Traditionalists look at the *Lex Mercatoria Moderna* as a set of legal practices the use of which has been made possible by states. In their view, over time nation states, based upon agreed national and international law, have granted a certain contractual autonomy to transnational commercial actors, while retaining ultimate regulatory authority over these practices. In contrast, *Non-Traditionalists* have argued that state authorities have largely relinquished their authority to regulate international contracting and dispute resolution, accepting and permitting that transborder trade functions autonomously in what is, in effect, an a-national environment. Today it is not certain if ever the twain will meet.²⁶

Interim conclusion 2

For a second interim conclusion in my view the described developments show that, over the years, it has appeared to be possible to extend law that gradually had become the principal instrument of ordering the territories of nation states in the physical world, to spaces in that physical world that were at first seen as belonging to nobody *casu quo* to everybody and beyond anybody's control. This extension was founded upon concepts which to that aim from the 17th Century onwards were produced by legal theory and legal practice. Central to these concepts was the notion of sovereignty. In order to fall under the rule of law, *i.e.* to become a territory, a space needed to have a sovereign.

As a consequence, an important issue became the question of how legitimate sovereignty - nationally and internationally recognized – could be vested. It appears - and it suffices for

²⁴ Ursula Stein, *Lex mercatoria: Realitaet und Theorie* (Klostermann, 1995); Willem Grosheide, The Duty to Deal Fairly in Commercial Contracts, in Stefan Grundmann, Denis Mazeaud (eds.) *General Clauses and Standards in European Contract Law* (Kluwer Law International, 2006) at 197; Filip DeLy, "Lex Mercatoria (New Merchant Law): Globalisation and International Self-Regulation" in Richard P. Appelbaum, William F. Felstiner, Volkmar Gessner (eds.) *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001) see Part Three: The Autonomous Rules: the new *lex mercatoria* and self-regulation 151-248 at 159 (the *Lex Mercatoria* is a set of rules finding their origins outside domestic legal systems which are applicable to international business transactions [largely] composed of international sources of law and self-regulatory rules).

²⁵ Stone Sweet, note 23 above at 627. For a formal definition of identity see Hal Abelson, Lawrence Lessig, Digital Identity in Cyberspace, White Paper submitted for 6.805/Law of Cyberspace: Social Protocols, available at <http://www.swiss.ai.mit.edu/6095/student-papers/fall98-papers/identity/white-paper.html> (accessed 3 Dec. 12) at 3: "Basically, the essential and unique characteristics of an entity are what identify it."

²⁶ Relevant in this respect is the following quotation from Marcel Fontaine, Filip DeLy, *Droits des contrats internationaux* (Bruylant/FEC 2003), at 673-674: "Le constat que l'on peut tirer de ces débats est qu'une majorité des membres du Groupe de Travail [a group of scholars and practitioners specialising in international contract drafting which assisted the authors] sont hostiles ou réticents à admettre que la pratique contractuelle internationale se développe en dehors des cadres du droit étatique. Ce constat a notamment souligné en ce qui concerne les clauses de best efforts, les clauses pénales, les clauses d'exonération et de limitation de responsabilité et les clauses de hardship. Evidemment, il y a des exceptions... Ces exceptions ne semblent que confirmer une pratique générale de référence à un droit national... Par contre, la pratique contractuelle internationale confirme son autonomie par rapport au droit étatique dans la mesure où les praticiens développent de nouvelles solutions ou techniques dans les limites posées par le droit étatique."

present purposes - that this could be the result of the factual occupation of no man's land, of negotiations between those who were already sovereigns, or through - again national and international - the acceptance by actual sovereigns of a form of self-government in a specific societal group (international commercants). It should be stressed that this all concerned the physical, real world in its terrestrial appearance.

Later, it appeared that the indicated theories *per analogiam* also could be applied and as a consequence were applied to use law as we know it for the ordering of spaces other than terrestrial spaces, such as parts of Outerspace, *e.g.* the Moon. This raises the intriguing question of whether it will also be possible to extend and apply real world law to and in the virtual world, *i.e.* Cyberspace. For an answer to that question, it seems appropriate to pay attention to the phenomena of *off-line identity* and *on-line identity*.²⁷

3. Law and (Legal) Identity

3.1. *Off-line Identity*

Identity, as we know it today in relation to societal (inter)relations, is a rather modern and still somewhat unclear concept.²⁸ It plays a role in the current debates about such issues as personality, gender, religion, nationality, ethnicity, and the like. Applied to law for present purposes, the notion of identity will be used as the common denominator for a description of any aspect of ascribing human behaviour in a societal context.

Identity, although not labelled with that term, matters in law. History teaches us that through the ages law has been more than norms and regulations alone. Of old one can already find references to that characteristic of law in religious and philosophical sources.²⁹ Indeed, law also establishes and reinforces the identity of individuals. As is well known, since the 19th Century, groups (corporations; corporate entities), including nation states, are treated equally. Granting legal identity and/or personality to groups is an interesting development which is comparable to the gradual expansion of the notion of space and of that of virtual identity. These corporate entities were in fact incorporated fictional persons, originating by governmental declaration by authorities under existing law.

Recognition by the law of an individual's or a group's personality and/or identity has as a consequence that it is transformed into a legal position and *vice versa*. However, this does not mean that claiming such a legal position is always done successfully. As an example we only have to consider what has happened over time with the development of human rights. Whereas for individuals and groups in the Western world these rights have only recently been introduced (recognized, if you wish), in other parts of the world (*e.g.* for indigenous groups) this is still not the case.³⁰

²⁷ See for a comparable reasoning *per analogiam* with regard to the players of virtual games Edward Castronova, *The Right to Play*, in Jack M. Balkin, Beth Simone Noveck (eds.) *The State of Play: Law and Virtual Worlds* (New York University Press, 2006) comparing the gamer to the legal fiction of corporate identity.

²⁸ The identity concept in its original sense is practised in philosophy and formal logic.

²⁹ Legal cultures in ancient times, but also still in modern societies, acknowledge legal identity or personality differently. See on legal identity and legal tradition Patrick H. Glenn, *Legal Traditions of the World* (Oxford University Press, 2000) at 31-37.

³⁰ Legal identities such as corporations can also claim human rights protection. See for the position of indigenous peoples UNO, Declaration of Indigenous Peoples 2007.

So, recognition by a national state of whatever form of legal position vests a relation between (a person's) identity and a particular space, a specific national territory. Many examples can be given of that state of affairs such as the law regarding national frontiers, the law of nationality, the law of personal information and the protection of privacy, the law of the family, the law of (mis)representation, the law against identity theft, procedural law, and aspects of intellectual property law.³¹ In all these different fields of law the relation between identity and space is at stake and is regulated from a particular perspective.

Related to, but different from, the issue of identity is that of anonymity and pseudonymity as a special form thereof. Generally speaking, modern law takes account of these forms of identity as part of the law on privacy. However, it is questionable but arguable whether, with respect to anonymity and pseudonymity, the same applies as has been stated for identity.³² The latter is arguable, since if and in as far as anonymity and pseudonymity are reducible to persons (natural persons as well as legal persons), these persons are always situated in the physical world. Finally, it should be stressed that what has been said so far is applicable to physical identity in the physical world.³³

3.2. On-line Identity

Next comes on-line identity: does what counts for off-line identity also count for on-line identity?³⁴

Before answering that question, the notion of on-line identity needs to be clarified by distinguishing at least two forms thereof. First comes a person's real identity, *i.e.* her or its acting in Cyberspace as Miss so-and-so or Corporation x. In that capacity, the real person makes herself or itself known in the Internet environment as the same person that she or it is in the physical world. Next comes a person's virtual identity, *i.e.* her or its acting in Cyberspace as a character which is different from that in the physical world, but directed by the real person that uses it, while being constrained by that same character which it develops in the virtual world that is beyond her or its control.³⁵ Virtual identity can be temporary (for

³¹ Since these comments are on material law, I will not pay attention to procedural issues such as questions of jurisdiction (competent courts) in relation to national territories.

³² See on his *e.g.* A. Michael Froomkin "Legal Issues in Anonymity and Pseudonymity" (1999) 15(2) *The Information Society: An International Journal*, 113-127; J.E.J. Prins, "Over privacy, identiteit en anonimiteit in de informatiemaatschappij" in J.M. Titulaer-Meddens (ed.) *Privacy: ons een zorg! De betekenis van privacybescherming voor het V&W-beleid, Ministerie van Verkeer en Waterstaat 2002*, at 30-42, with references to Dutch and foreign sources. Ken D. Kumayama "A Right to Pseudonymity" (2009) 51 *Arizona Law Review* 427-464 available at: <http://www.arizonalawreview.org/pdf/51-2/51arizlrev427.pdf> (accessed 10 Dec 12) Simone Van der Hof, Bert-Jaap Koops, Ronald E. Leenes "Anonymity and the Law in the Netherlands" in I. Kerr, V. Steeves, C. Lucock (eds.) *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009).

³³ It is assumed here that it is still well-thought of to qualify and characterize the physical world as reality. But see also Derrick de Kerckhove, *The Skin of Culture: investigating the new electronic reality* (Sommerville House, 1997) at 120: *Since Einstein, Niels Bohr, Heisenberg, Freud and television, reality has been disintegrating rapidly. Today it is falling apart (...) Emulating the Beatles, physicist and theorist David Bohm is hard at metaphysical work to show that yes, it's true, it's all in your mind.*

³⁴ The terms on-line identity, Internet identity, or Internet persona are used indiscriminately. In what follows, I do not take into account a new, special form of virtual identity stemming from accepting that a computer (software)-enabled agent can execute autonomously both human and machine-related actions.

³⁵ Danièle Bourcier, *De l'intelligence artificielle à la personne virtuelle: émergence d'une entité juridique?*

the time the on-line contributor is on-line with that specific identity) or permanent (when the natural person chooses to remain active in her virtual identity).

Taking on a virtual identity is of particular concern for natural persons. Examples thereof can be found in on-line contexts such as Internet forums, instant messaging and on-line games.³⁶ It is done by choosing an avatar, an iconized graphic image. What counts for natural persons equally counts for communities thereof. Such communities, *e.g.* Second Life, are known as MUDs (Multi-User Domains): on-line environments where multiple users are logged on and interact with one another.

In the context of this paper the LambdaMOO example is exemplary.³⁷ It can be described as a text-based virtual community. Within its confines, participants, exploring this virtual world, can talk or play; can flirt or fight; can drive automobiles and fly helicopters; can build houses and make investments; can create copyrightable works and commit torts; can take on jobs or book theatre tickets; can teleport themselves from the Netherlands to Africa or take an elevator from the USA to China. In sum, participants are building their own universe by even creating a new language or building a new social structure. Interestingly, also a legal system is emerging within this LambdaMOO world. This system is mainly an arbitration-based dispute-settlement self-regulation with respect to property rights and free speech rights in the MOO.³⁸

Not surprisingly, the phenomenon of real persons entering Cyberspace by adopting a virtual identity has raised concerns about whether it is first desirable and secondly possible to regulate this virtual society. For indeed, if virtual worlds such as games evolve into alternative places not only for leisure and entertainment, but also for working and investing, it is questionable whether this can be done without real world law stepping in to protect the participants from arbitrary judgements by the game developers. All sorts of preliminary questions should be answered in that respect. So, if one takes the view that the law of the real world is applicable in Cyberspace, what are the arguments for such a claim?

But if one takes the view that real world law is not applicable in Cyberspace, even more difficult questions arise, such as whether it is possible, and if so, on what grounds, to offer protection *e.g.* against virtual damage to property or virtual harm to the person. Does it require for such actions that the accused virtual person has legal subjectivity, making it accountable for legal rights and obligations? For that aim should the fiction of legal personality, introduced in the real world for corporate entities, be extended to the virtual world for virtual persons?

In this respect it is important to note that in Cyberspace, even more than in the real world, anonymity and pseudonymity are used as vehicles of virtual identity. Whilst anonymity or pseudonymity - like in the real world - may be sought here for legitimate reasons, it may also be used for illegitimate goals. Again it is worth knowing in such an instance whether, and if so, how well, traditional law applies in the Internet world.

It is appropriate to return here to Post's argument, holding that with regard to Cyberspace (external) regulation imposed by national states is less legitimate than (internal) regulation developed by virtual communities themselves. It is of note that obviously any regulation is

³⁶ See on that Ralph Koster, Declaration of the Rights of Avatars 2000, available at <http://www.raphkoster.com/gaming/playerrights.shtml> (accessed, 3 Dec 12)

³⁷ LambdaMOO was introduced in 1990 by Pavel Curtis (Xerox Parc). A MOO is a variety of a MUD.

³⁸ Jennifer L. Mnookin, "Virtual(ly) Law: The Emergence of Law in LambdaMOO"(1996) 2(1) *Journal of Computer-Mediated Communication*.

also desirable for Post, but that he prefers self-regulation above state regulation since the latter “completely abandon any notion that governments derive... their just power from the consent of the governed, or that the individuals to whom law is applied have the right to participate in formulating those laws.”³⁹ Post stresses that if virtual communities’ own sovereignty is not recognized, this, together with the possibility to fall back on state law, risks making virtual law *play-law*.⁴⁰ He asks himself “who will undertake the hard work required to set up a legal system if it’s just play-law...and (i)f everyone believes that “real law” from “real sovereigns” is the only law that matters (or can ever matter).”⁴¹

In line with some other scholars, Suzor has convincingly argued that accepting that the fall-back position on enforceable state law stands in the way of an adequate development of self-regulation in the shadow of state law is contradicted by *e.g.* the flourishing of contract law which is principally left to the freedom of the parties.⁴² Besides, as has been pointed out by Cohen, there seems to be no reason why either full self-regulation or total state law should be relied upon.⁴³

Interim conclusion 3

In my reading of the reported juxtaposition of off-line identity and on-line identity the following three contesting views can be distinguished:

- the virtual world, with its inhabitants, is a play space that should be left to its own devices
- the virtual world, with its inhabitants, is more than a play space but should nonetheless be left to its own devices
- the virtual world and its inhabitants is an extension of the real, physical world (the earth)and ought to be approached from that perspective

It follows that when it comes to regulation, it depends on the view taken whether no regulation whatsoever, self-regulation, state regulation, or in one of the last two instances, a combination thereof should be opted for.

I share the view that the virtual world ought to be seen as an extension of the real world and that, as a consequence thereof, acts performed in the virtual world - either in a person’s own name or by using anonymity or pseudonymity – should be related to the addressers of these acts in the real world. This means that adopting a virtual identity does not safeguard a natural person from the applicability of real world law to his behaviour in Cyberspace, whether or not in combination with sector-specific self-regulation. For, whereas systems of self-regulation might arguably have a role to play here in limited circumstances, it seems that more formal controls are required now that the Internet has moved far beyond any comparison to a members’ club.

³⁹ Post, note 2, p. 910 (117a).

⁴⁰ Post, note.2, p. 913.

⁴¹ Post, note 2, p. 913.

⁴² Nic. Suzor, “The Role of the Rule of Law in Virtual Communities” (2011) *Berkeley Technology Law Journal* 1818 -1866

⁴³ Cohen, note 12 at 224.

4. Concluding Observations

In the Introduction, with reference to the Goldsmith/Post debate, a distinction has been made between the Unexceptionalists' and the Exceptionalists' view of regulating Cyberspace. Later on, this distinction has been articulated and extrapolated by making the juxtaposition between the Citizens' approach and the Netizens' approach, as well as that between the Traditionalists and the Non-Traditionalists. Positioning myself in this debate, I may say that I feel most comfortable with the Unexceptionalists' *cum suis* view.

My first argument in this respect is of a philosophical and a politico-legal nature. To me it is rather artificial (and just the opposite of what the Exceptionalists call artificial) to perceive Cyberspace as a world of its own that is disconnected from the physical world. This is artificial, since both worlds are in the end inhabited by natural persons or their representatives. For that aim it is not even required to use the 'Cyberspace as a place' metaphor. I agree on this point with Cohen arguing that Cyberspace is best understood as a networked space, connected to the real world space and inhabited by natural persons as its users and understandable through experience.

It follows, and I think that this is desirable, to keep the real world and the virtual world related to each other in many respects, one of these being legal regulation. Taking into consideration that mankind incontestably favours some sort of regulation for living together above the struggle of all against all, which will inevitably follow upon lawlessness, the existence of law is indispensable for the preservation of order and the achievement of co-ordination in any human society. Without law various desiderata for human beings will remain impossible, or will be severely impaired. I do not see why that is different in the virtual world in comparison with the physical world.⁴⁴

My second argument is that it also seems to be quite well possible to apply real world law (both state law and self-regulation!) to Cyberspace when viewed from a technical-legal perspective. In the same way as it has been possible through the ages to apply, by extension, existing positive state law to regulate spaces that were initially seen as no man's land, to internationally regulate open seas by either qualifying them as public domain or transforming them into territorial waters, and to develop an internationally accepted self-regulatory system of merchant law in the shadow of state law, it is perfectly legitimate to regulate Cyberspace by any form of real world law. Legally accepted instruments such as the use of analogies and fictions can also be helpful in this respect. The fictional personhood for corporations is a clear example. Looking from the indicated perspective at the questions put forward at the beginning leads to a negative answer thereto: no, in fact these questions are not really new, and already provided answers can again be used.

However, this still leaves unanswered the question of what kind of legal regulation would be best placed. Here again I favour an approach that links the real world and the virtual one to each other. Given the fact that today's physical world is structured along the lines of national states, it is national state law and international state law which in my view best serve the need to regulate the virtual world. This is not to say that I do not see room for additional forms of self-regulation. I do see room for that, but always in the shadow of real world law.

⁴⁴ For present purposes I use the following definition of law: a system of authoritative norms for the general regulation of conduct, offering adequate means for the enforcement of that norm. Comp. Matthew Kramer, *In Defense of Legal Positivism* (Oxford University Press, 1999) at 254: "In short, the existence of law within any community is a necessary condition for the rewardingness of individual lives and the fruitfulness of social/economic/political relations therein."

5. Final Conclusion

It becomes increasingly clear that existing real world law - at international and national levels - is related to the Cyberspace behaviour of individuals and institutions. However, it is not generally agreed that this is a good development. Many legal professionals and Cyberspace frequenters still contest the fact that any regulation of that behaviour is required. And if so, it is said - based on arguments which have been exposed in the preceding paragraphs - it is doubtful whether the existing real world legal system is the appropriate way to deal with human behaviour in this new sphere. Others - again based on arguments exposed in the preceding paragraphs - take the view that the legal ordering of Cyberspace, comparable to that in the physical world, is not only desirable but even inevitable, although they differ in how they think that this can best be done. In all these respects *Unexceptionalists/Traditionalists/Citizens*, on the one hand, and *Exceptionalists/Non-Traditionalists/Netizens*, on the other, have different opinions. As has been argued I share the arguments of the Unexceptionalists.

In fact, legal developments are moving in the direction of the Unexceptionalists. This follows particularly from the fact that lawmakers, judges, and practitioners often have neither the expertise nor the time to develop new ways of looking at the regulation of Cyberspace issues. A well-known legislative example in this respect is the American Digital Millennium Copyright Act (DMC 1998). As far as legal practice is concerned an example is the situation where judges and practitioners are called upon to resolve disputes with respect to issues like property claims in Cyberspace.

However, although these developments serve my preference, I do not consider them as a valid argument for the fact that the actual law-giving institutions are increasingly using the Cyberspace as a place metaphor to justify the application of traditional, real world law in the virtual world. This is so because I think that convincing arguments should and can be found in sound philosophical, political and legal considerations.

Finally, I should stress that I have no real preference for either international and/or national governmental regulation as the case may be, together with co-regulation or self-regulation. In addition, for the regulation of Cyberspace I suggest that a tailor-made approach should be followed. So it may well be that - as has already become apparent in copyright law - the regulation of the prerogatives of the copyright owner in Cyberspace requires a different approach from that in the real world.