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# REGULATION OF THE INTERNET: THREE PERSISTENT FALLACIES

JACK GOLDSMITH\*

The principal papers have two things in common. They each claim that the Internet is a novel phenomenon that promises to transform legal regulation. And they each illustrate a fallacy that pervades the Internet regulation literature. David Post and David Johnson offer a normative argument against governmental regulation of the Net.<sup>1</sup> But their argument, like many arguments about jurisdiction over Internet transactions, erroneously assumes that Cyberspace is a place hermetically separated from the “real” world. Dan Burk’s analysis of the Internet’s effect on national copyright regulation<sup>2</sup> rests on a common but incomplete understanding of how nations regulate transnational transactions. Dean Henry Perritt argues that the Internet will strengthen international law.<sup>3</sup> This argument exemplifies the Internet literature’s unjustified optimism about the promise of cheap, plentiful information.

## FALLACY I: CYBERSPACE IS A SEPARATE PLACE

Post and Johnson have famously argued that territorial governments should not regulate Internet transactions.<sup>4</sup> Their spillover effects analysis in this symposium is designed to support this conclusion in the following way: The Net is oblivious to geographical constraints. Content providers cannot control their information flows in territorial

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1. See David G. Post & David R. Johnson, “*Chaos Prevailing on Every Continent*”: *Towards A New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT. L. REV. 1055 (1998).

2. See Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943 (1998).

3. See Henry H. Perritt, Jr., *The Internet is Changing International Law*, 73 CHI.-KENT L. REV. 997 (1998).

4. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378 (1996).

space because information on the Net appears simultaneously in all national jurisdictions. One consequence of the Net's architecture is that territorial regulation of Net information flows creates spillover effects on Net users in other territories. For example, Minnesota's threat to impose liability on an Internet gambling site in Antigua could, by forcing the website operator to shut down or curtail operations, affect the cost or availability of the same site in territorial jurisdictions where it is legal. Such spillover effects are illegitimate, Post and Johnson believe, because the web page operator and users outside Minnesota lack voice in or exit from the Minnesota regulation. Participants in Net transactions, by contrast, can design laws for a-geographical cyber-communities that permit low-cost voice and exit. Territorial governments should, therefore, defer to the "rule-sets" designed by the "a-geographical, decentralized, voluntary associations" on the Net.<sup>5</sup>

This is an efficiency argument for Net self-regulation. Post and Johnson have not explained why efficiency is the appropriate criterion of legitimacy in this context. But even assuming it is, their conclusion that nations should not regulate the Internet does not follow. Like many other Internet commentators,<sup>6</sup> Post and Johnson are in the grip of a misleading metaphor. The metaphor is that the Net is an a-geographical place analogous to, but separate from, territorial space.

5. See Post & Johnson, *supra* note 1, at 1087. This is my translation, in light of Post and Johnson's prior work, of the following important passage from their symposium paper:

We have suggested elsewhere that the Internet calls for a higher degree of deference to rulemaking within a-geographical, decentralized, voluntary associations, and we believe that the foregoing provides normative underpinnings for this view. Allowing individuals to define the boundaries of their own, a-geographical patches by voluntary movement into and out of decision-making bodies that have little or even no ties to a particular physical location—what we might call "self-governance"—may allow both more rapid and more "congruent" responses to shifts in spillover patterns. Individuals are more likely to be in possession of the relevant information regarding the effect of spillover on their own welfare and can act more quickly on that information than can agents at a higher level of the organizational hierarchy (i.e., their elected representatives) to whom that information must be re-directed and re-processed before "official" boundary realignment can occur. Individuals on whom spillover is most directly concentrated can, using their ability to "enter" and "exit" such venues, have the most impact on the rules applicable to the spaces from which the spillover emanates, which may allow both more rapid and more "congruent" responses to shifts in spillover patterns. In other words, putting boundary-definition in the hands of individuals directly affected by the rules made within those boundaries may allow a faster and more flexible response to rapidly changing spillover patterns.

*Id.* at 1087-88 (footnotes omitted).

6. See, e.g., Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 JURIMETRICS J. 1, 9 (1994); Curtis E.A. Karnow, *The Encrypted Self: Fleshing Out the Rights of Electronic Personalities*, 13 J. MARSHALL J. COMPUTER & INFO. L. 1, 6 (1994); David Nimmer, *Time and Space*, 38 IDEA 501, 502, 525 (1998).

And it is a very special place. Persons who inhabit it—presumably content providers, access providers, and users—suffer the effects of territorial regulations. But (according to Post and Johnson) these persons can also design private legal orders that permit costless exit by persons burdened by Net activities. In short, activities in this special place do not produce effects beyond it.

The problem is that the Net is not a separate place, and Net users are not removed from our world.<sup>7</sup> They are no more removed than telephone users, postal users, or carrier-pigeon users. They are in front of a screen in real space using a keyboard and scanner to communicate with someone else, often in a different territorial jurisdiction. And these real-space communications can cause real-world harms. Internet gambling can decrease in-state gambling revenues and cause family strife; a book uploaded on the Net can violate an author's copyright; a chatroom participant can defame someone outside the chatroom; terrorists can promulgate bomb-making or kidnapping tips; merchants can conspire to fix prices by e-mail; a corporation can issue a fraudulent security; or a pornographer can sell kiddie porn. In these and many other ways, Net transactions produce harmful real-world effects. And the people harmed by these transactions often do not have a voice in the transaction and cannot exit from the private "rule-sets" that facilitate it.

Post and Johnson's conception of the Net as a special place that produces no real-world harms leads them to overlook important costs in their efficiency analysis. They worry about the third-party costs of territorial regulation of the Net. But they ignore the third-party costs of Net self-regulation. It is these latter third-party costs to its citizens and residents that a nation worries about and aims to regulate.<sup>8</sup> On its own terms, an efficiency analysis in support of self-regulation must show that there are fewer spillover effects from self-regulation than from national regulation. This analysis would require difficult and controversial valuations that Post and Johnson have not begun to attempt. Such an analysis would need to focus on particular regulatory contexts rather than on Net regulation per se. It is unlikely that this analysis would conclude that Net self-regulation is always (or even usually) more efficient than national regulation.

The spillover effects of Net self-regulation are not the only spill-

7. See Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1406 (1996).

8. Nations also legitimately regulate for purely paternalistic reasons. I set aside this basis for regulation for purposes of this argument.

overs that the Post and Johnson efficiency analysis ignores. Their analysis also ignores the spillover effects of territorial regulations that facilitate Net transactions. Post and Johnson worry about the effects of Minnesota's regulation of the web page operator in Antigua and Net gambling users in other countries. But what about the regulation (or the absence of regulation) that permits the web page operator in Antigua to transmit the offending content into Minnesota? The Antiguan regulation (or non-regulation) facilitates an activity in Antigua that imposes costs on Minnesota's regulatory efforts and on persons in Minnesota—family members of gamblers, Minnesota gambling establishments and their employees, Minnesota schoolchildren who benefit from taxes on in-state gambling, and so on—without voice in or exit from the extraterritorial regulation.

Post and Johnson's efficiency analysis provides no basis for choosing between the trans-jurisdictional costs produced by the competing regulatory regimes in Minnesota and Antigua. This choice can only be made by virtue of an independent normative theory. Such a theory would need to explain, among other things, why Minnesota must forego control over and protection of persons within its territory to accommodate the users of a new technology in Antigua. Post and Johnson clearly embrace some such theory, but they have yet to articulate it.

#### FALLACY II: TERRITORIAL GOVERNMENTS CANNOT REGULATE THE NON-TERRITORIAL NET

Dan Burk claims that the Net threatens to "put[] information production into a death spiral of lowered prices and lower production, ending in [a] type of underproduction" for digitized goods.<sup>9</sup> His central assumption is that cheap, digitized products made in a territory with a permissive copyright regime can be sent into territories with restrictive copyright regimes with impunity.<sup>10</sup> "[I]nterdiction of infringing products may become nearly impossible," he reasons, because "the sheer volume of Internet traffic would make it prohibitively time consuming to examine each packet coming into the territory of a copyright restrictive nation, and to sort among them for potentially infringing copies."<sup>11</sup> Because territorial governments with

9. See Burk, *supra* note 2, at 970.

10. See *id.* at 960-61.

11. *Id.* at 960.

restrictive copyright regimes cannot prevent the import of cheap digital goods made offshore in permissive copyright territories, the restrictive regime's copyright protections will become useless. Information producers in the restrictive territory will be forced to lower their prices to compete with the offshore goods.<sup>12</sup> The information-fostering incentives of restrictive copyright regimes will thus be defeated, leading to a chronic under-supply of digitized goods.<sup>13</sup>

Burk embraces a conception of regulation common to Net scholarship.<sup>14</sup> These scholars are skeptical about the feasibility of territorial regulation of Net transactions for essentially two reasons. First, they think that territorial governments cannot regulate offshore content producers who are beyond the state's physical control. Second, they think that because territorial governments cannot stop the flow of information packets across territorial boundaries, they cannot regulate the flow of Net transactions within their borders.

This conception of regulation is surprising. It is surprising because it comes at a time when so many people—including some who claim that territorial regulation of the Net will be ineffectual—are complaining about the adverse consequences for the Net of territorial regulations. For example, commentators have complained about the adverse consequences for the Net caused by the European Directive on Data Protection,<sup>15</sup> United States export controls on encryption technology, and (directly on point with Burk's analysis) the World Intellectual Property Organization ("WIPO") Treaties Implementation Act.<sup>16</sup> Commentators complain about these and other territorial regulations because these regulations raise the cost—often significantly—of Internet transactions.

These complaints belie Burk's assumption that digitized goods can migrate costlessly across territorial borders. If governments can raise the cost of Net transactions, they can regulate Net transactions.<sup>17</sup>

12. *See id.* at 970.

13. *See id.*

14. *See, e.g.,* John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L. L.J. 207, 217 (1997); Johnson & Post, *supra* note 4, at 1378; Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 913 (1996); John Perry Barlow, *A Cyberspace Independence Declaration* (visited Feb. 19, 1999) <<http://www.barlow.eff.org>>.

15. *See* Council Directive 95/46 of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31.

16. *See* Digital Millennium Copyright Act of 1998, H.R. 2281, 105th Cong.; Digital Millennium Copyright Act of 1998, S. 2037, 105th Cong.

17. *See* Lessig, *supra* note 7, at 1408-10.

Burk may be right that—under the current architecture of the Net—a territorial government has difficulty stopping at its borders digital goods produced abroad.<sup>18</sup> But this says very little about the efficacy of the territorial government's restrictive copyright regime. A nation does not have to inspect every item crossing its borders to effectively regulate the flow of items within its borders. Instead, it can achieve a great deal of regulatory control over illegal foreign imports by imposing costs on persons and property within its territory.

This form of indirect extraterritorial regulation is how nations have, in similar contexts, regulated local harms caused by illegal imports that are difficult to stop at the border. Consider extraterritorial communications that produce local in-state harms. For example, unwanted radio and television content can be broadcast from one nation into another. The content source is beyond the local territorial government's control, and the broadcast signals are difficult to stop at the borders. Does this mean that a nation cannot control the promulgation of the unwanted foreign content within its borders? Of course not. A nation can punish local consumers of the content, regulate local transmission facilitators, or regulate the technical design of local reception devices.<sup>19</sup> To the extent that these local regulations raise the local price to obtain foreign content, they regulate the foreign content even though the source of the content is beyond the nation's control and the nation cannot stop broadcast signals at its borders.

Consider, similarly, the situation presented by gray-market goods sold in the United States. A gray-market good is one lawfully made abroad but imported into the United States without the consent of the U.S. owner of the intellectual property rights associated with the good. Gray-market goods possess many of the characteristics of

18. See Burk, *supra* note 2, at 960-61. It is not impossible to stop digital goods from crossing the border. It is just very costly, at least right now. A nation could choose (as a very few have) to have no connections to the Net whatsoever. See Timothy S. Wu, *Cyberspace Sovereignty?—The Internet and the International System*, 10 HARV. J.L. & TECH. 647, 651 (1997). This is becoming increasingly difficult to do, for it in effect requires shutting off all channels of international communications. Short of this, nations can, at great cost, achieve significant control over digital information flows by heavily regulating the channels of communication. For example, China regulates access to the Internet through (among other means) centrally regulated servers. See *id.* at 652-54. Many believe that digital identification technology and content filtering technology will one day permit nations (and individuals) to achieve extraordinary control over the flow of digital goods. See Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 BERKELEY TECH. L.J. 137, 139-44 (1997). Burk acknowledges this possibility. See Burk, *supra* note 2, at 992-93.

19. All three strategies were employed by nations seeking to interrupt cross-border propaganda transmissions. See Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 344-49 (1991).

Burk's digital goods. They are manufactured abroad under a regulatory regime that makes them less expensive than the identical goods with valid local trademarks or copyrights. They are relatively easy to import into the United States because they are difficult and costly to intercept at the border. Once imported, they have a competitive advantage over authorized, and thus more expensive, products or copies. Does the inability to interdict these goods at the borders mean that domestic intellectual property regulations will be rendered useless? No. The United States can regulate domestic users and distributors of the gray-market goods. This is what it does, for example, when it permits valid trademark or copyright holders to sue gray-market distributors and users.<sup>20</sup> This regulation of the local demand side of the gray market can raise the local cost of gray-market goods, thus protecting the integrity of the goods with valid local trademarks or copyrights and thereby effectuating the local intellectual property regulation.

These and similar methods of regulating foreign supply by regulating local persons and property show how nations can regulate the flow of cheap digital goods made offshore under a permissive regulatory regime. The easiest way to control illegal cross-border information flows is to enforce the regulation against the local assets of the foreign supplier of the information. With Net transactions, however, the foreign supplier will often have no local presence. But the regulating jurisdiction still has many options. It can penalize in-state end-users who obtain or use the illegal foreign content. It can regulate in-state hardware and software through which Internet transmissions are received.<sup>21</sup> It can regulate Internet access providers and other local firms that facilitate the local transmission of the digital goods.<sup>22</sup> Or it can regulate local financial intermediaries—banks, credit card companies, and the like—that facilitate Internet transactions.<sup>23</sup> In these

20. See, e.g., *Parfums Givenchy, Inc. v. Drug Emporium, Inc.*, 38 F.3d 477, 481 (9th Cir. 1994).

21. Thus, for example, numerous Asian and Middle East countries have set up software blockades and proxy servers to control Internet content flows, and the Federal Communications Commission recently mandated V-chip blocking technology in computers capable of receiving video broadcasting. For a general analysis of this point, see James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 202-04 (1997); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 893-95 (1996).

22. For example, Internet gambling legislation before Congress in 1998 proposed to authorize federal and state officials to order Internet service providers to shut down illegal Internet gambling sites. See Jack Goldsmith, *What Internet Gambling Legislation Teaches About Internet Regulation*, 32 INT'L LAW. 1115 (1998).

23. Cf. Matt Beer, *The Wagers of the Web: Lawsuit Could Unravel On-line Gaming Indus-*



and many other ways, local territorial regulations raise the price of local transmission and use of the digital good made abroad under the permissive intellectual property regime.

These enforcement strategies show why it is error to assume that the Net allows costless migration of digital goods across territorial borders. In a way, Burk's assumption to the contrary rests on a Post and Johnson-like view of the Net as a place removed from the real, territorial world. But whereas Post and Johnson think that the Net is a separate place that suffers from real-world regulation without producing real-world consequences, Burk thinks the Net is a separate place immune from territorial regulation. Once one recalls that the Net consists of people using equipment in a territory, it becomes clear that the territorial government can exercise force over these people and their equipment to regulate both territorial and extraterritorial transactions.

Nothing in my analysis suggests that territorial enforcement strategies will *eliminate* illegal digital imports. But regulation is rarely if ever perfect in this sense, and it need not be perfect to be effective. The relevant question is whether these regulatory strategies will heighten the cost of transmitting, obtaining, copying, and using digital goods sufficiently to achieve acceptable control over them. How much control is "acceptable control"? That depends on several factors. It first depends on the normative commitments of the regulating government—the importance to the government of achieving certain levels of control, and the cost the government is willing to pay to achieve such control. It also depends on the costs of the government's regulations. Some of these costs depend on technological and other empirical questions that remain unresolved. For example, some predict that content providers and regulators will be able to assert near-perfect monitoring of and control over digital goods; however, others think these predictions are exaggerated. Other costs depend on the nature of the normative commitment to regulate. It is unlikely, for example, that regulators care enough about digital goods to impose a penalty of life imprisonment for their illegal use.

Burk claims that restrictive copyright regimes will be ineffectual when applied to digital goods on the Net. I have tried to show why he underestimates the many ways that nations can regulate the Net. The

*try*, S.F. EXAMINER, Aug. 17, 1998, at B-1 (describing a California lawsuit arguing that Internet gambling is illegal and seeking to bar credit card companies and their issuing banks from collecting gambling debts).

point is important, but by itself narrow. To say that territorial governments can raise the cost of local Net transactions and thus regulate the flow of digital goods is to say very little about the issue that Burk set out to address, namely the Internet's ultimate effect on national copyright regulation. The ultimate effect of the Net on the regulation of digital goods will be informed by this regulation's effect on the Net. And this in turn will depend on the normative case for regulating digital goods, the technology of digital goods (and, more broadly, of the Net), and the monetary and non-monetary costs of regulating digital goods—issues that are interdependent, changing, and contested.

### FALLACY III: OPTIMISM ABOUT CHEAP, PLENTIFUL INFORMATION

Internet commentators tend to be optimistic about the Internet's transformative capabilities. The Internet, respectable commentators tell us, will foster tolerance, promote democracy, redistribute wealth, improve writing and reading skills, destroy trade barriers, and bring world peace.<sup>24</sup>

Perritt's sanguine assessment of the Internet's effect on international law falls in this vein. The Net makes possible cheap and easy access to the decisions of courts and legal institutions all over the world. Perritt believes such access will facilitate harmonization of public and private international law,<sup>25</sup> thus promoting compliance with both.<sup>26</sup> We have, to be sure, witnessed new harmonization and enforcement efforts to lower the costs of the prodigious conflict-of-law challenges presented by Net transactions.<sup>27</sup> But Internet law harmonization will not always (or even usually) be possible. And in any event, Perritt's claims are much more ambitious. He does not argue that the Net will facilitate harmonization and enforcement of laws that govern Internet transactions. Rather, he argues that it will facilitate harmonization and enforcement of *all* of public and private international law.

24. See FRANCES CAIRNCROSS, *THE DEATH OF DISTANCE: HOW THE COMMUNICATIONS REVOLUTION WILL CHANGE OUR LIVES* 119-20, 155, 209-10, 233-34 (1997); MICHAEL L. DERTOUZOS, *WHAT WILL BE: HOW THE NEW WORLD OF INFORMATION WILL CHANGE OUR LIVES* 82-85 (1997); ESTHER DYSON, *RELEASE 2.0: A DESIGN FOR LIVING IN THE DIGITAL AGE* 83-86, 125 (1997); BILL GATES, *THE ROAD AHEAD* 135-36, 157-58, 184-85 (1995); NICHOLAS P. NEGROPONTE, *BEING DIGITAL* 55-59 (1995).

25. See Perritt, *supra* note 3, at 1040-42.

26. See *id.* at 1038-39.

27. For a few examples, see Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1230-32 (1998).

In its enthusiasm for the Internet's transformative potential, this argument neglects a number of analytical difficulties. Perritt's claim might prove to be true. But the issue is much more complex than he suggests.

Harmonization is a term with several meanings.<sup>28</sup> What Perritt means by the term is convergence on a single substantive standard for a particular issue by courts and lawmakers in different territorial jurisdictions. Perritt claims that "as a matter of practical politics, a judge will be pressed to explain deviations from precedent established elsewhere."<sup>29</sup> It is unclear why and to what extent judges follow precedent,<sup>30</sup> but the matter is certainly more complicated than this. Judges who want to minimize decision costs will defer to precedents established elsewhere. Decision-cost reduction, however, does not begin to exhaust the factors in judicial decision. Judges who seek influence or acclaim achieve this end by defying precedents. Judges also might be moved by personal or national biases. Perritt's claim that a judge can deviate from a precedent established elsewhere only at a political cost overlooks the fact that some judges are legally immune from political pressure and that others are legally barred (or suffer political costs) from following a foreign precedent. It also ignores the fact that the non-efficiency reasons for deferring to precedent—fairness, predictability, and tradition—do not necessarily (or even usually) apply when a judge in one legal community looks to a precedent from another.

There is a more fundamental problem with Perritt's harmonization claim. Assume with Perritt that judges are leisure-seekers who suffer political costs from not deferring to precedents established elsewhere. It still does not follow that cheaper access to legal information promotes harmonization. Just as the Net makes it easier to find precedents in support of a particular legal conclusion, it also makes it easier to find contrary precedents on point. It will thus be easier for litigants to present judges with precedents on both sides of

28. See David W. Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in 1 FAIR TRADE AND HARMONIZATION 41, 43 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

29. Perritt, *supra* note 3, at 1041.

30. For helpful discussions, see Clayton P. Gillette, *The Path Dependence of the Law*, in THE LEGACY OF OLIVER WENDELL HOLMES: "THE PATH OF THE LAW" AND ITS INFLUENCES (Steve Burton ed., forthcoming 1999); Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 994-95 (1995); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39-41 (1993).

an issue. Judicial choice among competing precedents requires non-rule-like determinations about the similitude between the precedents and the case before the judge. In this sense, it is unlikely that even precedent-deferring judges will, over a range of cases, converge on a single precedent. The opposite appears likely: a sharp increase in readily available precedents will, all things being equal, likely increase rather than decrease judicial variance both within and across jurisdictions.<sup>31</sup>

There are objections to this analysis. Harmonization can take place in many contexts and over many ranges of jurisdictional difference. Take an extreme case of two jurisdictions, A and B, that have different conceptions of tort law and no knowledge of the other. In this situation, a change in technology that makes it cheap and easy for A to access the precedents of B will increase the likelihood that B will influence the tort law of A, and that A will conform to B's view of tort law, thereby promoting harmonization of tort law between the two jurisdictions. A related objection is that the harmonizing tendencies of easy access to new precedents might be masked by the *misleading appearance* of judicial variance. The fact that it is easier for litigants to bring contrary precedents to a judge's attention might make us think that there is less harmonization, when in fact the underlying influence of the new precedents creates greater harmonization across jurisdictions than would have been the case without the new precedents.

These examples remind us of the complexity of the harmonization problem. They show that the Net might promote marginal harmonization even if it does not lead to complete harmonization. More broadly, they show how difficult it is to predict the Net's consequences for legal harmonization, for in the abstract we cannot tell which dominates: the harmonizing tendencies of access to new legal precedents or the non-harmonizing tendencies of too many precedents. I do not claim that the Net's easy access to more precedents will, on balance, defeat rather than promote harmonization; I only contend that the question is very complex, and that Perritt's predictions about the Net's harmonizing tendencies are unjustifiably optimistic.

31. For historical examples of the apparently dis-harmonizing effects of technologies that made it easier to copy and distribute legal information, see M. ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 35-48 (1989); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037, 1040-44 (1961).

My analysis thus far has been limited to the Net's effect on the common law process. Perritt's harmonization claim is no more convincing when we move to judicial interpretations of law produced by public and private international lawmakers.<sup>32</sup> To the extent that the Net makes trans-national communication easier, Perritt's claim that it facilitates uniform international lawmaking might be true. Assuming that nations adopt these uniform laws, Perritt's further claim that "it is logical that courts from different states would decide similarly the same issues under the same law"<sup>33</sup> does not follow. Because of the significant conflicts of national interest that must be resolved, uniform international laws tend to be crafted not as rules but rather as standards.<sup>34</sup> Standards are easier to agree on precisely because the content of the law is not determined *ex ante*, but rather is left to the law interpreter. And the law interpreters in international contexts are decentralized national courts, which are not likely to interpret standards in a uniform fashion.<sup>35</sup> It is possible that the harmonizing tendencies of applying the same standard minus the non-harmonizing aspects of standards application will, in the aggregate, lead to greater harmony than would have been the case in the absence of a uniform international law. But it is difficult to say so for sure at the level of generality and confidence that Perritt asserts.

Perritt's claim that the Net will harmonize customary international law ("CIL") is his least convincing. Perritt invokes the traditional definition of CIL: a customary practice followed from a sense of legal obligation. This gentle definition masks enormous conceptual disputes about the proper sources of CIL. CIL has always been burdened by uncertainties about the appropriate criteria for identifying customary state practice and the elusive sense of legal obligation.<sup>36</sup> The multiplication of nation states in the post-World War II period has exacerbated these uncertainties. Among many other problems is the fact that custom-development and custom-identification become more difficult as the number of actors and the range of their interactions increase. The identification of CIL has become even more difficult during the past quarter century because the traditional focus on

32. That is, treaty makers and private organizations that develop model international laws.

33. Perritt, *supra* note 3, at 1040.

34. Cf. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597, 651 (1995) (making similar point in context of private legislatures).

35. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 985 (1995).

36. See David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERM. Y.B. INT'L L. 198, 199-208 (1996).

the actual practice of states has begun to shift to an even vaguer “consensus” criterion that looks to treaties (ratified or not), General Assembly Resolutions, and domestic enactments as additional sources of CIL.<sup>37</sup> CIL today is bedeviled by an overabundance of potential sources and little definitive guidance about source hierarchies. The Internet’s easy and cheap access to all of these sources makes the problem worse, not better.<sup>38</sup>

### CONCLUSION

The Net creates many new and interesting problems, and promises, for legal regulation. The first generation of Net scholarship has tended to exaggerate these problems and promises, however, by focusing exclusively on what is new about the Net and overlooking what is old about it.

37. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839-40 (1997) (discussing this trend).

38. Perritt also thinks that the Internet will promote compliance with international law because knowledge is a prerequisite to compliance, and the Internet increases knowledge of the law. See Perritt, *supra* note 3, at 1038-39. I have already explained why easier access to more legal sources does not necessarily (or even probably) lead to coherence in law or an increased knowledge about law. Here, as elsewhere, Perritt mistakenly views law as an objectively discoverable, uncontroversially ordered phenomenon, access to which the Internet will enhance.

