What is Cyberlaw, or There and Back Again

Author : Michael Madison

Date : December 9, 2016

Jeanette Hofmann, Christian Katzenbach & Kirsten Gollatz, *Between Coordination and Regulation: Finding the Governance in Internet Governance*, New Media & Society (2016), available at [SSRN](#).

The concept of "cyberspace" has fascinated legal scholars for roughly 20 years, beginning with Usenet, Bulletin Board Systems, the World Wide Web and other public aspects of the Internet. Cyberspace may be defined as the semantic embodiment of the Internet, but to legal scholars the word "cyberspace" itself initially reified the paradox that the Internet both seemed to be free of law and constituted law, simultaneously. The explorers of cyberspace were like the advance guard of the United Federation of Planets, boldly exploring open, uncharted territory and domesticating it in the interest of the public good. The result was to be both order (of a sort) without law, to paraphrase and re-purpose Robert Ellickson's [work](#), and law (of a different sort), to distill Lawrence Lessig's famous exchange with Judge Frank Easterbrook.[1] For the last 20 years, more or less, legal scholars have intermittently pursued the resulting project of defining, exploring, and analyzing cyberlaw, but without really resolving this tension, that is, without really identifying the "there" there. Perhaps the best, most engaged, and certainly most optimistic embrace of that point of view is David Post's [In Search of Jefferson's Moose](#).

Less speculative and less adventurous cyberlaw scholars, which is to say, most of them, quickly adapted to the seeming hollowness of their project by aligning themselves with existing literatures on governance, a rich and potentially fruitful field of inquiry derived largely from research and policymaking in the modern regulatory state. That material was made both relevant and useful in the Internet context via the emergence of global regulatory systems that speak to the administration of networks, particularly the Domain Name System and ICANN, the institution that was invented to govern it. The essential question of cyberlaw became, and remains: What is Internet governance, and what do we learn about governance in general from our observations and experiences with Internet governance? As an intervention in that ongoing discussion, [Between Coordination and Regulation: Finding the Governance in Internet Governance](#) is an especially welcome and clarifying contribution, all the more so because of its relative brevity.

The lead author is the head of the Humboldt Institute for Internet and Society and a veteran observer of and participant in Internet governance dialogues at ICANN and the World Summit on the Information Society (WSIS). She and two colleagues at the Humboldt Institute have produced a useful review of relevant Internet governance literature and a new framework for further research and analysis that is eclectic in its reference to and reliance on existing material and therefore independent of the influence of any single prior theorist or thinker. The resulting framework is both novel yet recognizably derivative of and continuous with respect to earlier work in the field. This is not a work primarily of legal scholarship by legal scholars, but properly understood, it should contribute in important ways to sustaining the ongoing project of cyberlaw. Internet governance is conceptualized here in ways that make clear its relevance and utility to questions of governance generally.

The paper introduces its subject with an overview of the definitional problems associated with the term "governance" and especially the phrase "Internet governance." In phenomenal terms, the concept often refers to combinations of three things: one, rulemaking and enforcement and associated coordinating behaviors that implicate state actors acting in accordance with established political hierarchies; two,

formal and informal non-state actors acting in less coordinated or un-coordinated "bottom up" ways, including through the formation and evolution of social norms; and three, technical protocols and interventions that have human actors as their designers but that have sorts of independent technical agency in enabling and constraining behaviors.

The authors note that many researchers seeking to define and understand relevant combinations equate "governance" with "regulation," which leads to the implication that governance, like regulation, should be purposive with respect to its domain and that its goals should be evaluated accordingly. They reject that equation, observing that the experience of Internet institutions and other actors, of both legal and socio-technical character, suggests that such a purposive framing of the phenomenon of governance is unhelpfully underinclusive. A large amount of relevant behavior and consequences cannot be traced in purposive terms or in functional terms to planned interventions.

Also rejected, this time on overinclusiveness grounds, is the idea that governance can and should be equated with coordination among actors in a social space, as such. The authors correctly note that if governance is coordination of actors in social life, then virtually any and every social phenomenon is governance, and the concept loses any distinct analytic potential.

In between these two poles of the spectrum—that governance is regulation, or that governance is coordination—the authors settle on the argument that governance is and should be characterized as "reflexive coordination." They define this concept as follows:

> Critical situations occur when different criteria of evaluation and performance come together and actors start redefining the situation in question. Routines are contested, adapted or displaced through practices of articulation and justification. Understanding governance as reflexive coordination elucidates the heterogeneity of sources and means that drive the emergence of ordering structures. (P. 20.)

This approach preserves the role of heterogeneous assemblages of actors, conventions, technologies, purposes, and accidents, while calling additional attention to moments and instances of conflict and dispute, where "routine coordination fails, when the (implicit) expectations of the actors involved collide and contradictory interests or evaluations become visible." The authors' point is that this concept, which they refer to as *reflexive* coordination, or more clearly stated, these *processes* of reflexive coordination, are specifically aligned with the concept of Internet governance in particular and with governance in general. The *reflexivity* in question are practices and processes of contestation, conflict, reflection, and resolution that sometimes accompany more ordinary or typical practices and processes of institutional and technical design and activity. Those ordinary or typical practices and processes constitute questions of coordination and/or regulation, broadly conceived. Those are appropriately directed to the Internet, but not under the governance rubric.

The authors acknowledge their debt to a variety of social science research approaches, including Bruno Latour, John Law, Elinor Ostrom, Douglas North, and Oliver Williamson, and to American scholars of law and public policy, notably Michael Froomkin, Milton Mueller, Joel Reidenberg, and Lawrence Lessig, but without resting their case specifically on any one of them or on any particular work. As a student of the subject, I was struck not by the identities of the researchers whose work is cited, but rather by the conceptual affinity between the authors' concept of "reflexive coordination" and an uncited concept. Recently, in a parallel literature on the anthropology (and dare I say, governance) of open source computer software, Christopher Kelty, now a researcher at UCLA, coined the phrase "recursive public" to describe the attributes of an open source software development collective.[2] Kelty writes:

> A recursive public is a public that is vitally concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means of its own existence as a public; it is a collective independent of other forms of constituted power and is capable of speaking to existing forms of power through the production of actually existing alternatives. Free Software is one instance of this concept, both as it has emerged in the recent past and as it undergoes transformation and differentiation in the near future….In any public there inevitably arises a moment when the question of how things are said, who controls the means of communication, or whether each and everyone is being properly heard becomes an issue…. Such publics are not inherently modifiable, but are made so—and maintained—through the practices of participants.[3]

The extended quotation is offered to suggest that processes of reflexive coordination already resonate in governance domains beyond those associated with the Internet itself. To the extent that reflexive coordination needs affirmation as a generalized model of governance, Kelty's research on recursive publics offers some useful evidence that the model is useful. Open source software development collectives seem to fit the model of governance quite readily, despite the fact that the concepts of "reflexive coordination" and the "recursive public" arise in different intellectual traditions and for different purposes. The challenges of understanding and practicing Internet governance speak to the challenges of understanding and practicing governance generally. "Between coordination and regulation: Finding the governance in Internet governance" offers a helpful and important step forward in that broader project.

1. *See* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 **U. Chi. Legal F.** 201; Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 **Harv. L. Rev.** 501 (1999).
2. Christopher M. Kelty, Two Bits: The Cultural Significance of Free Software (2008).
3. *Id.* at 3.

Cite as: Michael Madison, *What is Cyberlaw, or There and Back Again*, JOTWELL (December 9, 2016) (reviewing Jeanette Hofmann, Christian Katzenbach & Kirsten Gollatz, *Between Coordination and Regulation: Finding the Governance in Internet Governance*, New Media & Society (2016), available at SSRN), https://cyber.jotwell.com/what-is-cyberlaw-or-there-and-back-again/.