

## CHAPTER 17: WHAT DECLAN DOESN'T GET

Declan McCullagh is a writer who works for *Wired News*. He also runs a "listserve" that feeds to subscribers the bulletins that he has decided to forward and facilitates a discussion among these members. The list was originally called "Fight Censorship," and it initially attracted a large number of subscribers who were eager to organize to resist the government's efforts to "censor" the Net.

But Declan uses the list now for more than a discussion of censorship. He feeds to the list other news that he imagines his subscribers will enjoy. So in addition to news about efforts to eliminate porn from the Net, Declan includes reports on FBI wiretaps, or efforts to protect privacy, or the government's efforts to enforce the nation's antitrust laws. I'm a subscriber; I enjoy the posts.

Declan's politics are clear. He's a smart, if young, libertarian whose first reaction to any suggestion that involves government is scorn. In one recent message, he cited a story about a British provider violating fax spam laws; this, he argued, showed that laws regulating e-mail spam are useless. There is one unifying theme to Declan's posts: let the Net alone. And with a sometimes self-righteous sneer, he ridicules those who question this simple, if powerful, idea.

I've watched Declan's list for some time. For a brief time I watched the discussion part of the list as well. But the most striking feature about this list to me is the slow emergence of a new topic of concern—one that now gets more posts than "censorship."

This topic is Y2K—the "year 2000 problem" that threatens to disrupt much in our social and economic life as computers discover that the new millennium does not compute. As clearly as Declan's libertarianism comes through, so too does his obsession with Y2K. He is either terrified or perversely amused by what the new millennium will bring.

From the perspective of this book, these twin concerns—with regulation by the state and regulation by code—are quite consistent. Just as we should worry about the bad regulations of law, so too should we worry about the bad regulations of code. And from the perspective of this book, Y2K is our first real crisis in code. It is the first time that the culture as a whole will have to confront the environmental damage done by shortsighted coders. Like shortsighted lawmakers, they have created a crisis whose proportions we cannot yet see.

But from the perspective of Declan's libertarianism, these twin concerns are harder to reconcile. Y2K is the product of a certain kind of libertarianism. It is the product of not thinking through the regulation of code, and of law not properly holding coders responsible for their code. Thousands of coders went about their work thinking their actions were simply their own. The culture and the legal system essentially treated those actions as those of individuals acting alone. Now, years after the first bad code was compiled, we are faced with a kind of environmental disaster: we are surrounded by code that in critical and unpredictable ways will misfire—at a minimum causing the economy millions of dollars, and under some doomsday scenarios causing much worse damage.

It is a lack of a certain kind of regulation that produced the Y2K problem, not too much regulation. An overemphasis on the private got us here, not an overly statist federal government. Were the tort system better at holding producers responsible for the harms they create, code writers and their employers would have been more concerned with the harm their code would create. Were contract law not so eager to allow liability in economic transactions to be waived, the licenses that absolved the code writers of any potential liability from bad code would not have induced an even greater laxity in what these code writers were producing. And were the intellectual property system more concerned with capturing and preserving knowledge than with allowing private actors to capture and preserve profit, we might have had a copyright system that required the lodging of source code with the government before the protection of copyright was granted, thus creating an incentive to preserve source code and hence create a resource that does not now exist but that we might have turned to in undoing the consequences of this bad code. If in all these ways government had been different, the problems of Y2K would have been different as well.

Y2K is just one example of a more general point that has been at the core of this book. We've had technology in our lives forever, and people have written about the consequences of technology for society since there has been technology. But this continuity should not blind us to an important disconnect we are about to see. Code may be only a difference in degree, but a difference in degree at some point becomes a difference in kind. The unintended consequence of private coding behavior is a time-bomb set to explode over the next year or so. The Y2K problem

should awaken us to other time-bombs in our lives—that is, to the general effect that code will have on our lives.

For here is a reality that all this “code talk” obscures. By speaking as I have about the code in cyberspace, by describing how government might regulate that code, by making it seem as if the worlds I am describing were in some sense elsewhere, I have obscured an obvious and critical point that the Y2K crisis makes real: code is not elsewhere, and we are not elsewhere when we feel its effects. As Andrew Shapiro puts it: “Seeing cyberspace as elsewhere misconstrue[s] its legal significance. It keep[s] us from seeing the way that regulatory forces like code, which some say are ‘there,’ are actually affecting us here.”

We live life in real space, subject to the effects of code. We live ordinary lives, subject to the effects of code. We live social and political lives, subject to the effects of code. Code regulates all these aspects of our lives, more pervasively over time than any other regulator in our life. Should we remain passive about this regulator? Should we let it affect us without doing anything in return?

And thus again the odd juxtaposition of Declan’s two obsessions. Governments should intervene, at a minimum, when private action has public consequences; when shortsighted actions threaten to cause long-term harm; when failure to intervene undermines significant constitutional values and important individual rights; and when a form of life emerges that may threaten values we believe to be fundamental.

Yet so pervasive is our sense of the failure of government that a writer as intelligent as Declan cannot see the implications of these two great evils that he does so much to report. If we believe that government cannot do anything good, then Declan’s plea—that it do nothing—makes sense. And if government can do nothing, then it follows that we should treat these man-made disasters as natural. Just as we speak of the disaster of the West Coast sliding into the Pacific, so too should we speak of a disaster of code sliding us into another dark age. Neither can we do anything about, yet both are great topics for growing audiences.

I’ve advocated a different response. We need to think collectively and sensibly about how this emerging reality will affect our lives. Do-nothingism is not an answer; something can and should be done.

I've argued this, but not with much hope. So central are the Declans in our political culture today that I confess I cannot see a way around them. I have sketched small steps; they seem very small. I've described a different ideal; it seems quite alien. I've promised that something different could be done, but not by any institution of government that I know. I've spoken as if there could be hope. But Hope, it turns out, was just a television commercial.

The truth, I suspect, is that the Declans will win—at least for now. We will treat code-based environmental disasters—like Y2K, like the loss of privacy, like the censorship of filters, like the disappearance of an intellectual commons—as if they were produced by gods, not by Man. We will watch as important aspects of privacy and free speech are erased by the emerging architecture of the panopticon, and we will speak, like modern Jeffersons, about nature making it so—forgetting that here, we are nature. We will in many domains of our social life come to see the Net as the product of something alien—something we cannot direct because we cannot direct anything. Something instead that we must simply accept, as it invades and transforms our lives.

Some say this is an exciting time. But it is the excitement of a teenager playing chicken, his car barreling down the highway, hands held far from the steering wheel. There are choices we could make, but we pretend that there is nothing we can do. We *choose* to pretend; we shut our eyes. We build this nature, then are constrained by this nature we have built.

It is the age of the ostrich. We are excited by what we cannot know. We are proud to leave things to the invisible hand. We make the hand invisible simply by looking the other way.

But it is not a great time, culturally, to come across revolutionary technologies. We are no more ready for this revolution than the Soviets were ready for theirs a decade ago. We, like the Soviets, have been caught by a revolution. But we, unlike they, have something to lose.