INVENTING THE FUTURE:
BARLOW AND BEYOND

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> We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.
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> We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.
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> . . . .
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> We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.[1]

I know the purpose of this volume is not to merely praise or bury John Perry Barlow, but to use him as a jumping off point. But I don't think I can get to the second part without addressing what many of his critics miss about what he was trying to do with the *A Declaration of the Independence of Cyberspace* (*Declaration*).

Since Barlow's death, I've spent a lot of time trying to ensure that the straw men who have Barlow's face taped to them don't overshadow the actual man. The basic straw man story goes like this: Barlow was the leader of a band of naïve techno-utopians who believed that the Internet would magically fix all problems without creating any new ones. History has shown that the Internet didn't solve all problems and created many new ones, so Barlow was a fool or worse. Pieces like this showed up periodically during his lifetime too.

To be fair, the real Barlow definitely was an optimist and he loved all attention, positive or negative. You could argue that he sometimes pasted his own face on that straw man. Especially in the *Declaration*, his language was expansive and visionary. You don't start a legal or policy argument with: "you weary giants of flesh and steel."[2] You don't seek nuance with: "I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose

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[1] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, 18 DUKE L. & TECH. REV. 5, 5–7 (2019), *reprinted from* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (FEB. 8, 1996), https://www.eff.org/cyberspace-independence.
[2] *Id*. at 5.

on us."[3] In talking about the *Declaration* at Electronic Frontier Foundation (EFF) many years later, Barlow admitted that when he stepped out of a party at Davos to write it, he was both a little drunk and trying desperately to channel Thomas Jefferson. So maybe some of the sweeping rebukes are just trying to match his original bravado.

But I think that this approach misses what Barlow was up to. Barlow wasn't trying to predict the future; he was trying to invent it. Here's what he wrote in response to one of those "straw men" articles in the Washington Post in 2015:

> I [] knew that we were building the most penetrating and total surveillance system that could be imagined, and I was no more comfortable with the Googles (which didn't exist but predictably would) who would peer out through those All-Seeing Eyes than I was with an equally enhanced NSA, Chinese Government, or United States Cyber Command. However, just as Alan Kay said, "The best way to predict the future is to invent it," I knew it's also true that a good way to invent the future is to predict it. So I predicted Utopia, hoping to give Liberty a running start before the laws of Moore and Metcalfe delivered up what Ed Snowden now correctly calls "turn-key totalitarianism." Which is now available to a number of secretive institutions, public and private (not that there's a useful distinction).[4]

Barlow was trying to use the force of his will and mighty pen to bring a good future to pass in a world where it was far from certain. He was trying to get out ahead of what he knew would be the powerful forces against freedom online.

To be truthful, I didn't really understand that at first either. I used to start my early Internet law presentations with a quote from Ecclesiastes: "there is nothing new under the sun."[5] I would then proceed, like a good American litigator, to tie the liberties of the future Internet to the precedents in the founding of the country. I would tie anonymous online speakers to Publius of the Federalist Papers.[6] I would tie the need for digital encryption to the physical encryption systems

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[3] *Id.*

[4] Letter to the Editor from John Perry Barlow to the Wash. Post (sent in response to J. Silverman, *The Internet's First Anarchist*, WASH. POST, Mar. 22, 2015 (evening edition)).

[5] *Ecclesiastes* 1:9.

[6] A series of 85 essays, written by Alexander Hamilton, James Madison, and John Jay, explaining the Constitution and urging its ratification in the State of New York. *See generally* THE FEDERALIST (Alexander Hamilton et al).

used by Madison and Jefferson.[7] Later I would tie the fight against mass surveillance to James Otis' fight against general warrants.[8] Since Barlow's assertions were factually wrong—of course people could be held accountable for what they did online as long as their feet touched down in the jurisdiction of some government somewhere—I worried that he risked us losing the civil liberties and human rights online that so many had worked so hard to win offline.

In retrospect, we both had useful strategies for convincing different audiences to protect freedom online. It's just that I aimed for the Supreme Court while Barlow aimed for the sky. Unlike me, he gave a big voice to the dream that the digital world could be a chance for a fresh start against the incumbents—governments, telecommunications companies, movie and record cartels and more. His vision drew strongly on that powerful American idea that one could, like Huck Finn, "light out for the territory" to start anew.[9]

Remember, Barlow was writing in 1996 as the United States government tried to stop "indecent" speech online and demanded that all telecommunications lines be built to be easily tappable.[10] Barlow co-founded EFF with Mitch Kapor and John Gilmore in 1990 in response to government raids on online services like bulletin boards that reflected a nearly complete lack of understanding about the early users of public digital networks.[11] Governments were the biggest worry for building a

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[7] *See* Rachel B. Doyle, *The Founding Fathers Encrypted Secret Messages, Too*, ATLANTIC (Mar. 20, 2017), https://www.theatlantic.com/science/archive/2017/03/h3ll0-mr-pr3s1d3nt/521193/; *see also* Chris Campbell, *Thomas Jefferson Used Encryption*, LAISSEZ FAIRE BOOKS (Sept. 1, 2012), https://lfb.org/thomas-jefferson-used-encryption/.
[8] *See* Kade Crockford, *A Brilliant Young Man Who Left Plum Job in Opposition to General Warrants (in 1760)*, AM. CIVIL LIBERTIES UNION (June 18, 2013), https://www.aclu.org/blog/national-security/secrecy/brilliant-young-man-who-left-plum-job-opposition-general-warrants; *see also* David Snyder, *The NSA's "General Warrants"*, ELEC. FRONTIER FOUND. (2007), https://www.eff.org/files/filenode/att/generalwarrantsmemo.pdf.
[9] MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 295 (Glassbook Classic N.D.) (1884) (ebook).
[10] *See* Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C. §§ 1001–1021 (2012)); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (2012)).
[11] *See* John Perry Barlow, *A Not Terribly Brief History of the Electronic Frontier Foundation*, ELEC. FRONTIER FOUND. (Nov. 8, 1990),

free technology future in the early to mid-1990s so it's no surprise that Barlow focused his attention there.[12]

Barlow did so much inventing of the future that sometimes we forget what has gone his way. Chief among them is that the digital revolution eliminated barriers that physical distance used to create for information sharing and connection. He inspired people to believe that this new network would let them speak and connect to anyone around the world. On that score, the Internet has given a voice to far more people than broadcast or cable television or newspapers. Barlow's vision arguably led, along with some strong legal strategy, to the Supreme Court's embrace of the Internet as a place protected by the First Amendment in *Reno v. ACLU*:

> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.[13]

This promise is not over. At EFF we continue to work with people in remote (and not so remote) parts around the world who are struggling to make their voices heard and who still view the Internet as that best pathway to operating outside of repressive government control. Oppressed people worldwide continue to go to extraordinary lengths to use the Internet to get their message out to the world.

Barlow's early focus on governments as key obstacles to online freedom has helped us gain some protections that we might not have had without him. In order to ensure that the Internet became a place for formerly marginalized voices, we helped ensure that those places could

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https://www.eff.org/pages/not-terribly-brief-history-electronic-frontier-foundation.

[12] Barlow didn't just write about governments in the 1990s either and those who stop with the *Declaration* are selling him short. In 1993, long before the *Declaration*, Barlow published *Selling Wine Without Bottles: The Economy of Mind on the Global Net*. This essay, much longer and less expansive than the *Declaration*, recognized that the internet would create fundamental problems for intellectual property regimes and the companies that make their money from them. *See* John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, 18 DUKE L. & TECH. REV. 8 (2019), *also available at* ELEC. FRONTIER FOUND. (1994), https://www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net.

[13] Reno v. ACLU, 521 U.S. 844, 853 (1997).

exist, in part by standing up for the idea that, except in criminal circumstances, hosts should not be held legally responsible for what those voices say.[14] We have also seen digital search and seizure laws move slowly in the right direction, most importantly through the growing recognition from the Supreme Court, that the Fourth Amendment must be interpreted to reflect the realities of the modern world.[15] We lifted government restrictions on developing and sharing tools that protect privacy and security.[16]

Today we take it for granted that we can type or talk or scheme or build a tool or product or share or store information with someone in Gabon, Sao Paolo, or Bali just as easily as we can someone across town. People build friendships, create and grow political movements, fall in love and make each other laugh or cry across incredible physical distances instantaneously. We create mixes and remixes of our culture, building on each other's ideas with insight and ease. We have collaborative projects from Wikimedia to the Tor Project to Creative Commons Network, which span the globe in ways that were unthinkable in 1990. The same is true for businesses large and small. That this sort of distance-hopping would become commonplace was not obvious in the 1990s. Barlow's impact, "We will spread ourselves across the Planet so that no one can arrest our thoughts[,]" is undeniable.[17]

But there are major differences in the world we inhabit now and the world Barlow tried to invent. One of the key areas that has emerged as critical is a focus on how, through network effects, a lack of competition and stifled innovation, a small set of private entities has

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[14] 17 U.S.C. § 512 (2012) (protecting, through the safe harbor provisions of the Digital Millennium Copyright Act of 1998, service providers who meet certain conditions from monetary damages for the infringing activities of their users and other third parties on the Internet); 47 U.S.C. § 230 (2012) (providing, in the safe harbor provision of the Communications Decency Act of 1996, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").

[15] *See* Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (stating that as "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," the Supreme Court must assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted).

[16] *See* Bernstein v. United States Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999) (holding that software source code was speech protected by the First Amendment and that the government's regulations preventing its publication were unconstitutional).

[17] Barlow, *supra* note 1, at 7.

ended up having a tremendous impact on our civil liberties even if they are not the primary focus of the Constitution. While in the 1990s it was reasonable to focus on the government as the biggest risk to freedom online, we now have to address the problem of centralized corporate power, both as a tool of governmental repression and as its own problem for privacy, speech, and innovation.[18] Governments didn't go away, though. With the rise of authoritarian governments around the world we may soon see more focus on Barlow's original targets and there are now far more of them that have the technical wherewithal to censor, undermine and attack activists. The growth in the importance of the Internet means that the fronts on which we have to defend it have grown too.

Unlike the early days of the Internet, where a somewhat blank slate allowed the powerful offline incumbent companies to be cheerfully upended by upstart new players, we now have a set of big Internet companies that, having created their fortresses, are now trying to pull up the ladder. This is in addition to the long-ago success of the big telecommunications companies in eliminating serious competition in the broadband market. So, from the top layer of the Internet infrastructure to the bottom we have fewer choices and leverage than we should.

Sadly, the big Internet companies are now backing away from the kinds of protections that helped make it possible for them to exist. They are too often abandoning any commitment to provide a forum for marginalized people to speak, including the legal protections necessary for someone to create a new speech platform. They attack or fail to defend the right to build interoperable and competitive tools. They use one-sided click-wrap "contracts" to both disempower their users and support technical and legal claims that prevent reverse engineering and other sorts of follow-on innovation. *These Internet giants may not need the protection of these laws anymore, but their future competitors will*.

This centralization of corporate power has other consequences as well. Barlow believed that new approaches to solving conflicts would emerge, "Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract."[19] At this point in our contentious Internet history, it's clear that this hasn't occurred, at least not yet and not at scale.

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[18] Note that Barlow himself recognized this concern about corporate power in 2015. *See supra* note 4 and accompanying text. There are smatterings of it in earlier writings as well—Barlow had no love for monopolies or cartels, even if that wasn't his primary concern in the *Declaration*.

[19] *See* Barlow, *supra* note 1.

Harassment, hatred and other serious problems online have instead spurred calls for large online platforms to serve as judge, jury and executioner of what people may say online, even as the business models of these platforms arguably feed this behavior. The big companies have obliged, and now happily report how much speech they have censored rather than how well they have done differentiating the bad speech from the good or providing a forum for marginalized voices, much less adjusting their business models.

Finally, we have not succeeded in building a world "without privilege or prejudice," instead all too often re-creating or even making worse offline discrimination of marginalized people. While technology has made it possible for marginalized groups to find each other, associate and build communities together, this has not translated into the kind of political, financial or social power Barlow envisioned. Worse, the technology companies that have reaped the most financial benefits of this new world are even less diverse at the top than the corporate dinosaurs they replaced.

In the end, I think Barlow was right to focus on technological advances empowering users and communities to self-organize to respond to bad actors and actions online, even if we aren't there yet. But we also need law and policy to ensure that we can create and support the tools necessary to keep the Internet free. Without that, the big corporations are inevitably going to cater to those with the most power and voice, rather than stand with the less powerful. And governments will happily put pressure on them to do so. By pressuring our corporate dictators to protect us, without efforts to empower users and communities to protect themselves, we risk further re-creating online the marginalization that the powerless have long experienced.

In short, we are seeing that in many ways the new bosses are the same as the old bosses. Offline prejudices and power differentials are more easily replicated online than Barlow had hoped—and they are just as difficult to undo.

INVENTING 2039

So on to the fun question posed by this symposium. What should we take from today into the next 20 years? Or as Barlow might put it, what do we need to say and do today to invent the future we want? While a short answer could be that we want to win our current fights: rein in government surveillance, protect coders, privacy and freedom of expression, ensure neither copyright nor overbroad criminal laws squelch freedom of expression, freedom to tinker or innovation online, and more.

But Barlow would want us to go further. I brainstormed a bit with my EFF colleagues and the theme that came up consistently in our conversations was envisioning a future where power and control rested to the end points in the network—the humans. Here are some of the ideas we generated, presented with a light touch of Barlow-style rhetoric:

We are building a civilization that empowers humans as the users, builders and beneficiaries of technologies. Governments, businesses, religions, cultures, communities and robots all matter, but they all work under, and are transparent to, the bright light of the humans they serve. We're building a society that gives power back to people, especially those who have been robbed of it for too long. We unflinchingly recognize the bias and prejudices that have forestalled equity and caused our visions of a just society to fall short, and we use the power of technology and law to ensure those wrongs cannot invade further into our digital societies.

We are building a world where the users have primary control over their tools, devices and networks. Technology serves us, not the other way around, and it treats efforts to surveil, track or profile us as hostile measures that should be blocked. Where it cannot, we have protected pathways—legal, technological, policy and cultural—so that we can leave those walled gardens, panopticons and crystal prisons to build our own new worlds.

We're building a society where technological advances serve to empower humans rather than tricking, manipulating or replacing them. Builders take care to ensure that all technologies, no matter how sophisticated, are fundamentally accountable to the humans who are impacted by them, not just the humans who build or deploy them.

We are building a society where control has moved from centralized systems—from the Facebooks and Amazons and Alphabets—to the end points, the users. A society where power is distributed along with technology, including the power to control who can see what we do and say and to keep ourselves secure. We are building a civilization where people not only have the right to speak, they have the right to have their voices heard and heeded. A civilization where people can gather together to build a better world, free of government or corporate surveillance. A civilization where agreements must really be "agreed" to, because all those party to them have the power to require a real negotiation and meeting of the minds. A civilization where the consequences of inevitable technological mistakes and glitches are borne by those who implement and benefit from the technology, not just those who are affected by their mistakes or lack of care.

We seek a civilization governed not by corporate policies but primarily by self-governing communities of trust, where protections for users come from their tools and communities, who have careful, thoughtful mechanisms for stepping in when users are harassed, threatened or harmed, along with mechanisms to correct mistakes and redress wrongs. If that fails, people can obtain real legal redress from those who have harmed them, but also have an easy path to leave, including to choose or start a community that better reflects their values and protects them. We seek a world where people have many such communities to choose from and can participate in multiple ones seamlessly, including choosing a separate identity for each. Ultimately, we seek a civilization that contains multiple options, laboratories and experiments for how to organize a society, so that we can all learn and make conscious choices to move forward.

We are building a civilization where empowerment is not expressed through property rights, ownership and one-sided adhesion contracts as much as by protecting autonomy and control while still promoting free expression and transparency. Just as Barlow recognized the need for new methods of monetizing creative work,[20] in the next 20 years we will evolve new ways to establish control and protection over our personal data. We will recognize both the need for personal and associational privacy and control and the critical role of free flowing information in keeping us informed and empowered.

In short, we are building a world where everyone has free (as in speech) access to read, speak, create, and control their experience, including creating their own tools and protecting their own privacy. A world where humans have the legal, policy and cultural support and protection to do so. Where individuals have the strength and processing power to take on larger organizations, whether government or corporate, as well as to be protected from them. A world where our technology, whether as simple as an email or as complex as an AI system, is trustworthy and loyal to us.

May it be more humane and fair than the world your governments and giant companies have made before.

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[20] *See* Barlow, *supra* note 12.