

REVISITING BARLOW'S MISPLACED OPTIMISM

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Barlow's *A Declaration of the Independence of Cyberspace* calls for a "civilization of the mind in cyberspace," and he says it will be "more humane and fair" than what governments have created.¹ Barlow's vision is unapologetically optimistic, easily embraced by anyone who longs for better times to come. Yet twenty years later, it's easy to see some important respects in which reality fell short of his vision. Alongside the Internet's many pluses are clickbait, scams, hacks, and all manner of privacy violations. Ten thousand hours of cat videos may be delightful, but they're no civilization of the mind. With a bit of hindsight, Barlow's techno-utopianism looks as stilted as other utopianism—and equally far removed from reality.

Beyond being overly optimistic about how perfectly the 'net would unfold, Barlow was also needlessly skeptical of plausible institutions to bring improvements. He writes: "The only law that all our constituent cultures would generally recognize is the Golden Rule."² But the moral suasion—and practical effectiveness—of the Golden Rule presupposes participants of roughly equal power and status. It is no small feat to meaningfully consider what Joe User might want from Mega Social Network if the tables were turned and Joe owned the goliath. As a practical matter, any claim a user has against a goliath requires state institutions to adjudicate and enforce. When Barlow wrote *A Declaration of the Independence of Cyberspace*, tech goliaths were much smaller. Plus, the Internet's early users were in a certain sense more sophisticated than the mainstream users who eventually joined. So the gap from little to big was much narrower then, arguably making governments less important in that era. But as the big get bigger and as the Internet attracts average users who lack the special sophistication of early adopters, governments play key roles—adjudicating disputes, enforcing contracts and beyond.

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¹ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, 18 DUKE L. & TECH. REV. 5, 7 (2019).

² *Id.* at 6.

I. THE SUCCESSES OF RECENT TECH-POLICY

It's easy to criticize government interventions that are ham-handed or worse, and even easier to mock the occasional politician abusing terminology. (Think Ted Stevens' "series of tubes."³) But stepping back, I'm struck by the important work that governments have done with relative success. Let me offer some specific examples:

First, government succeeded in reining in some of the most clear-cut violations of copyright. Consider Napster. It was a remarkable moment when internationally-known tech startups, VC-backed firms, and even publicly-traded firms were fairly alleged to have intentionally facilitated copyright infringement, and indisputably profited from it.⁴ Against that backdrop, Barlow presented piracy as both inevitable and appropriate, and he made the arguments well. But the fact of piracy in the shadows nowhere necessitates investors getting rich—or content creators giving up the rights plainly provided by longstanding law. More recently, rights-holders and service providers found room to disagree about copyright treatment of peer-to-peer video sites,⁵ news articles,⁶ image thumbnails,⁷ and countless other issues arguably at the boundaries of copyright. If one of these is your life's work or your income source, it may seem like no small matter. One wouldn't say courts have offered an overwhelmingly compelling approach to these questions. Nonetheless,

³ Senator Ted Stevens, Remarks at Senate Commerce Committee Hearing on Net Neutrality (June 28, 2006).

⁴ For example, Napster counted among its funders some of Silicon Valley's most well-regarded investors. In separate litigation against video-streaming service Veoh, Universal Music Group alleged that three of Veoh's investors were so intertwined with company operations that they should themselves be liable for the infringement UMG saw at Veoh's site—the Ninth Circuit disagreed. *See UMG Recordings, Inc. v. Shelter Capital Partners L.L.C.*, 718 F.3d 1006, 1013, 1022–23 (9th Cir. 2013). Meanwhile, litigation documents revealed that YouTube co-founders personally uploaded infringing material, embracing a strategy of using infringing videos to attract users and increase the site's valuation. *See Viacom's Statement of Undisputed Facts in Support of Its Motion for Partial Summary Judgment at 8–10, Viacom Int'l Inc. v. YouTube Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (No. 1:07-cv-02103).

⁵ *See e.g., Viacom*, 718 F. Supp. 2d at 514.

⁶ *See e.g., EU Copyright Directive*, Art. 11 (not yet in force); *see also Ley De Propiedad Intelectual* (B.O.E. 2014, 11404) (Spain) (limiting how news aggregators and other online services can use news from publishers, and broadly requiring licenses and payments); *Achtes Gesetz Zur Änderung des Urheberrechtsgesetzes* [Copyright Law], May 7, 2013, BGBl I at 23 (Ger.) (same).

⁷ *See e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

courts successfully put a stop to the most brazen illegality, and to those who sought to profit most directly from it. Napster and Grokster, good riddance.⁸

Second, government has made important progress opposing online scams.

- Post-transaction marketers placed ambiguous buttons like “continue” onto retailers’ confirmation screens. Pressing such a button enrolled a user in a high-priced monthly subscription from a company whose site she had never even visited. “But wait!” you might protest: “She never gave that company her credit card number.” That’s true but oddly irrelevant: Post-transaction marketers copied a customer’s credit card numbers from the just-completed transaction, making it altogether too easy to “agree” to a monthly charge that was genuinely unexpected.⁹
- Online platforms sold games and virtual trinkets to kids and denied parents’ requests for refunds. It’s Hornbook law that kids broadly have the right to void transactions,¹⁰ most of all those entered in the “weakness of youth.” Online games, designed to addict, fit the rule in spades. Nonetheless, game and app platforms argued that they had always said “all sales are final,” so they refused refunds. Litigation by private attorneys (this author among them) and the FTC delivered refunds for many who were harmed.¹¹
- Tech support scammers claimed to call from well-known tech companies, but charged big money for snake oil or

⁸ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (effectively shuttering the firm); *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (same).

⁹ See MAJORITY STAFF OF OFFICE OF OVERSIGHT & INVESTIGATIONS, STAFF OF S. COMM. ON COMMERCE, SCI. & TRANSP., 11TH CONG., *AGGRESSIVE SALES TACTICS ON THE INTERNET AND THEIR IMPACT ON AMERICAN CONSUMERS* (Comm. Print 2009); Benjamin Edelman, *Deception in Post-Transaction Marketing*, BENEDELMAN.ORG (Nov. 19, 2009), <http://www.benedelman.org/posttransaction/>.

¹⁰ See 5 WILLISTON ON CONTRACTS, § 9:5 (4th ed. 2018).

¹¹ See, e.g., *Bohannon v. Facebook, Inc.*, No. 12-cv-01894-BLF, 2019 WL 188671 (N.D. Cal. Jan. 1, 2019); see also FTC proceedings against Amazon.com, Inc. (F.T.C. File No. 122 3238, Civil Action No. 2:14-cv-01038, W.D. Wash.), Apple Inc. (F.T.C. File No. 112 3108), and Google, Inc. (F.T.C. File No. 122 3237).

worse. After a series of raids in the United States and abroad, key perpetrators were brought to justice, and these schemes much reduced.¹²

Super-libertarians sometimes blame victims for their gullibility in falling for these schemes. But I doubt Barlow would have had that instinct. Barlow was always a friend to the little guy, and I never knew him to blame anyone even for the clearest of foolishness. In any event these practices are basically offensive to most Americans. To its credit, the judicial system saw the offense and stepped into action.

Notably, all these successes were achieved via traditional mechanisms of state power. Lawyers wrote complaints and filed motions. Judges heard witnesses and wrote decisions. Politicians held hearings and talked of new legislation. (Occasionally, though only occasionally, they actually passed bills on these subjects.) The industry details would be unfamiliar to the Founding Fathers, but the procedure was as they intended it. Government doesn't look so hopeless after all. Though the misbehavior occurred online, the perpetrators were flesh-and-blood—unavoidably subject to legal proceedings.

II. WORK TO BE DONE

Despite these successes, much important work remains to be done in making online communication all it can be. Some examples:

First, competition policy demands renewed attention. The leading online social network has grown so large that its founder-CEO can't name a viable alternative.¹³ In many countries, the leading search engine outranks competitors fifty-to-one. Even sectors with competition are a far cry from the models in economics textbooks. In online travel booking, two behemoths together control all the brands you've heard of.¹⁴ Competition in smartphone operating systems is similarly just two choices. Some argue that consolidation results from proper factors, causes little harm, or is otherwise unobjectionable. Reasonable people can disagree. But as politicians on both sides of the aisle turn their focus to market concentration, we can't assume unchecked market forces are the end of the story.

¹² See, e.g., *F.T.C. v. Elite IT Partners*, No. 2:19-cv-00125-RJS (D. Utah 2019).

¹³ *Facebook, Social Media Privacy, and the Use and Abuse of Data: Joint Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Commerce, Sci., & Transp.*, 115th Cong. (2018) (testimony of Mark Zuckerberg).

¹⁴ Benjamin Edelman, *Impact of OTA Bias and Consolidation on Consumers*, BENEDELMAN.ORG (July 12, 2017), <http://www.benedelman.org/publications/ota-bias-12jul2017.pdf>.

Second, consumers demand improved handling of hacking, ransomware, and the like. It is an outrage for an anonymous villain to hack your computer, encrypt your files, and demand, quite literally, a ransom for release of your hard-earned data. Equally outrageous are the sites that specialize in hosting material designed to harm—sites designed for negative reviews of small businesses (removable only if businesses pay for that privilege); sites that solicit photos of ex-lovers (again, removed only upon payment). Apparently market forces create these abominations. But no one should be surprised if a civilized democracy elects to prevent them.

Third, cyber-bullying is unsustainable. This isn't just schoolkid antics; careers have been ruined, and lives lost. Tech goliath platforms host these attacks, and they've been troublingly indifferent to the harm they facilitate.

I credit the predictable practical difficulties in government interventions on these subjects. Some schemes cross jurisdictions, creating a longstanding challenge. Do citizens of Illinois want to pay their police to pursue a hacker who mostly targets New Yorkers? How about the citizens of India? Russia? Yet everyone is somewhere. A perpetrator may think himself safe by staying far from his victims, but organized victims can nonetheless seek satisfaction—whether by themselves paying the cost of pursuit, or by targeting the miscreant's inevitable local assets and resources.

Fixing other problems will require consensus on who should actually be blamed. When a user is hacked, should we blame that user (for failing to keep her computer or phone secure), the company whose software or service was too easily hacked, or the hacker who actually pressed the button? Does the answer change when the harm is money lost versus privacy versus life itself? In the abstract, few people endorse blaming the victim. Yet the experts who examine these problems often cannot resist telling victims how they went astray.

Reflecting on these situations, I inevitably turn back to Barlow's reference to the Golden Rule as the supposed only source of authority. The victim of a cyber-mob would be thrilled to agree not to bully anyone in exchange for not being bullied. But that imagined agreement does her little good. The reality is that she is being bullied. Either someone will help, or no one will help. The Barlow I knew would have wanted to help, but with the departure of his body, we're left only with his text which calls for every man to himself. I don't see why that's the right result or a necessary result. Anyone who cares about a victim—really, anyone who knows a victim—should want better.

III. LOOKING FORWARD

In offering a vision of government making genuine progress on these challenges, I'm reminded of the bold government programs that are today largely beyond dispute.

A century ago, the Pure Food and Drug Act sought to assure accurate labeling, purity, and ultimately safety to products Americans consume every day.¹⁵ By all accounts this seemed difficult at the time. What stops a factory from changing its process or ingredients when the inspector leaves? And who's to say what consequences a drug might entail years later. Yet today the FDA achieves substantial success, and the problems of that era are delightfully in the past.

A generation later, the GI Bill of Rights stood for the principle that after defending the nation, a serviceman deserved a quality education and the reliable job it would usually bring.¹⁶ The next generation established Medicare—a safety net to assure that our nation's elderly would get sustenance and medical care befitting the nation's prosperity.¹⁷ For both of these, there were serious questions about cost and sustainability from the outset—but the moral imperative was clear, and the projects went forward. I never discussed these subjects with Barlow, and so far as I know he never wrote about them or spoke publicly about them. But each of these programs faced genuine challenges, arguably at least as fundamental as the technology architecture Barlow considered so important. We should be emboldened by our prior successes and no less willing to take on great challenges as we look ahead.

Ultimately, we can't have an important area of commercial and social activity that is above the law. Barlow excitedly envisioned a tech sector that was *de facto* above the law. The past twenty years, and especially the past few, have shown why that's every bit as dangerous as it sounds. In Barlow's honor, we should aspire for better.

¹⁵ See Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906).

¹⁶ See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

¹⁷ See Social Security Act of 1965, Pub. L. No. 89-97, §§ 1801–1844, 79 Stat. 286.