

UNWILLING AVATARS: IDEALISM AND DISCRIMINATION IN CYBERSPACE

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I made image upon image for my use . . .
I made god upon god . . .
I made the gods less than men
for I was a man and they my work.

- H.D., *Pygmalion*[†]

INTRODUCTION: GODS AND MONSTERS

Few would deny that cyberspace has a dark side. The of such negative incidents and perhaps even more widely as to the appropriate response to these incidents.¹ On one side are voices calling for increased regulation of the Internet: user codes of conduct,² the reform of Section 230 of the 1996

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¹ For reports and symposia on such incidents, see, e.g., INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES (2008), <http://cyber.law.harvard.edu/pubrelease/isttf>.

² See, e.g., Tim O'Reilly, *Draft Blogger's Code of Conduct*, O'REILLY RADAR (Apr. 8, 2007), <http://radar.oreilly.com/archives/2007/04/draft-bloggers-1.html> (last visited Mar. 9, 2010); *A Blogger's Code of Ethics*, CYBERJOURNALIST.NET (Apr. 15, 2003),

<http://www.cyberjournalist.net/news/000215.php>; see also Brad Stone, *A Call for Manners in the World of Nasty Blogs*, N.Y. TIMES, Apr. 9, 2007, available at http://www.nytimes.com/2007/04/09/technology/09blog.html?_r=3&scp=1&sq=manners%20nasty%20blogs&st=csc.

Communications Decency Act (CDA § 230),³ and stricter laws regarding online defamation, threats, and invasions of privacy.⁴ On the other side are those who argue that the benefits offered by the free and unregulated exchange of ideas that characterizes the medium of cyberspace far outweigh the harms facilitated by the Internet.⁵

The latter view is based on what this Article calls cyberspace idealism—the view of cyberspace as a utopian realm of the mind where all can participate equally, free from social, historical, and physical restraints. Though the high-flown rhetoric of early cyberspace idealists⁶ may now seem somewhat dated, the liberationist vision at its core maintains its hold on our (increasingly online) collective imagination. This vision is a quasi-Cartesian one: a vision of human identity as fundamentally divided between mind and matter, where matter is limiting and temporal and, as such, in many ways inferior to the mind. For those who hold this vision, cyberspace presents the opportunity to escape physical limitations, both geographic and bodily.

The concept of the *avatar*, broadly conceived, is central to cyberspace idealism. The term is generally used to refer to users' virtual self-representation—from sophisticated graphics to simple pseudonyms—in computer games, virtual reality systems and chat rooms. As used in this Article, an avatar also stands

³ 47 U.S.C. §230 (2000).

⁴ See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 95 (2009); Brittan Heller, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 285 (2007); David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN ST. L. REV. 667 (2006).

⁵ See e.g., FREE SPEECH, ELECTRONIC FRONTIER FOUND., <http://www EFF.org/issues/free-speech> (last visited June 20, 2011) ("Preserving the Internet's open architecture is critical to sustaining free speech. But this technological capacity means little without sufficient legal protections. If laws can censor you, limit access to certain information, or restrict use of communication tools, then the Internet's incredible potential will go unrealized.")

⁶ See, e.g., John Perry Barlow, *Declaration of the Independence of Cyberspace*, <http://homcs EFF.org/~barlow/Declaration-Final.html> (last visited: June 20, 2011); David R. Johnson and David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

more generally for the unique mode of being that cyberspace allows. The very structure of cyberspace facilitates a wall between a person's "real" identity and their virtual one. The term "avatar" is Sanskrit for "incarnation," and the religious resonance is telling. Cyberspace provides, according to this view, a powerful counter to the real world. In real life, individuals are constrained by physical limitations, with all the prejudice and division this engenders. In cyberspace, the only limitation is an individual's imagination and creativity.

Cyberspace idealism often produces conflicting accounts of the "realness" of cyberspace. On the one hand, cyberspace is often regarded as more real than real life—that is, the ability to control the terms of representation makes cyberspace existence more genuine. On the other hand, harms committed in cyberspace are often dismissed as "not really real," as they are by their nature not physical, bodily harms. The way this tension plays out in terms of the law's recommended role in cyberspace can yield schizophrenic results: freedom of speech, for example, in cyberspace is "really real" and must be vigorously protected; harassment in cyberspace is not "really real" and thus should not be taken very seriously.

This is not to say that cyberspace idealists do not find any cyberspace practices harmful. Many idealists do not object to tort and criminal remedies for defamation or stalking that occurs in cyberspace. The idealist position does, however, treat such harms as aberrations, as occasional malfunctions in an otherwise smoothly operating system. This Article argues that the idealist view sets up a false picture of cyberspace that preempts the proper evaluation of the harms of cyberspace harassment. Specifically, the idealist view fails to recognize—or at least to take seriously—how the same features of cyberspace that amplify the possibilities of individual liberty also amplify the potential for discrimination. Cyberspace idealism drastically downplays the Internet's power to activate discriminatory stereotypes and social scripts.

This Article focuses on the particular discriminatory phenomenon of the unwilling avatar. In stark contrast to the way users exert control over their online identities, the creation of unwilling avatars involves invoking individuals' real bodies for

the purposes of threatening, defaming, or sexualizing them without consent. Sometimes the creation of unwilling avatars takes a very literal form: for example, hacking into the account of a gamer and using her avatar as though it were your own, or creating a false profile of a real person on a social networking site. Other examples of unwilling avatars are more figurative. For example, women have been targeted for "revenge porn," a practice where ex-boyfriends and husbands post to the web sexually explicit photographs and videos of them without their consent. Another example is the case of Kathy Sierra, who was attacked by anonymous bloggers and posters with manipulated photographs and threats of death and sexual violence. Female law school students also become unwilling avatars when they are targeted by graphic and violent sexual threads at message boards such as AutoAdmit.com.⁷ In most cases of cyberspace harassment, the perpetrators use pseudonyms⁸ while identifying their targets not only by name but often also with private information such as home addresses and social security numbers. This informational asymmetry further aggravates the inequality resulting from cyberspace harassment.

The unwilling avatars phenomenon affects the way that many different groups interact with cyberspace, among them racial and sexual minorities. This Article focuses specifically on the way this phenomenon affects women, not because the impact on other affected groups is less important or interesting, but because the gendered dimension of harassment and abusive behavior online is worthy of independent study.⁹ Cyber harassment affects women disproportionately, both in terms of frequency and in terms of impact. Moreover, there is a particularly poignant irony in the nonconsensual sexualized embodiment of women in cyberspace. As will be discussed in

⁷ See sources and accompanying text *supra*, note 7.

⁸ Users generally must choose a screen name before they can post comments or enter chat rooms. Few people opt for their real name, choosing instead to post under a pseudonym.

⁹ Some cyber harassment is also perpetrated by women against men, and by women against women. It is not yet clear how much cyber harassment follows these patterns, and so this Article will refrain from addressing those forms in detail.

more detail below, cyberspace can present particularly compelling opportunities for women because they feel the constraints of physical vulnerability, especially sexual vulnerability, more acutely than men. In that case, the extent to which this physical vulnerability is re-imposed upon them—principally by men—in cyberspace is truly disheartening. If cyberspace harassment makes many women feel less safe online than they do in real life, and more exposed and vulnerable to sexual aggression both on and offline, this undermines the idealistic promise of cyberspace in a significant way. The volume and viciousness of cyber-attacks—especially sexualized attacks—on women by men suggests that cyberspace cannot be thought of as a place where, on balance, women and men can participate equally. Rather, it is a place where existing gender inequalities are amplified and entrenched.

This Article is concerned with gender discrimination as an interference with liberty and equality. It advocates for an expansive notion of liberty, one that includes the freedom to think and act and develop one's life as one wishes, without political *or social* restraints, except where that liberty would harm others.¹⁰ Though John Stuart Mill is invoked frequently in debates concerning the relationship between law and liberty, his insight that social restraints on liberty are often more pernicious and difficult to challenge than political ones is often forgotten. This insight is key to any complete analysis of discrimination's effects on liberty. Restraints on liberty can manifest in the form of formal legal restrictions, as they did in laws permitting slavery, but they can also manifest as social restrictions, as they do in cross-burnings and racist propaganda. An African-American man who could not enter a restaurant that had a "whites only" sign in the window experienced a once-legally permissible infringement on his liberty; an African-American man who avoids the same restaurant because of the racist jeers and taunts of other customers experiences a social infringement on his liberty. This is not to collapse the two experiences into one—for there are important differences between them—but merely to underscore the point that infringements on liberty can occur both through legal-political means and social means.

¹⁰ JOHN STUART MILL, ON LIBERTY 13 (1869).

A world in which members of certain groups avoid places, professions, opportunities, and experiences because they fear *de facto*, rather than *de jure*, discrimination—based not on their ideas but on their bodies (e.g. because they are women, or gay, or black)—is not a world that maximizes liberty.¹¹ The virtual world has not only reproduced the various forms of discrimination that exist in the physical world, but has allowed them to flourish in ways that would not be possible in the physical world. Again, one could use any number of examples, racism¹² and homophobia among them, to illustrate this principle, but this Article deals specifically with sexism in cyberspace. Women shut down their blogs, avoid websites they formerly frequented, take down social networking profiles, refrain from engaging in online political commentary, and choose not to maintain potentially lucrative or personally rewarding online presences due to cyberspace harassment.¹³ The harms they experience also spill over into their offline lives: women have dropped out of school, changed jobs, moved cities, gone into hiding, experienced mental breakdowns, and, in extreme cases, committed suicide due to cyberspace harassment.¹⁴ The harassment that they experience is promulgated by users who overwhelmingly self-identify as male, though most remain anonymous beyond that, and is overwhelmingly characterized by obscene, sexually violent, sexist language and behavior.

When cyberspace idealists argue against increased legal regulation because of its implications for liberty, they ignore the fact that cyberspace harassment has already undermined and compromised liberty. Sometimes this ignorance is genuine; sometimes it is thoroughly disingenuous, in that many

¹¹ It is true, however, that many scholars argue that only the first form is properly under law's control. See, e.g., ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

¹² See e.g., Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000); Margaret Chon, *Erasing Race?: A Critical Race Feminist View of Internet Identity-Shifting*, 3 J. GENDER RACE & JUST. 439 (2000).

¹³ See Citron, *supra* note 5, at 64.

¹⁴ *Id.* at 68.

cyberspace idealists are fully aware that the liberty they desperately wish to defend is liberty only for others like them.¹⁵ In either case, it is necessary to explode the myth of cyberspace as a state of liberty that deserves wide deference and instead view it for what it is: a state of license in which certain groups with power oppress, threaten and harass groups with less power. As Locke described it in *Two Treatises on Government*, a state of license is one in which some groups have taken liberty at the expense of others.¹⁶ Such a state is no longer “natural,” according to Locke, and as such requires intervention of the law.¹⁷ Cyberspace has become a state of license in which women as a group are afforded less liberty than men as a group and thus must be regulated through laws that distribute liberty more equally. If cyberspace is not to be merely a state of license, we must turn our attention to finding the best possible legal responses to harassment.

Part I of this Article begins with a description of cyberspace idealism— who propounds it, how, and with what effect. This Part highlights the conceptual significance of the avatar in cyberspace idealism and investigates how the fantasy of cyberspace as a Lockean “state of liberty” closely tracks and mutually reinforces liberal conventional wisdom about the “marketplace of ideas.” Part II complicates the picture of cyberspace advanced by idealists, detailing the phenomenon of “unwilling avatars” and its effects on women in particular. This Part demonstrates how cyberspace more closely resembles a Lockean state of license than a state of liberty and looks to Mill’s conception of social restraints on liberty for insight into the restriction of harmful speech. This Part also shows how the nature of cyberspace magnifies the harmful effects of discrimination. Part III describes how the phenomenon of unwilling avatars serves as a “double embodiment” that not only undermines women’s ability to escape or subvert real-world

¹⁵ Anthony Ciolli and Jarret Cohen, the original owners of AutoAdmit.com, may fall into the latter category. See *infra* note 57 and accompanying text.

¹⁶ JOHN LOCKE, TWO TREATISES ON GOVERNMENT AND A LETTER CONCERNING TOLERATION 102 (Ian Shapiro ed., Yale Univ. Press 2003) (1689).

¹⁷ *Id.* at 154–56

inequality in cyberspace, but also reinforces that inequality. Part IV addresses objections to the analysis of cyberspace harassment offered here.

I. Cyberspace Idealism: Paradise?

A. Avatars in Utopia

As many scholars have described it, the creation of cyberspace is only the most recent of human attempts to create a utopia.¹⁸ The utopian drive is certainly not new: it can be observed in rhetoric about the New World, the Wild West, Communist Russia, cults, and any number of hippie communes.¹⁹ The concept of paradise seems to exert a particular influence over western Judeo-Christian civilization, reflected (or possibly produced) by its literal placement at the beginning of human time in the Bible. Paradise in Christianity is much more than just the Garden of Eden; it is a metaphysical, originary condition—the pure state from which humans have fallen.²⁰ Freud proposed that religious belief was largely driven by a commonly-felt nostalgia for a lost state of perfect wholeness—what he referred to as the “oceanic feeling” (a term coined by Romain Rolland) and surmised was really a dim remembrance of the womb.²¹ Whatever its literal source, the belief in and nostalgia for a state of perfection has been a frequent theme in Western literature, exploration and politics.²²

¹⁸ See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 4 (1999).

¹⁹ *Id.*

²⁰ See Romans 5:12; Aurelius Augustin, Bishop of Hippo, *A Treatise on the Merits and Forgiveness of Sins, and on the Baptism of Infants*, in A SELECT LIBRARY OF THE NICENE AND POST-NICENE FATHERS OF THE CHRISTIAN CHURCH 58-59 (Philip Schaff ed., 1987); JOHN MILTON, “PARADISE LOST: A POEM WRITTEN IN TEN BOOKS”: AN AUTHORITATIVE TEXT OF THE 1667 FIRST EDITION 10 (John T. Shawcross & Michael Lieb eds., 2007) (1667).

²¹ See SIGMUND FREUD, THE FUTURE OF AN ILLUSION 34-35 (James Strachey ed., W. D. Robson-Scott trans., 1964) (1927).

²² There is even an entire academic field of utopian studies. See *About the Society*, THE SOC. FOR UTOPIAN STUD., <http://www.utoronto.ca/utopia/about.html> (last visited June 20, 2011).

It is not difficult to see why cyberspace, especially in the early days of the internet, would incite such utopian fervor. As noted by numerous writers, cyberspace provides a heady opportunity to escape one's physical boundaries, both geographical and personal, in a more extreme way than ever before. In cyberspace, as the saying goes, "no one knows you're a dog."²³ Or a woman, or a Jew, or overweight, or deaf, or whether you're in Arkansas, or Massachusetts, or St. Petersburg. At its most basic level, cyberspace seems to allow people to control who they want to be and to go wherever they want to go.

While most people think of avatars primarily as sophisticated visual icons of virtual worlds and computer games (e.g., the avatars in *Second Life*, where users can choose from a wide range of body types, skin colors, facial features, clothing, and accessories), the term encompasses more minimalist representations as well, such as pseudonyms, also known as "handles," in online chat rooms, blogs, and instant messaging. What is common to all avatars, however, is that they allow users to make choices about their virtual identity. In theory, no matter how one looks, dresses, or walks in real life, a user can create his or her own identity within the range of options available in a given environment.²⁴ At a minimum, avatars allow users to separate themselves from who they "really" are. Avatars can behave in ways their users never would in real life, making it possible for individuals to communicate and act in ways foreclosed in the offline world.

In English, the term "avatar" has been used since the 1980s to describe the visual or textual representations of computer users. The term was first used in this context in *Ultima*, a computer game series created by Richard Garriot in 1981. In the fourth game of that series, the player's quest is to become enlightened in the "Eight Virtues" in order to become a spiritual model in the fictional land of Britannia. Once a player achieves

²³ Peter Steiner, Cartoon, *On the Internet, Nobody Knows You're a Dog*, NEW YORKER, July 5, 1993, at 61.

²⁴ There are reasons to be skeptical about the broad claims made by avatar enthusiasts—the avatar options available to users in a given virtual environment may themselves reflect racist, sexist, or heteronormative biases—but that is not the focus of this Article.

enlightenment in the virtues—honesty, compassion, valor, justice, honor, sacrifice, spirituality, and humility—he or she becomes the Avatar. Garriot was reportedly influenced by a television show about the avatars of Hinduism and the sixteen virtues that they were said to have to master.²⁵ The term avatar was also used in Neal Stephenson's 1992 novel *Snow Crash*.²⁶ In the novel, Stephenson posits a virtual-reality based successor to the Internet, the Metaverse. Users' virtual representations of themselves in the Metaverse are called avatars. Those who can only access the Metaverse through public terminals are marked by the poor visual quality of their avatars, which greatly influence social status. *Snow Crash* was a hugely popular novel and is credited with popularizing the term "avatar" to refer to the virtual representations of gamers and computer users more generally.

It is no accident that the identities users create in virtual reality settings are called avatars. The Sanskrit word "Avatara" is often translated into English as "incarnation," but literally means "descent."²⁷ In Hinduism, the term generally describes the descent of the Supreme Being into lower spiritual realms.²⁸ Vaishnava Hindus, who worship Vishnu as the supreme god, believe that Vishnu has ten principal avatars. Each avatar appears in a different historical age to save the world from strife and destruction. Vishnu's avatars have taken various forms, including animals, humans and beings that are half animal and half human. Religious scholars have noted that the Hindu conception of the avatar bears much similarity to the Christian conception of incarnation—a divine being that takes on human form.

The religious resonance of the term "avatar" is thus appropriate. The power to shape one's virtual embodiment

²⁵ SHAY ADDAMS, *THE OFFICIAL BOOK OF ULTIMA* (1990).

²⁶ NEAL STEPHENSON, *SNOW CRASH* (1992).

²⁷ CARL OLSON, *THE MANY COLORS OF HINDUISM: A THEMATIC-HISTORICAL INTRODUCTION* 148 (2007).

²⁸ See JEANEANE D. FOWLER, *HINDUISM: BELIEFS AND PRACTICES* 17 (1997).

evokes a sense of liberation and transcendence, perhaps even a sense of divinity. The real world is riven by prejudices of all kinds; race, gender, class and physical appearance create social stratifications and hierarchies that are difficult for individuals to challenge. In cyberspace, however, users have the opportunity to escape those constraints. The power of the avatar is, on this view, the source of cyberspace's radical social potential. Cyberspace, populated by self-created avatars and freed from physical constraints, evokes visions of a paradise.²⁹

**B. The State of Nature and the Marketplace of Ideas:
Two Ways of Looking at the Law**

Given that cyberspace offers significant liberating possibilities, it was predictable that a certain idealism would spring up with the widespread use of the Internet. The new possibilities of interaction, activity, and information for individuals who might never have possessed the confidence or ability to partake of them in real life are exciting. This excitement lends itself easily to idealization, reflected in rhetoric about cyberspace's unique capacity for equality and the free exchange of ideas. As John Perry Barlow put it in his Declaration of the Independence of Cyberspace:

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. 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.³⁰

A striking feature of this rhetoric is its similarity to the way John Locke describes the "state of nature."³¹ Locke's description of the state of nature, *contra* Hobbes' darkly pessimistic view, is of

²⁹ But see, e.g., Lauren Bans, *Same Shit, Different Life*, BITCH MAG. 39 (2008), at 57 (criticizing racism and sexism in *Second Life*).

³⁰ Barlow, *supra* note 7.

³¹ LOCKE, *supra* note 17, at 101.

a state of liberty and equality: a paradise.³² As Locke tells it, the state of nature is a state of liberty: “[A] state of perfect freedom [for mankind] to order their actions and dispose of their possessions and persons as they think fit.”³³ Locke’s conception of liberty is closely tied, if not indistinguishable from, equality:

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature and the use of the same faculties, should also be equal one amongst another without subordination or subjection.³⁴

Locke describes the social contract—the intervention of the laws—as irreparably altering the state of nature. As discussed below, the story Locke tells about the social contract is a story of a Fall: the story of how mankind devolved from its state of perfect liberty and provoked the distribution (and necessarily partial forsaking) of liberty. Locke implies that if mankind had maintained the state of nature, had not “fallen,” rules, laws and the attendant loss of liberty would never have been necessary.³⁵

It follows, then, that if one maintains that cyberspace is not “fallen,” that it is still paradise, then rules and laws are not necessary there either. And this is just the conclusion that Barlow makes in his Declaration. The occasion for the Declaration was, in fact, the passage of the Telecommunications Act of 1996. To this attempt to restrict and regulate cyberspace content, Barlow responded: “I declare the global social space we are building to be naturally independent of the tyrannies you

³² See KIM IAN PARKER, *THE BIBLICAL POLITICS OF JOHN LOCKE* 129 (2004).

³³ LOCKE, *supra* note 17, at 101.

³⁴ *Id.*

³⁵ *Id.* at 154–56.

seek to impose upon us.”³⁶ Cyberspace, according to the idealist view, is a paradise that needed no externally imposed laws.

Cyberspace idealism has undergone an interesting transformation in recent years. Contemporary anti-regulation rhetoric is more often than not characterized in free speech terms akin to John Stuart Mill’s “marketplace of ideas” instead of Locke’s “liberty.” In 1990 Barlow, along with John Gilmore and Mitch Kapor, founded the Electronic Frontier Foundation (EFF) an organization that has gained considerable influence in the debate over cyberspace regulation. The EFF’s stated purpose is to protect “rights in cyberspace” and fight off “bad legislation.”³⁷ It was established, according to its founders, in response to a basic threat to speech.³⁸ The EFF’s rhetoric does not have the anarchic tone of Barlow’s manifesto (“I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us”),³⁹ but is grounded instead in law itself, specifically, the First Amendment.

The evolution of cyberspace idealists’ relationship to the law is interesting for many reasons. It is unclear what really drove the shift from anarchism to civil liberties—was it merely an inevitable tempering of radical views over time? A sense of resignation (if you can’t beat ‘em, join ‘em)? Or does it indicate some more fundamental change in understanding, perhaps a recognition that there is no liberty without law?

The most notable characteristic of this updated rhetoric, though, is how it simultaneously invokes and obscures the importance of law. This new idealism still insists that cyberspace is a realm of unfettered freedom, where liberty, now most often framed as freedom of speech, is maximized to a degree unmatched in the real world: “In countless ways, the Internet is radically enhancing our access to information and empowering

³⁶ Barlow, *supra* note 7.

³⁷ *About EFF*, ELEC. FRONTIER FOUND., <http://www.eff.org/about> (last visited June 20, 2011).

³⁸ *See id.*

³⁹ Barlow, *supra* note 7.

us to share ideas with the entire world. Speech thrives online, freed of limitations inherent in other media and created by traditional gatekeepers.”⁴⁰ Cyberspace, it is claimed, is the genuine marketplace of ideas, where anyone can speak and where the best ideas will prevail. Attempts to regulate website content or restrict access to certain sites interfere with this great egalitarian enterprise. Thus, the EFF warns: “If laws can censor you, limit access to certain information, or restrict use of communication tools, then the Internet’s incredible potential will go unrealized.”⁴¹

According to this vision, cyberspace is a place where, left alone, the great project of freedom is being realized. Idealists believe that this status quo is the fully-functioning marketplace of ideas, a site of genuine liberty and equality that is *interrupted* by regulation efforts. Thus, any attempt to change the status quo is viewed as *prima facie* illegitimate and liberty-depriving. According to cyberspace idealists, the regulation of Internet speech can only deprive its users of liberty. This view necessarily ignores the fact that cyberspace’s very legitimacy is grounded in a highly legalistic conception of free speech.⁴²

II. UNWILLING AVATARS: THE FALL

Cyberspace idealism unsurprisingly appeals to individuals who feel their life experiences have been restricted by their physical identity: by their social status, their age, their gender, or their physical appearance. Going online allows these individuals to experience a certain kind of positive disembodiment. One’s “real” race, gender, age, and social status need never be disclosed in cyberspace, and so negative stereotypes that may

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Or, as Cass Sunstein puts it: “There is no avoiding ‘regulation’ of the communications market—of television, print media, and the Internet. The question is not whether we will have regulation; it is what kind of regulation we will have... Those who complain most bitterly about proposed regulation are often those who profit, often financially, from current regulation What they are complaining about is not regulation as such—they need regulation—but a regulatory regime from which they would benefit less than they do under the current one.” CASS SUNSTEIN, *REPUBLIC.COM 2.0* 154 (2007).

attach to any of those attributes can be avoided in a way not possible in real life. Particularly for historically marginalized groups, the power to re-create oneself and control the public representation of one's identity through avatars can be liberating.

What happens, then, when individuals are *not* in control of their online embodiment? What if one is embodied against one's will, in places that one never chose to enter, in ways one never consented to be shown, in graphic and vicious detail for all the world to see and which may be impossible to erase? We would surely describe that experience as a profound loss of liberty, the very antithesis of the freeing process of avatar creation. A world populated by an increasing number of unwilling avatars, reduced to their physical characteristics, caricaturized, ventriloquized and under attack, looks much more like hell than paradise.

A. Bringing in the Women

Christina McCormack⁴³ had been dating fellow University of Georgia student Richard Baker only a short while before things got serious. According to Baker, they moved in together, got a dog, and exchanged promise rings.⁴⁴ They broke up in January 2007. When a male friend stayed at McCormack's place for a few days, Baker became enraged. He hacked into McCormack's MySpace account and sent messages to McCormack's friend in her name. These messages included claims that McCormack had certain medical conditions and that she was still in love with Baker.⁴⁵ Baker installed spyware on McCormack's computer so that he could track her Internet use and gain access to her IDs and passwords. Finally, he uploaded naked pictures of McCormack (which he had obtained without consent) on his Facebook page. In May 2008, Baker was charged with 32 felonies. News reports as of this writing indicate

⁴³ Not her real name—Author has been asked to use pseudonyms for both the victim and the harasser while the case is pending.

⁴⁴ Richard Morgan, *Revenge Porn*, DETAILS, available at <http://www.details.com/scx-relationships/porn-and-perversions/200809/revenge-porn> (last visited Mar. 15, 2010).

⁴⁵ Lee Shearer, *Ex-Lover Got Revenge Online*, Athens Police Say, AUGUSTA CHRONICLE, May 30, 2008, available at http://chronicle.augusta.com/stories/latest/lat_053008_computerrevenge.shtml.

that he is currently free on bond, awaiting trial.⁴⁶

Sayani Chakraborty had never been a member of Orkut, a social networking site similar to Facebook and MySpace, but she discovered that someone had created a profile of her on the site and used it to send offensive messages to her family and friends.⁴⁷ Someone created a similar profile for a schoolgirl in Delhi, complete with obscene photographs and the girl's home address and telephone number.⁴⁸ The profile came to light after her family began receiving calls asking to speak with the girl and referencing the Orkut profile. Eventually, two men came to her home claiming that the girl had invited them over for sex.⁴⁹

An Oklahoma State University sophomore named James Cory Lanier videotaped himself and his 19-year-old girlfriend having sex.⁵⁰ After the woman broke up with him, Lanier threatened her with physical violence and promised to "ruin her life."⁵¹ He threatened to upload the videos of the two having sex to the Internet unless she agreed to continue having sex with him. His ex-girlfriend reported him to the police, and Lanier was charged with felony blackmail. That charge was eventually dismissed, and Lanier pleaded guilty to disorderly conduct.⁵²

⁴⁶ Morgan, *supra* note 48.

⁴⁷ *Hey, That's Not Me on the Net!*, TIMES OF INDIA, Jan. 29, 2007, available at <http://timesofindia.indiatimes.com/news/city/ahmedabad-times/Hey-thats-not-me-on-the-net/articleshow/1539403.cms>.

⁴⁸ *Fake Orkut Profile of Schoolgirl Posted*, REDIFF INDIA ABROAD, Feb. 6, 2007, available at <http://www.rediff.com/news/2007/feb/06orkut.htm>.

⁴⁹ *Id.*

⁵⁰ *OSU Student Charged With Blackmailing Ex-Girlfriend*, Feb. 28, 2007, available at <http://www.ktul.com/news/stories/0907/459290.html>.

⁵¹ Patti Weaver, *Blackmail Charge Against Former OSU Student Dropped*, KUSH RADIO, Jan. 29, 2008, <http://www.1600kush.com/story.php?id=186§ion=1>.

⁵² *Id.*

The owners and operators⁵³ of the message board AutoAdmit.com, which they characterized as a forum where individuals could share information about law firms, clerkships, and succeeding in law school, claimed that it was by “respect[ing] the merits of the free, uninhibited exchange of ideas” that the site became the most successful and informative law school discussion board on the Internet.⁵⁴ In March 2005, Brian Leiter highlighted the pervasive racism and sexism on AutoAdmit⁵⁵ on his blog, *Leiter Reports*. The message board achieved increased notoriety in April 2007 after *The Washington Post* ran an article about sexist, obscene and racist posts on the site, focusing on the particularly vicious attacks on female law school students.⁵⁶ These posts included links to pictures of many of these students, with entire message threads devoted to “ranking” the women’s bodies, discussing their alleged sexual activities and expressing what users would like to do with them sexually in graphic and often violent detail.⁵⁷ The women in question were frequently targeted by name, while their attackers posted under pseudonyms. Several of the women targeted knew nothing about the site prior to the *Post* article, and only found out about it when the threads came up on Google searches or when friends alerted them.⁵⁸ Some of the women attacked on the site contacted the site’s administrators requesting that the abusive posts be removed, only to be told that no post would be

⁵³ Jarrett Cohen and Anthony Ciolli, the latter of which has since claimed he never had “operator” power, and has since resigned from AutoAdmit. See David Margolick, *Slimed Online*, PORTFOLIO.COM, Feb. 11, 2009, available at <http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying?page=2#page=2>.

⁵⁴ Eugene Volokh, *More from Xoxohth*, THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1110500300.shtml> (Mar. 10, 2005, 18:18 EST).

⁵⁵ Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse*, LEITER REPORTS: A PHILOSOPHY BLOG (Mar. 11, 2005, 6:12 PM), http://leiterreports.typepad.com/blog/2005/03/penn_law_studen.html.

⁵⁶ See Nakashima, *supra* note 1.

⁵⁷ *Id.*

⁵⁸ See Margolick, *supra* note 57 at 3–4.

“censored.”⁵⁹ In some cases, the administrators posted the women’s complaints on the site, leading to further derogatory name calling and threats to punish them with rape, stalking, or other abuse.⁶⁰ In some of these cases, users posted the women’s home addresses and phone numbers.⁶¹

Kathy Sierra is a programming instructor and a game developer who runs a blog called *Creating Passionate Users*. This blog is centered on discussions about “designing software that makes people happy.”⁶² At about the same time as the AutoAdmit controversy broke, Sierra began receiving death threats in the comments section of her blog.⁶³ Someone wrote about slitting her throat and ejaculating; another posted her photo alongside an image of a noose with a caption: “The only thing Kathy has to offer is that noose in her neck size.”⁶⁴ On an external site, a user posted a manipulated photo that appeared to show Sierra with underwear across her face, struggling to breathe. The picture was captioned: “I dream of Kathy Sierra . . . head first.”⁶⁵ Sierra canceled several speaking engagements and suspended her blog in the wake of the threatening posts.⁶⁶

Chelsea Gorman was a freshman at Vanderbilt University when she was raped on her way to campus one evening. Gorman left school for that semester, struggling with panic attacks and self-blame. When she returned to school in the fall of 2007 she had only told her family and a few friends about the rape. In

⁵⁹ *Id.* at 4.

⁶⁰ See Nakashima, *supra* note 1.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Victoria Murphy Barret, *Anonymity and the Net*, FORBES, Oct. 15, 2007 available at <http://www.forbes.com/forbcs/2007/1015/074.html>.

⁶⁵ *Id.*

⁶⁶ *Blog Death Threats Spark Debate*, BBC NEWS, Mar. 27, 2007, available at <http://news.bbc.co.uk/2/hi/technology/6499095.stm>.

March 2008, a friend at another college called to tell her that someone had posted about her rape on a gossip site called JuicyCampus.com. On the Vanderbilt University page of the site, there was a post titled "Chelsea Gorman deserved it." The post not only announced the rape, but went on to read: "what could she expect walking around there alone. Everyone thinks she's so sweet but she got what she deserved. wish i had been the homeless guy that f***** her."⁶⁷ The post became the talk of Vanderbilt's campus—both the virtual one on JuicyCampus and the real one Gorman had to face every day.⁶⁸

Nicole Catsouras was eighteen years old when she died in a horrific car accident. On October 31, 2006, she and her father had an argument, and he confiscated the car keys as punishment. Later that day, Nicole snuck out, taking the car keys with her. Fifteen minutes later, she crashed into a freeway tollbooth at a speed of over 100 miles per hour. The collision mangled her body, nearly decapitating her. The police photographs of the accident were leaked and published online. The gruesome images began to appear in chat rooms and fetish websites where users would discuss, among other things, how Nicole "deserved" what happened. A MySpace user posted the pictures along with sexualized commentary about Nicole; another created a fake profile of Nicole that included a close-up of her remains.⁶⁹ Someone posted the Catsouras' home address and encouraged others to harass the family. Nicole's parents received numerous pseudonymous emails and text messages that included the photos, along with vicious captions. They attempted to convince web site owners to take down the pictures, but met with little success: "We've asked them to please take down the pictures, and they've said, 'No, I don't have to because I've got my First

⁶⁷ Eamon McNiff & Ann Varney, *College Gossip Crackdown: Chelsea Gorman Speaks Out*, May 14, 2008, ABCNEWS.COM, <http://abcnews.go.com/2020/story?id=4849927&page=1>.

⁶⁸ *Id.*

⁶⁹ Barret, *supra* note 68.

Amendment rights',” says Nicole’s mother, Lesli Catsouras.⁷⁰ Nicole’s family uploaded a memorial video of Nicole on *YouTube*, hoping that it would help show that they “are a family with real hearts, and it hurts what people are doing.”⁷¹ A number of vicious and sexist pseudonymous comments were posted on YouTube in response, including the following: “she got what she deserved . . . you wanted equality, fine, fuck that stupid cunt . . . hahahaha, she got what she deserved”⁷²

The phenomenon of unwanted online embodiment is by no means a new one. Cyber harassment has existed since the first cyberspace communities were created. Julian Dibbell’s now infamous article, “A Rape in Cyberspace,” describes one such early instance of virtual violence.⁷³ LambdaMOO is a still-existing virtual community founded in 1990 by Pavel Curtis. A MOO is a kind of MUD (short for multi-user dimension/dungeon), which is a multi-user, real-time virtual world and stands for MUD, Object Oriented. The object orientation refers to the way that users can change the server interface by adding new objects and rooms. In 1993, a user called Mr. Bungle, who had obtained “voodoo power” through his high standing in the LambdaMOO community, used that power to commit virtual “rapes” of several female characters and one character of indeterminate gender.

[Bungle] could take over the voices and actions of other characters and make them appear to do things they did not really do
He invoked this power, in this public space, and took over the voices of these people. Once

⁷⁰ Jim Avila, Teri Whitcraft, & Scott Michels, *A Family’s Nightmare: Accident Photos of Their Beautiful Daughter Released*, ABC NEWS, Nov. 26, 2007, available at <http://www.abcnews.go.com/TheLaw/Story?id=3872556&page=1>.

⁷¹ *Id.*

⁷² Comment Posting, http://www.youtube.com/comment_servlet?all_comments&v=AC6zt2yWWgA&fromurl=/watch%3Fv%3DAC6zt2yWWgA

⁷³ Julian Dibbell, *A Rape in Cyberspace*, VILL. VOICE, Dec. 23, 1993, available at <http://www.villagevoice.com/2005-10-18/specials/a-rape-in-cyberspace/>.

they were in his control, Bungle 'raped' these women, violently and sadistically, and made it seem as if they enjoyed the rape.⁷⁴

Dibbell offers this description of how the virtual violence affected the real-life women whose avatars were assaulted:

[T]he woman in Seattle who had written herself the character called Iegba, with a view perhaps to tasting in imagination a deity's freedom from the burdens of the gendered flesh, got to read . . . sentences in which Iegba, messenger of the gods, lord of crossroads and communications, suffered a brand of degradation all-too-customarily reserved for the embodied female.⁷⁵

The Bungle incident was not unique, either. Dibbell and others relate that female-identified MUDers frequently experienced sexual attacks.⁷⁶

In 1995, a University of Michigan student named Jake Baker submitted a story about raping, torturing, and murdering a fellow student to alt.sex.stories Usenet group. Baker used the fellow student's real name in the story. Once notified of the incident, the University of Michigan police searched Baker's computer and found several similar stories on his hard drive, along with email correspondence with a man named Arthur Gonda. This correspondence included details of plans for the two men to meet in order to carry out the real-life rape, torture and murder that they fantasized about. Judge Avern Cohn dismissed the case, ruling that there was no evidence Baker

⁷⁴ LESSIG, *supra* note 19 at 74–75.

⁷⁵ Dibbell, *supra* note 77.

⁷⁶ Avatar rape has become a valued commodity in virtual environments. Second Life users can pay for rape experiences using Linden dollars (Second Life currency), with options including "Rape victim," "Get raped," or "Hold Victim." See Michael Bugeja, *Avatar Rape*, INSIDE HIGHER ED, Feb. 25, 2010, available at <http://www.insidehighered.com/views/2010/02/25/bugeja>. Several popular computer games feature rape scenarios, including Grand Theft Auto and Rapelay (the latter features rape as the primary goal of the game).

actually intended to act out his fantasies.⁷⁷

Sites that thrive on gossip and insults, like AutoAdmit and JuicyCampus (JuicyCampus has now folded, only to be replaced by another college campus gossip site⁷⁸), direct much of their negative attention to women and girls, many of whom do not themselves participate in these online communities. The comments sections of many online newspapers, blogs, and video hosting sites are rife with obscene, sexist abuse targeted at specific women. Social networking sites such as Facebook and MySpace have become highly effective outlets for vengeful men to attack ex-girlfriends, and an extraordinary number of sites are exclusively devoted to “revenge porn,” which is defined by the Urban Dictionary as “[h]omemade porn uploaded by an ex girlfriend or (usually) ex boyfriend after particularly vicious breakup as a means of humiliating the ex or just for own amusement.”⁷⁹ An entire class of web sites caters to fetishizing real-life violence, a number of which explicitly favor pictures of female victims.⁸⁰

B. Cyberspace as a State of License

Part I noted the similarity between the way cyberspace

⁷⁷ United States v. Alkhabaz, 104 F.3d. 1492,1496 (6th Cir. 1997). For commentary on the implications of the *Baker* case, see, e.g., Robert Kurman Kelnor, United States v. Jake Baker: *Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287 (1998); David C. Potter, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. REV. 779 (1999); Steven G. Gey, *A Few Questions about Cross Burning, Intimidation, and Free Speech*, 30 NOTRE DAME L. REV. 1287 (2005).

⁷⁸ Nora Sorena Cascy, *Juicy Campus Folds Citing Lack of Funds, Makes Way for New Gossip Site*, THE CHI. MAROON, Feb. 10, 2009, available at <http://www.chicagomaroon.com/2009/2/10/juicy-campus-folds-citing-lack-of-funds-makes-way-for-new-student-gossip-site>. At least two of these sites are spending a lot of money seeking to capture JuicyCampus' former audience. See Jeffrey R. Young, *They're Back, and They're Bad: Campus-Gossip Web Sites*, CHRON. OF HIGHER EDU., Aug. 31, 2007, available at http://chronicle.com/article/Theyre-BackTheyre-Bad/48220/?sid=wb&utm_source=wb&utm_medium=en.

⁷⁹ JonasOooohycah, *Revenge Porn*, URBANDICTIONARY.COM (Sept. 25, 2007), <http://www.urbandictionary.com/define.php?term=revenge%20porn>.

⁸⁰ To avoid providing publicity for these sites, this Article will not name them.

idealists describe cyberspace and the way John Locke describes the state of nature as one of perfect liberty. The examples given above tell a very different story. They paint a world in which only certain individuals enjoy the mythic degree of liberty and freedom from physical restraints touted by cyberspace idealists, while others experience a loss of liberty and a re-entrenchment of physical restraints already unequally imposed upon them in the offline world. Women targeted by cyber harassment experience restrictions in liberty both in cyberspace and out of it. They experience new levels of objectification, confronting reductions of themselves to sexualized body parts in message boards, chat rooms, social networking sites, and Google searches. Women who have been targeted by cyber harassment avoid certain sites to avoid being attacked; they close down email accounts that have been flooded with abusive and obscene messages; they shut down blogs; in some cases, they withdraw from what were lucrative and vibrant online presences. The losses of liberty follow them offline, as well: they face harassment and slander stemming from online attacks in their workplaces and schools, leading them to quit or change jobs and universities; they change their daily routines for fear of being stalked or physically assaulted; they are sometimes stalked, assaulted or even killed by their online harassers.⁸¹

Some of the other harms, especially hedonic ones, are harder to quantify but are no less powerful for the toll that harassment takes on women's sexual identity, which can be extreme and enduring.⁸² Sexual autonomy is undoubtedly an important aspect of liberty; sexually autonomous agents do not repress, denigrate, or distance themselves from their sexuality because of fear of ridicule, threats, or vengeful disclosure of private intimate acts. Yet in an environment where women are frequently subjected to unwanted sexual attention, harassment, and public shaming for their sexuality, this is precisely what

⁸¹ See Citron, *supra* note 5, at 69–81.

⁸² See e.g., Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000).

some women are forced to do.⁸³

Locke's notion of liberty, like that of many others, is tied to equality and independence and is not to be understood as something that can be used to harm others. As mentioned above, Locke explicitly distinguishes between the state of liberty and what he called the "state of license."

But though this be a state of liberty, yet it is not a state of licence: though man in that state have an uncontrollable liberty to dispose of his person or possessions The state of nature has a law of nature to govern it which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.⁸⁴

Where cyber harassment persists unchecked, women are not treated as equal members of society. Harassers use their freedom to deny freedom to the women they attack, an exercise not of liberty, but license.

Efforts to regulate Internet harassment, for example by limiting the veritable immunity provided to web hosts by CDA § 230, have been characterized as ruinous attempts to destroy cyberspace paradise. Reforming CDA § 230 is of course not the only possible legal response to online harassment, and the task of reform would require difficult balancing, but increased regulation is not *per se* inconsistent with liberty. Cyberspace has never been a state of perfect or even almost perfect liberty. It has always been a realm of unequal distributions of liberty and license. The notion of cyberspace as a paradise is fictional, unless what one means by paradise is a place where certain groups (e.g., men) have disproportionate access to liberty over

⁸³ See Anupam Chandor, *Youthful Indiscretions*, in *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (Saul Levmore & Martha C. Nussbaum eds., 2010).

⁸⁴ LOCKE, *supra* note 17 at 102.

other groups (e.g., women).⁸⁵ If cyberspace ever had the potential to become a paradise, its fall was caused by its own inhabitants—by the cyber harassers.

Locke writes that when mankind finds itself unable to preserve the state of nature, it necessarily must establish the rule of law.⁸⁶ If individuals abuse their liberty by exercising power in arbitrary and self-interested ways that threaten the security of the whole community, the community will slide into a state of war.⁸⁷ In a state of war, anyone at any time might be deprived of his or her liberty and possessions.⁸⁸ To avoid this outcome, the community collectively establishes a central authority and rules to regulate disputes. This necessarily involves giving up some of what Locke considers to be “natural rights” (e.g., the right to personally punish someone who has wronged you).⁸⁹ But it also results in liberty for more people and security for most of one’s other rights.⁹⁰ Security for the general public—not just for the strongest or most aggressive—is the basis for the forfeiture of some individual power. Put another way, rules ensure a measure of equality for all.⁹¹

The same can be said of regulations of speech on the internet. New legal regulations regarding behavior in cyberspace might indeed mean, in some sense, that some individuals will no longer have the same degree of “liberty” they had previously. It would mean, for example, that cyber harassers could no longer attack women with impunity. But the freedom to harass is an exercise of license, not liberty, and as such is hardly defensible in the first instance. The effects of such license, moreover, are

⁸⁵ Unfortunately, this is quite in line with many religious conceptions of Paradise.

⁸⁶ LOCKE, *supra* note 17 at 154–56.

⁸⁷ *Id.* at 107.

⁸⁸ *Id.* at 154.

⁸⁹ *Id.* at 155–56.

⁹⁰ *Id.*

⁹¹ *Id.*

that women as a group suffer a loss of liberty relative to men as a group. Regulation and reform are necessary to balance the equation and create a cyberspace that maximizes liberty for all groups.

C. Tyranny in the Marketplace

As discussed in Part I, much contemporary cyberspace idealism rhetoric is couched in terms of free speech values. Cyberspace, as a great equalizing environment—the great equalizing environment—is often touted as the true marketplace of ideas, where the conventional wisdom that the best response to bad speech is more speech can truly be put into practice. Though the expression “marketplace of ideas” was not his, John Stuart Mill is often heralded as the forefather of the principle of free speech and civil liberties more generally. Thus his theory of liberty is often invoked as a response to calls for regulation of speech on the internet.

Though Mill’s *On Liberty* is a nuanced and enduring dissertation on the complexity of civil liberties, the marketplace of ideas metaphor (and free speech more generally) is often simplistically invoked as an answer to any attempt to regulate content that some group would like to have. The very flexibility of the term, claimed as it is by groups of every ideological and political stripe when it suits them, gives some indication of its conceptual instability. Inasmuch as the metaphor is a coherent one, it has been trenchantly critiqued on many grounds. Serious and important questions include: what counts as an idea? Does anything like a free and equal marketplace for ideas actually exist? Has it ever existed? Is truth actually the highest value of a free society? Can a “marketplace” of ideas produce truth in any case?⁹²

This Article does not intend to review all the objections to the concept of the marketplace of ideas. Rather, this Article suggests that while Mill does indeed provide a great deal of

⁹² See, e.g., CATHARINE A. MACKINNON, ONLY WORDS (1996); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1995); STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH: AND IT’S A GOOD THING, TOO (1994); MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

insight into the debate over cyber harassment, this is precisely because his analysis of liberty and harm is far more sophisticated than suggested by a reactionary and simplistic invocation of the marketplace of ideas.⁹³ The way cyber idealists misunderstand Mill's concept of liberty tracks the way they confuse liberty and license – that is, they mischaracterize the status quo. Cyberspace idealists assume that cyberspace is and always was a paradise that needs only to be defended. But what Mill offers in *On Liberty* is first and foremost a diagnosis of what is wrong with the status quo, not an idealization of it. It is through recognition of current wrongs that he fashions his recommendations for safeguarding liberty. Cyberspace idealists, when they invoke “free speech” or the “marketplace of ideas” as slogans, ignore this diagnostic dimension. Mill argues that we need to honor principles of free speech precisely because so many individuals and groups are denied the speech and liberty that others enjoy.⁹⁴ Inasmuch as Mill claimed that the best answer to bad speech was more speech, he understood that this meant changing the conditions under which certain individuals are silenced and intimidated not only by the state, but sometimes, even more despotically, by society itself.⁹⁵

Indeed, free speech advocates who maintain that we need only be concerned with the *government's* interference with free speech—who seem to think only the government *can* interfere with free speech—can hardly claim Mill as a fellow traveler. To the contrary, Mill was in some ways even more concerned about the way that the majority could exercise tyranny in society than he was concerned about the same tendency in government.

Society can and does execute its own
mandates: and if it issues wrong mandates
instead of right, or any mandates at all in

⁹³ For more on Mill and offensive speech in the marketplace of ideas, see Mary Anne Franks, *For the Love of Hate: Why We Have Little To Fear From the Westboro Baptist Church*, <http://www.concurringopinions.com/archives/2011/03/for-the-love-of-hate-why-we-have-little-to-fear-from-the-westboro-baptist-church.html>.

⁹⁴ MILL, *supra* note 11 at 19–20.

⁹⁵ *Id.*

things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.⁹⁶

The cyber harassment highlighted in this Article is a form of social tyranny. To argue that women who are targeted by such harassment should simply not participate in cyberspace communities, as many anti-regulation advocates argue, both tacitly endorses the deprivation of their liberty to participate in any communities that they wish to, and ignores the extent to which individuals increasingly cannot simply ignore or exit the harassment they experience. Such harassment follows them into their physical lives, indeed into the “details of their life.”

Mill did not observe the wrongs committed by society with mere regret, believing them a necessary evil that could not be addressed through regulation. Mill called for the restriction of society’s interference with the private person.

Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.⁹⁷

Cyber harassment against women imposes an identity upon them that denies them the liberty exercised by many other groups in

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* at 6–7.

cyberspace⁹⁸—liberty to fashion their own existence and to explore dimensions of experience denied to them in their physical reality. When women act in ways that do not conform to cyber harassers' normative view of women, they are punished for it. This of course does not mean that harassment's effects are absolute. It is possible for some women to escape harassment in all contexts and for all women, probably, to escape it in at least some contexts. But tyranny does not have to be absolute to be effective. Oppression need not be experienced by every single member of a group, all of the time, to qualify as such.

To be sure, Mill believed that finding and enforcing the limit of collective opinion's interference with individual identity was a difficult and complex task. He would undoubtedly not have supported a regime that censored, either legally or socially, every bad expression of social opinion. But nor would he have ignored the harms of harassment, especially considering the extent to which these harms can be magnified in cyberspace to affect individuals' liberty both on and offline. A marketplace in which some are threatened, defamed, or harassed by others, where some groups are granted or denied access to the marketplace on that basis, is not a free and open marketplace. Nor is the principle of free speech upheld when some groups are judged not by the value of their speech but by the terms of their unwilling embodiment and objectification.

III. No Exit: The Double-Embodiment Effect

The phenomenon of forced embodiment of course predates the Internet. The reduction of women to their bodies has been a tactic of sexist and misogynist forces for a very long time. While many groups of people can and have been susceptible to unwilling embodiment, one can make the general observation that women's experience with sexual objectification is greater than that of men, and that men have been largely responsible for this objectification.⁹⁹ There is a long history in Western culture (although not *only* in Western culture) of viewing women as merely physical creatures with no capacities for rational thought

⁹⁸ To varying degrees.

⁹⁹ See e.g., West, *supra* note 86.

or refined feeling. As the influential Viennese philosopher Otto Weininger put it, in the "absolute female," a woman lacking any male personality traits, "there are no logical and ethical phenomena, and, therefore, the ground for the assumption of a soul is absent."¹⁰⁰ Catharine MacKinnon, among others, has detailed the various ways in which women as a group are objectified, especially sexually objectified, by men as a group.¹⁰¹ Martha Nussbaum has also examined objectification in depth, noting that the instrumental treatment of human beings is a "common feature of sexual life, especially . . . in connection with male treatment of women."¹⁰² There is no need to re-invent the wheel here; suffice it to say that women are still fighting to be recognized as full rational agents, having been considered inferior to men by both law and society for centuries. Though in modern Western society women have come quite far in achieving equal rights to men, the unfortunate legacies of disenfranchisement, unbalanced laws governing family, crime and property, and the denial of equal educational and occupational opportunity endure. Today, women still struggle for reproductive control of their bodies, and rape, domestic violence, and sexual harassment still enforce the view that women are objects who belong to, or are at least subject to the desires of men.¹⁰³

Given the extent to which women in their real lives are

¹⁰⁰ OTTO WEININGER, *SEX AND CHARACTER* 186 (1907).

¹⁰¹ See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); ANDREA DWORKIN, *WOMAN HATING* (1974).

¹⁰² See MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 238 (1999). Nussbaum maintains that objectification need not be a morally problematic phenomenon, articulating seven ways that people can be treated as things: "[A]ll types of objectification are not equally objectionable . . . the evaluation of any of them requires a careful evaluation of context and circumstance, and . . . at least some of them might be compatible with consent and equality, and even be 'wonderful' parts of sexual life." *Id.* at 218. Nussbaum has also written recently on objectification in the context of the online abuse of women. See Martha C. Nussbaum, *Objectification and Internet Misogyny*, in *THE OFFENSIVE INTERNET*, *supra* note 87.

¹⁰³ See e.g., ROBIN WEST, *CARING FOR JUSTICE* 100-09 (1997).

disproportionately and unwillingly reduced to their bodies, it is not surprising that women approached the promise of cyberspace with great enthusiasm. Consider again Barlow's ringing words from the Declaration of Independence of Cyberspace: "Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, *but it is not where bodies live*."¹⁰⁴ The promise of cyberspace seems to be the power to escape one's body and become a "standing wave" of language, of thought, of imagination. Cyberspace seemed to offer an extraordinary possibility for women to subvert the longstanding idea that "anatomy is destiny."¹⁰⁵ In the early years of the Internet, many women saw cyberspace as offering much more than a chance to join message boards or play online games; some saw in cyberspace the promise of a new society. The cyberfeminist movement, a term coined in 1992 by an Australian collective called the VNS Matrix, saw cyberspace as the opportunity to break down established binaries, especially gender binaries.¹⁰⁶ The British philosopher and writer Sadie Plant saw in cyberspace a radically feminizing potential: "Masculine identity has everything to lose from this new technics. The sperm count falls as the replicants stir and the meat learns how to learn for itself. Cybernetics is feminisation."¹⁰⁷ Sherry Turkle believed that the gender-swapping practices enabled in cyberspace produced a new reflectiveness and sophistication about gender identity that would translate into the real world.¹⁰⁸ Donna Haraway composed a "Cyborg Manifesto" in which she observed, "Up till now (once upon a time), female embodiment seemed to be given, organic, necessary," but now we can ask,

¹⁰⁴ Barlow, *supra* note 7.

¹⁰⁵ SIGMUND FREUD, THE DISSOLUTION OF THE OEDIPUS COMPLEX 320 (1924).

¹⁰⁶ Mary-Anne Brecze, *Attack of the CyberFeminists*, SWITCH, available at http://switch.sjsu.edu/web/v4n1/art_mez.html (last visited June 20, 2011).

¹⁰⁷ Sadie Plant, *Feminisations: Reflections on Women and Virtual Reality*, in *CLICKING IN AND CLICKING ON: HOT LINKS TO A DIGITAL CULTURE* 37 (Lynn Hersman Lecson ed., 1996).

¹⁰⁸ See SHERRY TURKLE, *LIFE ON THE SCREEN* (1997).

“[w]hy should our bodies end at the skin?”¹⁰⁹

But, as we have seen, this optimism about women’s self-creation or re-creation has failed to materialize in many important ways. The forced avatarization of women in cyberspace is a grotesque parody of self-creation, with effects often more widespread and lasting than objectification in the physical world. Far from being the site of radical gender deconstruction, or a realm of sophisticated reflection on gender roles, or a world offering freedom from the forced objectification of women’s bodies, cyberspace has become a place (or rather, places) that works in tandem with and reinforces women’s unwilling embodiment.

The fact that women’s unwilling online embodiment is in effect a double-embodiment is one of the reasons that cyberspace harassment of women should be taken seriously. Women are frequently objectified in real life in ways that negatively impact their health, careers and general well-being, and are then re-objectified online in ways that also negatively impact their health, careers and general well-being. In the offline world, women are disproportionately “bodied”—over-identified with their physical characteristics—through their physical vulnerability relative to men and their historical, legal, and social objectification. Many women go online in the hope that they will be able to escape or go beyond some of the effects of real-life objectification, only to discover that objectification awaits them there as well. Thus, it is not merely that women experience less of the liberty that cyberspace idealism promises relative to men; it is that this loss of liberty is a *second* loss, compounding the effects of offline social subordination.

A final point to note is that the effects of unwilling online embodiment are potentially even more pernicious and long-lasting than real-life harassment. This is due to four features of cyberspace that exacerbate the impact of harassment:

1. *Anonymity*: The increased opportunity for harassers to attack their targets

¹⁰⁹ DONNA HARAWAY, *SIMIANS, CYBORGS AND WOMEN: THE REINVENTION OF NATURE* 180 (1991). For a critical perspective on cyberfeminism, see JUDY WAJCMAN, *TECHNOFEMINISM* (2004).

anonymously, making it difficult if not impossible for the targets to engage in self-help or legal remedies;

2. ***Amplification***: The capacity for harassers to quickly find a wide audience for their harassment, including users who will join in the harassment;
3. ***Permanence***: Online attacks, which often include personal information about their targets, such as home addresses and telephone numbers, are very difficult to erase from the web;
4. ***Virtual Captivity/Publicity***: The options to avoid or exit situations in which cyber harassment occurs are extremely limited. Whereas specific acts of real-life harassment are often restricted to one place (for example, being harassed on the street does not necessarily impact one's experience in the workplace),¹¹⁰ the effects of cyberspace harassment can manifest much more readily. Particularly if the online attack is indexable by a major search engine like Google, it is accessible to almost anyone (the target's co-workers, fellow students, clients, children) almost anywhere (at her place of work, her school, her home, her doctor's office).

The law's response to cyberspace harassment should be considered against the background of the double-embodiment effect on women, and be placed in the larger context of collective discrimination and social stratification in which this harassment occurs.

¹¹⁰ Although it certainly can. For more on the effects of street harassment, see Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517 (1993).

IV. OBJECTIONS

This Part addresses two objections: one, the concern that this Article takes an essentialist view of cyberspace, discrimination, and women; and two, that current legal discourse on cyberspace harassment already properly accounts for its real harms.

A. Essentialism

Scholars have debated whether cyberspace can and/or should be conceived of as a "place" at all.¹¹¹ Cyberspace is not, indeed, a "place" as such, or any one thing at all. It is both more and less complex than any one "place": it denotes, at the most basic level, a set of protocols for transferring information, and beyond that, is a diverse and far-ranging assortment of communities, message boards, chat rooms, websites, and games. It is useful, however, to use the term "cyberspace" as shorthand for all of these things and as a way to differentiate between what happens there versus what happens in physical space.¹¹² It would perhaps be better, however, to refer to "cyberspaces" rather than cyberspace to indicate the plurality and variety of peoples' interactions with cyberspace.

As someone who does not wish to essentialize "cyberspace," I accordingly do not think a "law of cyberspace"¹¹³ is needed as such. I do believe, however, that cyberspace presents an important and complex legal challenge. This challenge consists not only of figuring out how best to conceptualize behavior in cyberspace to resemble behavior in real life, but also to interrogate the accuracy and efficacy of existing legal structures.

There are, of course, also problems associated with any

¹¹¹ See, e.g., Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 446-58 (2003); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 28 (2000).

¹¹² Or, as netizens call it, IRL (in real life).

¹¹³ See Frank Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

project that attempts to treat “women” or “men” as a homogeneous group. Women’s experiences, both on and offline, are diverse and mediated through race, class, socio-economic status, and many other factors, and the same is true for men. This Article does not claim that the unwilling avatars narrative is the story of how *all* women are victimized by *all* men in cyberspace. It does not even claim that *any* individual woman’s online experience is determined solely or even principally by harassment. Given the vastness and variety of the ways most of us experience the Internet, from private email accounts to news websites to restaurant reviews, it is unlikely that any person’s entire cyberspace experience is dominated by the effects of harassment.

However, none of this means that one cannot discuss the broad patterns of wrongs perpetrated by one group against another group, both in real life and in cyberspace. The extent to which any one member of the wronged group feels wronged, or any one member of the wronging group participates in the wrongdoing, can vary greatly. Not every African-American or gay person feels wronged by racism or homophobia; not every white or straight person participates in racism and homophobia. Moreover, the specific contours of what even constitutes racism and homophobia are often contested. Nonetheless, few would claim that racism and homophobia do not exist in contemporary American society. The same is true for sexism and misogyny.¹¹⁴

B. Current Legal Conceptions of Cyberspace Harassment

Some scholars argue that we already have adequate legal remedies for cyberspace harassment, namely, laws against defamation, threats, and invasions of privacy. There are three reasons that these remedies are insufficient.¹¹⁵ First among these

¹¹⁴ See Duncan Kennedy, *SEXY DRESSING, ETC. ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 141 (1993) (arguing that harassment and abuse of *some* women by *some* men constructs background conditions that impose costs on *all* women and costs to *all* men should the conditions change).

¹¹⁵ For more on the limitations of current legal approaches to the online harassment of women, see Mary Anne Franks, *Sexual Harassment 2.0* (forthcoming, *MARYLAND LAW REVIEW*, 2011).

reasons, as many scholars and practitioners have pointed out,¹¹⁶ is an enforceability issue: user anonymity combined with the content provider immunity provided for by CDA § 230 means that often no one can be held responsible for a given act of harassment.

Secondly, and more importantly for the purposes of this Article, there is a class of abusive online behavior that does not fall into or is not best captured by the categories of defamation, threats, or invasions of privacy. Violent sexual commentary suggesting “should be done” to certain women or graphically sexual statements about a woman’s physical appearance do not necessarily fall under any of the three categories. Thus, legal approaches that focus on reputation and privacy will not be able to address some of the most serious forms of cyber harassment.¹¹⁷ Moreover, even harms that can be categorized this way may actually be made worse by legal remedies based on reputation and privacy interests. If one of the significant harms of harassment is unwanted subjection to public scrutiny, litigation over defamation and invasions of privacy are almost certain to exacerbate this harm. Defamation is particularly problematic in this respect. Because truth is a defense to defamation, harassers being sued for defamation may attempt to defend themselves by searching for and publishing “proof” of their claims. While doing so may expose these harassers to liability for invasions of privacy, they may be able to inflict severe and irreparable harm in the process.

Thirdly, and most importantly, tort and criminal approaches treat cyber harassment principally as harm done to individuals, not groups. While the cyber harassment of women certainly does involve serious individual harm, its impact on women as a group

¹¹⁶ See e.g., Citron, *supra* note 5, at 116–17.

¹¹⁷ For examples of approaches focusing on privacy and reputation see e.g., DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007); Brian Leiter, *Cleaning Cyber Cesspools: Google and Free Speech*, in *THE OFFENSIVE INTERNET* (Saul Levmore & Martha C. Nussbaum eds., 2011); Nancy Kim, *Imposing Tort Liability on Websites for Cyber-harassment*, 118 YALE L.J. POCKET PART 115 (2008); Bradley A. Archart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41 (2007); Steven J. Horowitz, *Defusing a Google Bomb*, 117 YALE L.J. POCKET PART 36 (2007).

needs to be emphasized.¹¹⁸ The cyber harassment of women is a form of collective discrimination and should be treated as such.¹¹⁹

CONCLUSION

Cyberspace has extraordinary potential to be a site of liberation, transcendence and social equality. The opportunity to escape physical constraints imposed on one's identity and to exert control over one's self-representation can be particularly valuable to members of groups who have been marginalized on the basis of physical characteristics. The kinds of cyberspace harassment described in this Article deny women this opportunity, forcing them to become unwilling avatars whose bodies are used to re-entrench social inequalities. Creating false profiles on social networking sites, uploading images to "revenge porn" sites without consent, and launching violent sexual attacks on message boards all have tremendous discriminatory effects. This harassment compromises women's ability to share cyberspace on equal terms with men, and amplifies the sexual stereotyping and discrimination women experience in the offline world. The legal response to cyberspace harassment must be formulated against the background of the discriminatory harms facilitated by cyberspace, harms that are often obscured by idealistic rhetoric about cyberspace. The potential for cyberspace to deliver on its idealistic promise is contingent upon the recognition of and response to the discriminatory harms currently being perpetrated in it. Without thoughtful and realistic assessment of these harms, we risk allowing cyberspace to become yet another site of discrimination and social stratification—merely one more familiar, and broken,

¹¹⁸ For a discussion on the importance of articulating the harms done to women because they are women in terms of collective, not individual, harm, see Catharine MacKinnon, *Directions in Sexual Harassment Law*, 31 NOVA L. REV. 225, 227 (2007). For more on why certain forms of cyber harassment should be considered discrimination, see Mary Anne Franks, *The Banality of Cyber Discrimination, or, The Eternal Recurrence of September*, DU PROCESS: AN ONLINE SUPPLEMENT TO THE DENVER UNIV. L. REV., Feb. 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569202.

¹¹⁹ In another work, this Author details why and how certain forms of gender-based cyber harassment should be treated as sexual harassment. See Mary Anne Franks, *supra* note 119.

world.