

Building a Better (Critical Democratic) Speech Culture: Feminist Blogs and Freedom of Speech

by

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Free Speech and the Feminist Blogosphere

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Abstract

This thesis uses our lived experience of speech online to analyse the most common justification for freedom of speech: the "marketplace of ideas" metaphor. It opens with an account of a conversation in the feminist blogosphere that explicitly addressed the operation of social power in discussion. The lessons of that conversation is compared to accounts of the marketplace of ideas metaphor offered by theorists like Sunstein, Fiss, and Boyd White, as well as more internet-oriented theorists like Lessig, Benkler and Balkin. From that, and building on the insights of critics like Fraser and Mansbridge, the thesis argues that we ought to reject the "liberal-economic" paradigm of the function of speech and deliberation in a democracy, and proposes that we replace the "marketplace of ideas" metaphor with that of a "critical democratic culture." The thesis concludes by illustrating the usefulness of that new metaphor through the example of hate speech.

Table of Contents

INTRODUCTION	1
CHAPTER ONE: LESSONS FROM THE FEMINIST BLOGOSPHERE.....	7
1. WHY FEMINIST BLOGS?.....	7
2. METHODOLOGY OF STUDY	10
3. OVERVIEW OF THE FEMINIST BLOGOSPHERE.....	13
4. THE FEMINIST BLOGOSPHERE’S MENSIS HORRIBILIS: APRIL 2008.....	14
4.1 <i>Late March, 2008: “You All Engage Best Through Negative Discourse”</i>	16
4.2 <i>Early April 2008: “This Has Not Been A Good Week For Radical Women of Color Blogging”</i>	24
4.3 <i>Late April 2008: “I Guess It’s a Jungle In Here Too, Huh?”</i>	41
5. LESSONS LEARNED.....	47
5.1 <i>Competing Claims on the Matter of Civility</i>	47
5.2 <i>Professionalization and Privilege</i>	48
5.3 <i>Appropriation Beyond the Scope of Copyright</i>	50
5.4 <i>Continuing Relevance of Barriers Like Race to Understanding</i>	51
5.5 <i>Real-Time Silencing</i>	51
6. CONCLUSION.....	52
CHAPTER TWO: FEMINIST BLOGGING AND PRE-INTERNET FREE SPEECH THEORY	53
1. JURIDICAL ORIGINS OF MARKETPLACE OF IDEAS THEORY: JUSTICE HOLMES IN ABRAMS	54
1.1 <i>Two Interpretations of the Doctrine</i>	54
1.2 <i>Situating the Holmesian Conception in Relation to the Feminist Blogosphere</i>	59
2. ECONOMIC ELABORATIONS OF MARKETPLACE THEORY	64
2.1 <i>Neoclassical and “Neoeconomic” Approaches</i>	64
3. CRITICAL PERSPECTIVES AND NON-MARKET THEORIES	72
3.1 <i>Owen Fiss and the Democratic “Irony” of Free Speech</i>	72
3.2 <i>Irony and Silencing in the Feminist Blogosphere</i>	75
3.3 <i>James Boyd White and the “Form” of Free Speech</i>	78

3.4	<i>Living Speech in the Feminist Blogosphere</i>	81
4.	CONCLUSION.....	84
CHAPTER THREE: FEMINIST BLOGGING AND POST-INTERNET FREE SPEECH THEORY		85
1.	INTRODUCTION	85
2.	FREE SPEECH THEORY GOES ONLINE	86
2.1	<i>Lessig: Code</i>	87
2.2	<i>Benkler: Networks</i>	93
2.3	<i>Balkin: Democratic Culture</i>	99
2.4	<i>Sunstein: Polarities</i>	105
2.5	<i>The Promise and the Flaws of Post-Internet Free Speech Theory</i>	110
3.	FINDING SOLUTIONS IN CRITIQUES OF DELIBERATIVE THEORY	112
3.1	<i>Fraser: Social Status</i>	114
3.2	<i>Mansbridge: Multiplicity</i>	117
3.3	<i>Synthesis of the Fraser and Mansbridge Critiques</i>	123
4.	CONCLUSION.....	124
CHAPTER FOUR: PUTTING “CRITICAL DEMOCRATIC CULTURE” INTO PRACTICE: THE CASE OF HATE SPEECH REGULATION		126
1.	“OFFLINE” HATE SPEECH REGULATION, BEFORE THE INTERNET	127
1.1	<i>United States: Hate Speech as “Low-Value” Speech</i>	128
1.2	<i>Canadian Doctrine: Hate Speech As Violative of “Equality”</i>	132
1.3	<i>Conclusion</i>	136
2.	HATE SPEECH GOES ONLINE	136
2.1	<i>The Strengthening of “Global Hate”</i>	137
2.2	<i>Cyber-harassment as a Secondary Effect of Hate</i>	139
2.3	<i>Inadequacy of Currently Proposed Solutions</i>	143
2.3.1	United States: Borrowing from Tort and Civil Rights Laws	143
2.3.2	Canada: A Return to Free Speech Absolutism?.....	147

3. A BRIEF DEFINITION AND BRIEFER DEFENSE OF A “CRITICAL DEMOCRATIC CULTURE” THEORY OF FREE SPEECH.....	151
4. EVALUATING THE REGULATION OF HATE SPEECH BY REFERENCE TO A CRITICAL DEMOCRATIC CULTURE .	154
4.1 <i>Doctrine</i>	154
4.2 <i>Solutions</i>	156
CONCLUSION	160
APPENDIX A	169

List of Appendices

Appendix A: List of URLs.

Introduction

In my experience, conversations about the nature of freedom of speech and expression in the so-called Information Age are prone to descent into cliché. Of course, free speech theory itself is a field in which timeworn rhetoric has often been wielded in place of rational and fact-based argument. I am not alone in that observation. In a representative commentary, Henry Louis Gates, Jr, has referred to the dominant rhetoric surrounding freedom of speech as an "absolutism" of "the kind your uncle bangs on about" as resting on pillars of thought that "all pretty thoroughly rotted through."¹ Chief among these pillars is the image of a so-called "marketplace of ideas."

That phrase, which developed as an extrapolation from a famous passage of Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*,² has cast a long shadow in both legal and popular discourses about the nature of speech. The popularity of the metaphor has often stood in stark relief to its role, nearly from birth, as a constant source of debate and tension within free speech doctrine and theory. Some commentators worried whether the mass media necessarily distorted actual competition in the marketplace by imposing certain barriers - transaction costs of publishing in particular - to popular participation.³ Others were concerned

¹ Henry Louis Gates, Jr., "Critical Race Theory and Freedom of Speech" in Louis Menand, ed. *The Future of Academic Freedom* (Chicago: Univ. of Chicago P, 1996), 119-162 at 122.

² 250 U.S. 616 (1919). See Chapter 2 for an account of that extrapolation.

³ This is generally the concern of "institutional" First Amendment theory. See, generally, Joseph Blocher, "Institutions in the Marketplace of Ideas" (2008) 57 Duke L. J. 821; Frederick Schauer, "Principles, Institutions, and the First Amendment" (1998) 112 Harv. L. Rev. 84, 85-86. It is also a great deal of the point that seems to animate much of the debate over campaign finance regulation, insofar as the concern is with disparate material abilities to influence public opinion on individual candidacies for public office. See, e.g., Monica Youn, "First Amendment Fault Lines and the Citizens United Decision" (February 10, 2011) (forthcoming Harvard Law & Policy Review), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762746.

with the way in which non-economic forms of social power - for example the power that attaches to gender, race and class - were implicated in the ability to be "heard" within that marketplace.⁴

Because the internet has arguably reduced the costs of publication to negligible levels,⁵ the present debate about the value and uses of the internet in a free and democratic society is explicitly underwritten by reference to the metaphor. Writing about the internet, both scholarly and popular, is positively stuffed to the gills with encomia to the potential of the internet to operate as a Platonic embodiment of the "marketplace of ideas."⁶ In such utopian perspectives, the internet is a powerful democratic tool precisely because it gives us an arena for the conduct public debate in which all persons and claims are admissible, and all are given equal consideration, because the only regulation comes through the Invisible Hand of truth-value and human rationality, which will sort out the valuable idea. Curiously, it seems some people expected this to more or less put the question of other forms of social power to rest.

That the internet has not always fulfilled these hopes as those writers might have wished is at this point widely accepted. The best evidence of this is the way in which the sudden ubiquity of the internet - the manner in which our lives have come to revolve around Tweets and blogs and other forms of technologically-driven interconnectedness - is clearly disturbing a healthy proportion of contemporary commentators, both academic and popular. Some worry that our Internet-saturated life places undue emphasis on trivial political action - like Twitter "hashtag

⁴ See, e.g., generally, Richard Delgado & Jean Stefancic. "Images of the Outsider in American" (1991) 77 Cornell L. Rev. 1258; Richard Delgado & David Yun. "'The Speech We Hate': First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics" (1995) 27 Ariz. St. L. J. 1281.

⁵ For a representative iteration of this argument, albeit made specifically in the context of "social media" tools like Twitter and Facebook, see Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations* (New York: Penguin, 2008) at 25-54.

⁶ The sources of this equation are so numerous as to make the listing of a representative sample rather useless, but suffice it to say that even the American Supreme Court has expressly endorsed the analogy. See *Reno v. ACLU*, 521 U.S. 844 at 885 (1997) (calling the internet a "new marketplace of ideas").

campaigns," in which solidarity with a cause is indicated by way of tweeting on a certain topic and indicating it with a certain searchable term⁷ - over more real-world, and thus presumably "substantive," modes of political engagement.⁸ Others think the internet is a hotbed for "extremists" who threaten "social stability."⁹ Still others think that the primary form of discourse on the internet is character assassination, and are proposing new privacy norms and laws to address the problem.¹⁰ There are, of course, still commentators who believe that the internet provides new and exciting opportunities for people to express themselves. But even they feel suddenly compelled to qualify the free marketplace metaphor with ideas about the role of collaboration.¹¹ Thus the uneasiness with the marketplace metaphor is implicitly seeping into a lot of current disquiet about the often chaotic and even hurtful actual experience of the internet.

This paper seeks to dig a little deeper into these debates - both about the appropriateness of the marketplace of ideas metaphor, and about the fundamental nature of the internet - through the lens of one specific online community's struggle with these questions: the feminist blogosphere. This is a community that I have, myself, been a part of, on and off, since about mid-2008. It is also one that, as I describe in Chapter One, has had a considerable amount of internal discussion and even some self-awareness about the supposed utopian speech situation its participants find itself in. I present the community to you by giving an account of one debate

⁷ There are many of these, but my favourite recent one was the #mooreandme campaign. See Richard Adams, "#mooreandme: The Hashtag That Roared" *The Guardian* (28 December 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/dec/28/michael-moore-mooreandme-twitter>

⁸ See generally Evgeny Morozov, *The Net Delusion: The Dark Side of Internet Freedom* (New York: PublicAffairs, 2011); Malcolm Gladwell, "Small change: why the revolution will not be tweeted" *The New Yorker* (4 October 2010) http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwel.

⁹ See, e.g., Cass Sunstein, *Republic.com 2.0* (Princeton: Princeton U.P., 2009).

¹⁰ See, e.g., Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale U. P., 2007).

¹¹ See, e.g., Yochai Benkler, *The Wealth of Networks* (New Haven: Yale U. P., 2007).

that was greatly enmeshed with these issues. In Chapter Two, I use that debate to explore some of the main themes of legal and theoretical debates about the usefulness of the "marketplace of ideas" metaphor. My project there is not to cover all criticisms of the marketplace of ideas metaphor – others before me, have, for example, provided abstract critiques of the economic nature of the metaphor.¹² Rather, I want to demonstrate the way in which the metaphor's economic single-mindedness provides neither much descriptive nor prescriptive value in disputes about the nature of speech under conditions of social power, as occurred in the feminist blogosphere dispute. In Chapter Three, I build these insights into a critique of what I call "internet-driven free speech theory." That strain of modern internet scholarship, led by figures like Lawrence Lessig, Yochai Benkler, Jack Balkin and Cass Sunstein, has been influenced by certain Habermasian ideas about "deliberative democracy" and the nature of the "public sphere." I find certain critiques of Habermas' thought, particularly from Nancy Fraser and Jane Mansbridge, to be instructive and provide a much better normative and descriptive paradigm than the marketplace metaphor for resolutions of speech conflicts. I call the paradigm that emerges from these theoretical explorations that of a "critical democratic culture." Finally, in Chapter Four, in order to demonstrate the potential power of that criticism, I analyze the free speech problem of hate speech to identify the way that debate has been snarled around the liberal-economic paradigm of speech inherent to the marketplace of ideas. I then apply my more nuanced metaphor of a "critical democratic culture" to demonstrate the way in which it might disentangle the issues such that a more satisfactory approach to hate speech regulation is made possible. The fundamental idea here is to draw some more careful connections between the

¹² See especially Margaret Jane Radin, *Contested Commodities: The Trouble With Trade in Sex, Children, Body Parts, and Other Things* (Cambridge: Harvard U. Press, 1996), Chapter 12.

nature of freedom of speech and the nature of the internet that are driven by actual, embodied experience of the internet rather than theoretically-driven hypotheses about it.

The main reason I have chosen to approach these questions through a particular online community is admittedly a matter of personal experience. For people like me, the internet has been a way of life as long as I can remember. I am what is sometimes called in the literature a "digital native,"¹³ though I am of a slightly older generation than that which initially packed cell phones next to their elementary-school lunches. My father, a computer scientist teaching at Algonquin College in Ottawa, Ontario, Canada, signed me up for the local, dial-up based, text-only, FreeNet at the age of thirteen, in 1993. Since that time, I have maintained what I suppose you could call an active digital alter-ego, through email and also through contribution to various discussion fora on the internet, some fully public like UseNet groups and blog comment boards, and others less so, like listservs. Discussions on the internet have formed an important part of my intellectual and personal development.

Yet much of the literature, popular and scholarly, about the internet describes a place that is unrecognizable to me. I cannot help but suspect that many of the people who are writing these articles and books have not, themselves, engaged online very substantially.¹⁴ I do not wish to claim universality for my own experience, of course. But I do think that people who, like me,

¹³ The coining of this term, which is meant to capture those who are young enough not to have really known much life before the internet, is generally attributed to Marc Prensky, "Digital Natives, Digital Immigrants" (2001) 9:5 *On the Horizon*.

¹⁴ Sometimes, but not always, this has consequences for the scholarly value of the work. To give an example, in Chapter One you will encounter a blogger by the name of brownfemipower. That is the name she has chosen to use online, and yet when I recently came across a quotation of her work in Danielle Keats Citron's "Civil Rights in Our Information Age," in Saul Levmore & Martha C. Nussbaum, eds., *The Offensive Internet: Speech, Privacy and Reputation* (Cambridge, MA: Harvard U.P., 2010) 31-49, she is called "La Chola," (*ibid.* at 36) which was the name of her blog. Obviously this is a bit of a nit-pick; on the other hand, it raises the question of how closely scholars are actually reading and following the work of these discursive communities, if they are unable to actually keep the names straight. Cherry-picking quotes to support theses about the nature of the internet is more or less unavoidable, given the volume of the material, but it's possible to be too glib about it.

can be said to have "live[d] on the Internet," as one character in the recent film *The Social Network* put it, might agree with me that overall the situation is deserving of considerably more nuance than it has thus far been given. My online life has led me to believe neither that the internet is some kind of utopia for rational debate nor that its effect can be dismissed as trivial. I have personally had discussions online that were both intensely frustrating and intensely productive, and often these features were simultaneous. And it seems to me that those experiences were not so much unique to the internet as they were, fundamentally, about the nature of speech itself.

As such, I have begun to think about the value and utility of speech in a democratic society as less a matter of theory than of practice. Instead of trying to force people into a paradigm of speech that makes little reference to experience, I wonder if one might not do better, in the field of speech regulation, by striving towards an ideal that recognizes the material reality of the way we speak to each other. This paper is an initial effort towards that end.

Chapter 1

Lessons From the Feminist Blogosphere

I want to begin by presenting an account of feminist blogging. The aim here is to provide a narrative illustration of certain structural difficulties in online discourse – of internalized obeisance to social power structures like racism, of the difficulty of “listening,” and of the “professional” aspects of writing, that I have often observed over my years online. These features, I believe, are part of the process and function of public speech more generally, and as I will explore more fully in subsequent chapters, deviate significantly from our traditional image of a “marketplace of ideas.”

I do not claim to present a scientifically rigorous account of the dynamics of the online feminist space, since, as I explain below, I believe it would be more or less impossible to give its full flavour by way of charts and statistics. Instead, after explaining why I think feminist blogs are an instructive portion of the blogosphere in considering the nature of free speech and deliberation, I justify a methodological approach for describing their interpersonal dynamics by way of analyzing a particular conversation that took place in April 2008. After giving an account of that conversation, I identify the themes I think one can take away from it for my later analysis of the controlling power of the “marketplace of ideas” in free speech theory.

1. **Why Feminist Blogs?**

There are a number of reasons why I choose to illustrate speech “problems” by way of the feminist blogosphere specifically. I was attracted primarily by the vibrancy of the community, both as a matter of internal character and external influence on feminist discourse *generally*. That external influence, it should be noted, is not simply the effect of some self-identified feminist

bloggers having managed to translate the popularity of their blogs into book deals.¹⁵ Indeed, to a growing extent feminists in both academic and activist contexts explicitly acknowledge the contributions of blogging to what feminist political “movement” might still be said to exist.¹⁶

Of course, not all feminists view the rise of feminist blogging as a positive thing. For example, Susan Faludi, in a recent essay in Harper’s on intergenerational conflict in feminism, lists blogging as one of the things with which her (second-wave) generation sees contemporary (third-wave) feminists as overly obsessed.¹⁷ But even if references to blogging are frequently pejorative, prominent feminist writers, i.e. those perceived to have a platform of greater legitimacy than a free blogging account, choose to address it. Which suggests that feminist blogging is not without considerable effect. Thus the feminist blogosphere provides an optimal starting point from which to gauge the potential contributions of this new medium of public debate to the public debate writ large, precisely because writers beyond the blogosphere have acknowledged its newfound power.

¹⁵ The typical example here is Jessica Valenti, *Full Frontal Feminism: A Young Women’s Guide to Why Feminism Matters* (Emeryville, CA: Seal Press, 2007).

¹⁶ For perspectives oriented to academic audiences, see, e.g., Elizabeth K. Keenan, “If Liz Phair’s Exile in Guyville Made You a Feminist, What Kind of Feminist Are You?: Heterosexuality, Race, and Class in the Third Wave” (2010) 14 *Women & Music: J. of Gender and Culture* 45; L. Rapp et al., “The Internet as a Tool for Black Feminist Activism: Lessons From an Online Antirape Protest” (2010) 5 *Feminist Criminology* 244; C. Atlioff, “Policing Miscarriage: Infertility Blogging, Rhetorical Enclaves, and the Case of House Bill 1677” (2009) 37 *WSQ: Women’s Studies Quarterly* 125; Jill Filipovic, “Blogging While Female” (2007) 19 *Yale J. L. & Feminism* 295 .

For perspectives oriented towards popular and activist audiences, see, e.g. Stephanie Herold, “If You Can’t Find Us, It’s Because We’re Online” *Campus Progress* (online) (19 July 2010), http://www.campusprogress.org/articles/young_feminists_to_older_feminists_if_you_cant_find_us_its_because_we_r; Danielle Mastretti, “Shelf Life: Feminism 2.0” *UTNE Reader* (Mar-Apr 2008), <http://www.utne.com/2008-03-01/Media/Shelf-Life-Feminism-2-0.aspx>; Madeleine White, “Where Have All the Feminists Gone” *Toronto Star* (6 March 2008), <http://www.thestar.com/article/309685>; Kira Cochrane, “The Third Wave: At a Computer Near You” *The Guardian* (31 March 2006), <http://www.guardian.co.uk/world/2006/mar/31/gender.uk>.

¹⁷ Susan Faludi, “American Electra: Feminism’s Ritual Matricide” *Harper’s* (October 2010), <http://www.harper.org/archive/2010/10/0083140>.

I also chose this community in particular because, as will be a constant theme in this paper, it seems to me that current scholarship on the deliberative potential of blogs and blogging has suffered from myopia. Specifically, it has focussed near exclusively on a perceived debate between right and left.¹⁸ Such a preoccupation is perhaps understandable. But even within the so-called “right” and “left” there is often considerable argument about what constitutes the proper nature of its politics, and about the policy principles and goals that such politics entail. This type of argument might potentially say as much about the deliberative quality of the national conversation, it seems to me, as any “higher level” confrontation. The feminist blogosphere, as a subset of “left” blogs, offers a starting point to examine that aspect of this debate.

Finally, I chose the community because it is one in which there is much internal discussion and reflection on the nature of what it is to speak, and in particular what it is to speak for a constituency, whether that is “feminists” or “women” or “progressives.” That has been an ongoing topic of conversation in feminism writ large for some time, long before the age of the internet. It may forever be a theme of feminist discourse – and it probably should be. But it provides us with more or less first-hand accounts of the ways in which online communities – which again, nominally demand only that one have an interest in the subject to enter the conversation – navigate problems of voice and volume. And it’s these problems of voice and

¹⁸ See, e.g., Yochai Benkler & Aaron Shaw. “A tale of two blogospheres: Discursive practices on the left and right” (2010) Berkman Center for Internet and Society Working Paper Series, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1611312; Eric Lawrence, John Sides & Henry Farrell. “Self-Segregation or Deliberation? Blog Readership, Participation, and Polarization in American Politics” (2010) 8 Perspectives on Politics 141.

volume that, I will argue in subsequent chapters, traditional and internet-driven free speech theories have had difficulty accounting for.

2. *Methodology of Study*

I want to make clear that what follows is not an exhaustive empirical study of feminist blogs in the social scientific sense. With all due respect to those who may be currently pursuing such studies, I am not sure it will ever be possible to construct a statistically rigorous account of any portion of the blogosphere, let alone the whole thing. The empirical study of blogging is inherently fraught with difficulty, not just because of the sheer extent of text one would have to cover in order to claim comprehensiveness, but also because many blogs are deleted, either by their owners or by platform administrators for reasons of neglect. While sometimes old blogs can be retrieved at the Internet Archive,¹⁹ their records, which are built from cached snapshots collected by spiders that troll the web periodically, are incomplete at best.²⁰ Thus it is impossible to promise that one's documentary evidence is ever complete.

Moreover, the universe of blogging is large enough to evade comprehensive study on several different levels. First and foremost, of course, is the fact that these conversations are open to the public, and it is presumed at least formally that anyone who has some interest in the subject is free to join. But there are other factors that keep the boundaries of such conversations expansive.

¹⁹ Also known as the Wayback Machine, the Internet Archive preserves “snapshots” of the web taken periodically by its webcrawler program. See <http://www.archive.org>.

²⁰ Michael Keren has also commented on these obstacles to comprehensive study, noting that the existence of blogs in a virtual reality “turn[s] the study of the blogosphere into one of texts rather than of people.” Michael Keren, “Blogging and Mass Politics” (2010) 33 *Biography* 110 at 113. I am not sure I agree with Keren’s hard-and-fast distinction between “texts” and “people” in this context, as it’s been my experience that blogging is intensely personal for the participants, but the matter is beyond the scope of this study.

Not only are there innumerable blogs, but some are written by multiple authors who are not always philosophically in sync, and intra-blog conversations ensue. The practice of commenting often means that the threads of conversation between readers - often without the participation of the original blogger themselves - are sometimes more significant to the overall effect of the post than anything written within it. There is also a large temporal reach to these conversations. Being the kind of thing one can revisit to comment an hour later, the conversation inspired or taken up by a single blog post can stretch out over days and weeks. The sheer amount of data effectively prevents any claim to scientific comprehensiveness.

Setting aside those methodological problems, I am also skeptical that the depth and breadth of public conversation in any blog community is best measured by the kind of data such a statistical overview provides. These empirical studies are, for example, quite obsessed with the metric of linking. Sunstein, in fact, places great weight on the linking metrics in expressing his concerns that the blogs encourage “enclave,” sealed-off thinking – at one point even suggesting that one appropriate way to ensure proper conversation would be to mandate a certain amount of linking to opposing views.²¹ The idea is that the more a blog links to its opponents, the more engagement with critics it may therefore lay claim to. The attraction of such thinking is not difficult to understand, as the linking metric has the advantage of being easily quantifiable. But in my experience - and even as seen in the account below - the mere act of linking to someone’s blog post is in fact a very inadequate measure of one’s engagement therewith. Sometimes the post is linked to and carefully dissected; other times it is merely because the linked post gives factual

²¹ See, generally Sunstein, *Republic 2.0*, *supra* note 8.

support to whatever contention the blogger is advancing. Sometimes the link is made merely to ridicule. Attaching a substantive importance to the mere fact of a link thus seems to me more like scholarly wishful thinking than analytical rigor.

In light of all that, I have chosen here to give an account of the community not through spreadsheets and data but rather to do so through the lens of one particular conversation that cropped up in March and April 2008. In order to develop the account that follows, I used the links embedded by the participants themselves to gauge the extent of and identify the participants in that conversation. I followed every trackback and link, complete with comments sections, and then reorganized the material collected chronologically by date and time of blog posting. To the extent anything was deleted, I tried to retrieve it from the Internet Archive, and have noted where and when some material seems to be lost for good. The URLs of every blog post examined as a part of this analysis are recorded in Appendix A.

The advantages of this approach seem to me at least twofold. First of all, the identification of participants will not rely on some arbitrary metric, like a Google query for “feminist blogs” or some other term allegedly relevant to this conversation. This is particularly salient when it comes to this discussion, since as described below, many of the participants in the conversation gradually came to resist self-description as “feminists,” and some had abandoned the term long before. Second, in bringing the focus down to one conversation, it becomes possible to obtain a deeper reading of its quality.

3. *Overview of the Feminist Blogosphere*

Keeping in mind all those caveats regarding the difficulty of establishing empirically stable standards for studying the blogosphere, I nonetheless want to give a brief descriptive overview of the “feminist blogosphere” in order to make what follows more intelligible to those who are not familiar with it.

When described in the mainstream media, three blogs are usually identified as the major “hubs” of feminist conversation online. All have multiple authors, and all have had authors come and go over the course of their existence. The first of these is *Feministing*,²² founded in 2004 by Jessica Valenti, a young feminist activist then associated with NOW’s Legal Education and Defense Fund.²³ The second is *Feministe*.²⁴ Neither *Feministe* nor *Feministing* are commercial concerns,²⁵ but the third website often identified with them is *Jezebel*,²⁶ founded in 2007 by Gawker Media, a blog empire owned by the former British tabloid journalist Nick Denton. Two other group blogs are mentioned less often, but still frequently enough to be considered “major” sites: *Shakesville*²⁷ and *Pandagon*.²⁸ Many, though not all, of the feminist bloggers who work on these websites are pursuing writing as their primary career, but other than that they often strive

²² *Feministing* may be accessed at <http://www.feministing.com>.

²³ Rachel Kramer Bussel, Interview, “Jessica Valenti, Executive Editor and Founder, *Feministing.com*” *Gothamist* (15 February 2006), http://gothamist.com/2006/05/15/jessica_valenti_1.php.

²⁴ *Feministe* may be accessed at <http://www.feministe.us>.

²⁵ Both do accept donations but bloggers were not paid salaries.

²⁶ *Jezebel* may be accessed at <http://www.jezebel.com>.

²⁷ *Shakesville* may be accessed at <http://shakespearessister.blogspot.com>.

²⁸ *Pandagon* may currently be accessed at <http://www.pandagon.net>.

for diversity in their editorial staff. All of these blogs, for example, have had women of colour on their mastheads. Nonetheless, all address feminist issues with a decidedly American lens.

But these large sites do not constitute the entirety of what is referred to as “the feminist blogosphere.” Hundreds, possibly even thousands, of smaller sites fan out from them. Some cluster in sub-communities centred around particular strains of feminist discourse – radical feminism, “sex-positive” feminism, etc. Some of these blogs – and in particular those run by women of colour - do not even refer to themselves as “feminist” blogs - their authors self-identify under diverse titles including “womanists,” “radical women of colour,” and “mujeristas.” Still, given their ongoing participation in conversations like the ones described below, I include them in this study under a very broad definition of the term “feminist.” As stated above, if the blogger appears to consider themselves a part of the conversation about feminism (and its discontents), I consider them a part of this particular “blogosphere.”

4. ***The Feminist Blogosphere’s Mensis Horribilis: April 2008***

The conversation I chose as the way into this subject is a complicated one that convulsed the community for nearly a month in April 2008. It was a conversation about what kind of community had been created by all of this blogging, and thus provides a rather fascinating instance of a discursive community examining its own practices and the attendant difficulties of making oneself understood even to ostensible allies.

Before delving into the account, a few caveats seem necessary. All arise from the fact that blogging, as an informal medium, encourages an informal manner. The first is that I have preserved comments as they are written, which means that they contain typographical errors.

There are undoubtedly those who would say that a lack of attention to typographical detail - let alone rules of grammar and spelling and “polite conversation” - indicates an impoverished level of discourse. I disagree, for any number of reasons, not least that so long as a certain (low) threshold of intelligibility exists it makes no sense to deliberately erect barriers for entry into public conversation that depend on class privilege - in the sense of having had a “proper” education - or on neurotypicality. (In some cases, after all, the errors might be caused by dyslexia.) In any event, the best response I can think of to critics who think intelligence can be found in formality follows below. I think readers will find that very substantive ideas are at play in the discussions I describe, even with the spelling errors and funny names.²⁹

The second is that it is difficult to recreate, in narrative form, the temporal nature of a blogged conversation. It’s often the case, for example, that a conversation is happening in multiple fora at once, even among the same participants. For example, debates could be raging among commenters in two posts on the same topic, sometimes on the same blog, sometimes on different ones. I have done my best to keep what follows in rough chronological order, but where necessary for clarity have occasionally cited to a comment or two on a blog post that were made later than the date of posting.

A third caveat is something more of a methodological problem, but it bears mentioning in any event that the conversation described below has been reconstructed almost solely from its public record. Obviously, however, in researching such an account, there are a great many

²⁹ I have chosen to forgo even identifying typos with “[sic]” in the quotations because I would have to do so so often it would disrupt the text. As they are all cut-and-pasted, it may be assumed that any typo appearing in a quotation below also appears in the original comment.

documents to which a post-hoc researcher like me is not privy. For example, there were undoubtedly private email conversations of all kinds circulating among the participants of what I described below, some of them no doubt crucial for both the development of certain ideas in the debate and also for fostering certain bad feelings among the participants. That I do not cover these here – could not even if I wanted to – does not seem to me a serious flaw given that the subject of this entire paper is the issue of “public speech,” which is all regulatory ideals of speech could ever hope to meaningfully address. Obviously we all have different, less exacting standards of ourselves when we have our conversations privately than we do when we are pontificating from soapboxes, and it is the latter with which the entire notion of the “marketplace of ideas” is concerned. But I make the admission here in the interests of full disclosure.

4.1 **Late March, 2008: “You All Engage Best Through Negative Discourse”**

Identifying a starting point for any blog conversation is somewhat arbitrary. Like any other form of conversation, there is a sense in which it is always picking up on threads of prior discussions. But roughly, the conflagration began on March 30, 2008, when the blogger Blackamazon posted a report from her attendance at the WAM! (Women and Media) Conference in Boston, a conference popular with feminist bloggers, which took place from March 28-30, 2008. After noting that she loved the work she had engaged in there with other women of colour bloggers, she added, somewhat cryptically,

Oh and will elaborate later

But on some real don't mess with my fam.

Fuck Seal Press.³⁰

Seal Press is a small feminist publishing house, a part of Perseus Books Group. It was founded in 1976, with the explicit mission of “provid[ing] a forum for women writers and feminist issues, and since then, Seal has published groundbreaking books that represent the diverse voices and interests of women.”³¹ It wasn’t initially clear what exactly inspired BlackAmazon’s remark. In context with the praise of the work of radical women of colour at the WAM! Conference it seemed to imply some kind of neglect of radical women of colour by Seal Press.³²

It appears that Seal Press representatives had roughly the same interpretation. A couple of days after the post appeared, on April 2nd, a comment attributed to “Krista Lyons Gould and Brooke Warner” appeared on the site, reading:

Seal Press here. We WANT more WOC. Not a whole lotta proposals come our way, interestingly. Seems to me it would be more effective to inform us about what you'd like to see rather than hating.³³

³⁰ BlackAmazon, “Notes So Far From WAM,” *Having Read the Fine Print* (blog) (March 30, 2008), <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html>

³¹ <http://www.sealpress.com/about.php>

³² A recent revisiting of the conflict revealed that at the conference Seal Press representatives had rejected a book idea from a woman of colour blogger and writer. As Latoya Peterson recounted it: “Wendi and I had attended a pre-caucus lunch where we found out that a pretty awesome writer, Adele Nieves, had sat down with a publisher called Seal Press to pitch her idea for an anthology. From what I can recall about the initial pitch, it was about bringing marginalized voices to the center of feminist discourse – a book on feminism without the usual suspects. However, the person who sat down with her completely missed why such a book was needed, and informed Nieves that the book just wouldn’t sell without a brand name feminist, like Jessica Valenti.” Latoya Peterson, “On Being Feminism’s Ms. Nigga,” *Racialicious* (blog) (8 March 2011), <http://www.racialicious.com/2011/03/08/on-being-feminisms-ms-nigga/>. I have kept this detail out of the narrative above in order to recreate for the reader what clearly was the confusion a third party might have had, reading BlackAmazon’s post without having attended the conference or heard this story.

³³ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207158300000#c7109944307940126961>. As there is currently no agreed citation

BlackAmazon replied:

First and foremost how ever rude and disrespectful your entrance , welcome to MY blog.

Secondly , considering you want more women of color I find it highly comical your response to a WOC is to tell her what it seems like to you is the best option for her experience.

Because immediately my display of anger is met with a public call for what is essentially servitude

I t seems like to me that this lack of out reach and unbelievable entitlement might have something to do with the lack

And finally since were not toddlers or characters from Miami's most wanted. I would prefer you not use the phrase "hating". YE s my language was strong but yes I would encourage or do EXTRA work for someone who characterizes my words as essentially empty minded hating or envy.³⁴

Other commenters quickly chimed in, supporting BlackAmazon's position, noting that "The way you barged into my friend's space and started making demands is probably a good reason some women of color wouldn't want to send you shit."³⁵

Lyons Gould and Warner responded:

I appreciate the dialogue, ladies. First off, the blog feels very informal, and my language is in response to the language here:

1. You hate us.

standard for blog comments, I have chosen here and subsequently to simply provide a link to the comment itself where possible, or otherwise provide the name, date, and author of the comment.

³⁴ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207166340000#c7204460363006276827>

³⁵ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207167240000#c1132951369942522771>

2. We have nothing on WOC.

I get that you all engage best through negative discourse, but I find that too bad. It's not servitude when we pay our authors advances. And book publishing is not an industry of outreach as much as it is editors being presented with an idea and engaging would-be authors in creative co-creation. I just find it curious more than anything that you all are wasting your time hating (yes, purposeful reuse of the word) rather than actively engaging in changing something you find problematic. I totally respect the creative space.³⁶

The conversation continued in this fractured way in the comments to Blackamazon's post for some time. Several commenters made the valid point that if indeed Seal Press was looking to publish more work about women of colour, haranguing them in the comments section of a blog owned by a woman of colour was a curious public relations strategy.³⁷ Others pointed out that accusing women of colour of being angry has a long and fraught history within the feminist movement.³⁸

Several days went by. On April 3, 2008, Seal Press decided to move the conversation over to its own blog. There, Warner wrote a post explaining that she was the sole acquiring editor at the house and relied more on submissions than outreach in order to find new authors and titles to publish. Moreover,

I'm writing here today because I don't want to be boycotted by people who took offense to my comments yesterday. Seal is actually barely surviving. This press, which has a thirty-year history of publishing books that no other house wanted to publish, means a lot to me and to Krista [Lyons-Gould] and to a lot of women.

³⁶ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207172340000#c6443166971960161593>

³⁷ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207192260000#c3236012222503515268> (“I'm willing to bet that any women reading this who were considering submitting to Seal Press are reconsidering right now. This isn't just rude and condescending, it's strikingly bad PR.”)

³⁸ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207193160000#c7983106339617193229> (“Here we go again, we are hating. We are emotional, hot headed, “angry”, but not the “good” angry feminist way.”)

Seal has changed over the years because we've had to. We could not survive publishing only the types of books that Seal used to publish. There's been a constant push to be more commercial, and we've responded to that. When it's try or die, I opt for trying. I've been involved in the new direction the list has taken, and Seal is more mainstream than it's ever been. And for better or worse, this is what's allowed us to stay in existence. This doesn't mean that we don't care, or that we're not open to hearing where we're doing wrong, or where we could do better. And so even though I feel angry about the comments over at Blackamazon, and I admittedly posted somewhat defensively, the intention behind it was, "Hey, let's work together to get published more of what you want to see." It doesn't even mean that can or will happen. I have higher-ups to answer to, it's true. But it doesn't change the fact that Krista and I are not intentionally fostering a "wall of whiteness" here.

So the fact that my writing "We want WOC"---yes, it was crass and quick, but I meant "Seal wants to publish WOC"---resulted in such backlash says to me that yes, people were offended, and I do apologize for that. I want to open up this discussion and do so productively. I do want to cultivate WOC authors. I always have. If I haven't been successful or able it's not for a lack of trying or ignorance to the situation out there.³⁹

Commenters weighed in almost immediately after the post went up. One pointed out that with its mention of the pressure to publish more “commercial” books, the Seal Press editors were still implying that their focus fundamentally was not on issues of importance to women of colour. Noting that Seal Press had in the past recruited authors from the blog service Livejournal, one commenter pointed out: “so apparently you have time to outreach to some bloggers, but not WOC. they have to submit proposals with the right tone or else be told they aren't financially viable, as you've implied strongly here.”⁴⁰ Later, another commenter asked whether commercial viability was “worth it,” if exclusion was the cost. Warner replied, “i personally think the answer is yes. i'd rather that seal existed, publishing books for women, than not exist at all... and

³⁹ “Seal and Women of Color,” Seal Press (blog) (April 3, 2008), http://sealwomen.blogspot.com/2008/04/seal-and-women-of-color_03.php

⁴⁰ *Ibid.*, April 3, 2008, 2:34 p.m., bah.

we are actually trying to publish books that matter. i feel like this sentiment at least is a place where we have more commonality than divisiveness.”⁴¹ Commenter belledame222 replied, “well, matter to whom, is the question, isn’t it.”⁴²

A Seal Press publicist named Andie East also commented, noting that she was herself a person of colour, defending the comments Seal Press made at BlackAmazon as perhaps “rude, or inappropriate, but all that was said was we'd love to have more submissions from women of color.”⁴³

Another commenter, belledame222, pointed out that the entire conversation was thematically familiar:

This is more or less exactly the same "discussion" that comes up on the mainstream blogs, at events like WAM, in the public square, at universities...

Very basically, WoC object to something, or make a critique (usually far less harsh than a simple "Fuck ___, " even, which in itself is, you know--well, we'll get to that), and the very first (and second and third and fourth) reaction out of the gate is this out-of-all-proportion defensiveness, coupled with a high-handed sort of, "yes, well, you need us more than we need you, so play nice.."

Then, when the WoC are very clear that in fact they do -not- need the white feminist in question more than the other way around, tears and backpedaling and "come, let us reason together, we're all sisters here," more or less. And yet, still, at the same time: not really listening to the original complaints/critiques, or indeed really demonstrating -why- they "want more women of color." Is it for their own sakes? Or...⁴⁴

⁴¹ *Id.*, April 3, 2008, 7:01 p.m.

⁴² *Id.*, April 3, 2008, 7:14 p.m., belledame222.

⁴³ *Id.* April 3, 2008, 4:18 p.m., Andie East.

⁴⁴ *Id.* April 3, 2008, 4:44 p.m., belledame222.

Warner continued to insist that Seal Press had been correct to take the issue personally, citing its small stature as a publisher generally: “It's just us. It's not the same as saying Fuck Wal Mart. We're it.”⁴⁵ But that argument was not widely accepted, as commenter angry black woman noted: “Do you think that, just because you're a two-person operation that we need to modify our opinions because it might hurt your feelings? You seem to be missing the point. Whether there's one, two, ten, 59, 1001, a million of you, whatever makes women feel upset or disappointed in your press is STILL VALID. If someone feels that Seal press is fucking up, ignoring WOC, whatever, that opinion does not change depending on how many of you are involved.”⁴⁶

On April 8, 2008, Andi Zeisler, the editor of the third wave feminist magazine *Bitch*: Feminist Response to Pop Culture, and an author who had herself been published by Seal Press, weighed in on *Bitch*'s blog. “Seeing the Seal folks respond they way they did to Blackamazon's post — really, the fact that they responded at all in that space — was like watching from afar as your friend exits the club bathroom with her skirt tucked into her pantyhose and walks straight up to the guy in the ‘Too Drunk to Fuck, So Just Give Me a Blowjob’ t-shirt. You're trying to yell, “No! Retreat! Rewind! Bad idea!” but the music's just way too loud,” Zeisler quipped.⁴⁷ Commenters took issue with the applicability of the metaphor - it seemed to place Blackamazon in the role of the guy - but most seemed to agree with Zeisler that Seal Press had not handled the situation well. Only one objected, “Fuck anyone who thinks Blackamazon speaks for brown

⁴⁵ *Id.* April 3, 2008, 9:00 p.m.

⁴⁶ *Id.*, April 4, 2008, 5:57 a.m.

⁴⁷ Andi Zeisler, “On Seal Press and the Fucking of Same” *Bitch* (blog) (April 8, 2008) <http://bitchmagazine.org/post/on-seal-press-and-the-fucking-of-same>

ppl- she DOESN'T> She doesn't speak for me and she most certainly doesn't speak for my hermanas.”⁴⁸

On April 9, 2008, Seal Press took its April 3, 2008 post down from its blog, which they later said they did in response to Zeisler’s criticism at Bitch. Blackamazon responded in a post, soon after, noting that the gesture seemed to be designed

To make us all crazy. To make it all just us screaming into the thin air.

Because that's exactly how this works right, slip out , demand it done your way, and expect to be served right?

And if it doesn't work your way, try and make everyone who witnessed a liar.⁴⁹

On April 10th, Seal Press put the April 3rd post back up. “It's not that we wanted to stop the conversation [by taking the post down]. From our standpoint it was more that we felt that the entire thing had gotten so far away from us that we were attempting to put an end to it. Krista and I are new to blogging. This is our first run-in with an entire segment of the blogosphere whose spaces and rules of engagement are far different from anything we'd known,” Warner wrote. “As I said before, I took [Blackamazon’s remark] personally. Too personally. I understand that there's lots of emotional history and ill-feeling and feelings hurt on all sides. I am sorry.”⁵⁰ Commenters immediately pointed out that the mention of “rules of engagement” echoed earlier comments from Warner implying that the women of colour involved in this

⁴⁸ <http://bitchmagazine.org/post/on-seal-press-and-the-fucking-of-same#comment-274>

⁴⁹ BlackAmazon, “That’s All She Wrote” *Having Read the Fine Print* (blog) (April 9, 2008), <http://guyaneseterror.blogspot.com/2008/04/thats-all-she-wrote.html>

⁵⁰ “Response in the Aftermath of Listening” *Seal Press* (blog) (April 10, 2008) <http://sealwomen.blogspot.com/2008/04/response-in-aftermath-of-listening.php>

conversation were somehow unreasonable. Wrote one commenter, krystle, “As for "different" rules of engagement, there aren't any. Respect, treating someone who comments like a human even if they say something you do not like (or don't want to hear) is pretty standard in blogging and in life. Making a comment in someone's personal space that is inflammatory rather than asking, "why do you feel that way" does not go along with that. Neither is not engaging after bringing up a defensive post and then shutting it down all together.”⁵¹

4.2 **Early April 2008: “This Has Not Been A Good Week For Radical Women of Color Blogging”**

While the Seal flare-up was still ongoing, on April 2, 2008, the progressive blogger Amanda Marcotte published a piece at RHReality Check, a progressive website dedicated, in its own words, to advancing “sexual and reproductive rights.”⁵² The opinion piece was entitled “Can a Person Be Illegal?” and made the case that the rhetoric surrounding immigration in the United States dehumanized undocumented workers to the point of making them prey to sexual predators:

This woman's story demonstrates the way that the cut-and-dry distinctions between illegal and legal immigrants touted by the Lou Dobbses of the world tend to turn shades of gray when examined closely. Or actually, shades of paperwork. The rape victim entered the U.S. legally on a tourist visa and overstayed, but managed to enter the system to get her green card by marrying a citizen, which all but the worst mouth-breathers accept as a legitimate way to get a green card. Her story shows why it's front-loaded and racist to describe a human being as "illegal," especially when her illegal actions were misdemeanors such that they didn't even raise the ire of the law when she got her paperwork in order. I've managed to drive a car before after letting my inspection lapse, and then got the

⁵¹ <http://sealwomen.blogspot.com/2008/04/response-in-aftermath-of-listening.php?showComment=1207918260001#c5432430868282705945>

⁵² See “About,” *RHRealityCheck*, <http://www.rhrealitycheck.org>.

ticket straightened out by renewing my inspection sticker, an equivalent crime. No one describes my very being as illegal, though. Though rape, on the other hand, is not a minor crime and is earth-shattering enough that it's acceptable to describe the people who commit that crimes as "rapists," I suspect that rapists get called by that moniker less often than immigrants without their paperwork in order get called "illegals."⁵³

In support of that contention, Marcotte cited recent press reports about the sexual assault and botched abortions by undocumented workers, as well as a study by the Family Violence Prevention Fund.

Some context may be necessary to understand what happened next. By April 2008, Marcotte, a white woman from Texas, had been blogging for several years. She was then blogging at a group blog called Pandagon.⁵⁴ Marcotte had very recently made headlines by being one of two progressive bloggers - the other being Melissa McEwan of another progressive group blog, Shakesville⁵⁵ - hired to work for the Edwards campaign in early 2007. When news of her position with the campaign spread, several right wing journalists began to comb through Marcotte's archives, digging up statements deemed inflammatory. Many were drawn from Marcotte's statements on the Catholic Church, and the Catholic League protested Marcotte's appointment.⁵⁶ The campaign announced that it intended to keep Marcotte on staff, but on February 12, 2007, Marcotte announced she was quitting the campaign, writing at the online

⁵³ Amanda Marcotte, "Can A Person Be Illegal," *RHReality Check* (April 2, 2008) <http://www.rhrealitycheck.org/blog/2008/04/02/can-a-person-be-illegal>

⁵⁴ First located at <http://pandagon.blogspot.com/>, Pandagon later moved to <http://www.pandagon.net>. Marcotte had started out writing a solo blog, Mouse Words, <http://mousewords.blogspot.com/>, before moving to Pandagon. She still writes there today.

⁵⁵ Shakesville is found at <http://shakespearessister.blogspot.com/>.

⁵⁶ John M. Broder, "Edwards Learns Blogs Can Cut 2 Ways" (February 9, 2007) *New York Times*, <http://www.nytimes.com/2007/02/09/us/politics/09bloggers.html?ex=1328677200&en=bc555f23c328d4ac&ei=5088&partner=rssnyt&emc=rss%E2%80%9D>

newsmagazine Salon.com that, “[i]t became apparent to me that there were so many rumors and accusations of my supposed anti-Catholic bigotry that my ability to do my work with the Edwards campaign was suffering. I realized that I couldn't handle the stress of having people flinging an endless stream of baseless accusations at me without being able to come out and defend myself, so I resigned from the campaign.”⁵⁷ So by the time the RHRealityCheck article appeared, Marcotte was something of a “big name” among feminist and progressive bloggers - her writing was making news outside the blogosphere, and she was even building a career out of blogging. Her posts and articles were thus always widely linked and discussed.

The first sign that something was amiss appeared in an April 8th post by blogger Lisa at My Ecdysis.⁵⁸ While Lisa did not mention any names, the post was strident:

It's a pretty simple concept.

Stop stealing.

Cite your ideas, words, and the one who gave you the thought.

Stop stealing.

That echo? That echo I'm hearing in the "feminist" blogosphere is getting a bit too loud for me these days. I've been hearing it for years.

You know who you are.

It's a pretty simple concept, you know. We all learned it at some point in our development:

Give credit where credit is due.

⁵⁷ Amanda Marcotte, “Why I Had to Quit the John Edwards Campaign” (February 16, 2007) Salon.com, <http://www.salon.com/news/feature/2007/02/16/marcotte/>. McEwan resigned the next day under similar duress.

⁵⁸ <http://myecdysis.blogspot.com/>

That wasn't your seed, so cite where it came from. Stop spinning it like it's your own.

Stop stealing.⁵⁹

Commenters on the post seemed to know immediately what Lisa meant. One calling herself Octagalore noted, “That was pretty outrageous. Really unbelievable (well, maybe not). This wasn't just a blog post, but a speech at a conference where both women presented. Don't pretend you don't know about it.”⁶⁰

What Octagalore was referring to was a speech given by a popular woman of colour blogger who uses the screenname brownfemipower (often nicknamed “bfp”), and the conference was the WAM! Conference that sparked the controversy between Seal Press and Blackamazon. The accusation that Marcotte was somehow influenced by the speech was initially difficult to substantiate, though mentions of it would continue to weave through subsequent conversations.⁶¹

But that same day, April 8, another WoC blogger, Sylvia/M, wrote a remarkable post entitled “Don't Hate, Reappropriate” at her blog ProblemChylde.⁶² Using the Internet's full intertextual capabilities, she linked every sentence of Marcotte's article to a post by brownfemipower, and attributing the article to “X.” In total, the hyperlinked version linked to

⁵⁹ Lisa, “Feminists, Too, Steal” *My Ecdysis* (blog) (April 8, 2008), <http://myecdysis.blogspot.com/2008/04/feminists-too-steal.html>

⁶⁰ <http://myecdysis.blogspot.com/2008/04/feminists-too-steal.html?showComment=1207699020000#c3841820179202257208>

⁶¹ By the end of this episode it had been made clear that Marcotte did not, in any event, attend the speech.

⁶² <http://problemchylde.wordpress.com>

some [number] blog posts on brownfemipower's eponymous blog.⁶³ Sylvia/M explained her reasons for choosing that strategy in a later, undated addendum,

My post, which I was careful to compose, does not link point for point where Amanda “stole” things word-for-word from BFP. Rather, it makes BFP's work — who is just one of the bloggers who have been tying feminism with immigration before the article Amanda quoted hit the “zeitgeist” — visible. And it questions why Amanda took upon her shoulders the claim of authenticity on critical issues on immigration and feminism, immigration and dehumanizing language, and immigration and sexual abuse without giving some indication of the longstanding body of work from multiple people of color who have identified more heinous crimes, who have pointed out more causal links, and whose work undoubtedly could lead to honest and critical engagement with the situation and possible broader activism in coalition with people who don't want to touch the situation.

Because without that reference, it invisibilizes people who do have that authenticity and experience, who live those experiences, because they cannot impose a lens of detached whiteness that they did not have into their narratives. They cannot pretend that they're horrified witnesses without a dog in the fight who have sympathetic and probing viewpoints in the matter. And as a result of not being able to claim that detachment... as well as a continuing dependence on people carrying the white lens to ferret ideas from people of color for publicizing and spreading awareness. The peddling of brown people without last names who get mundane yet detailed narratives of their every move because it's so different. Who get their horrific moments sensationalized and their tragic and common moments ignored.⁶⁴

Sylvia/M's post was widely linked into what rapidly became an explosive conversation about Marcotte, the nature of plagiarism, racism and ambivalence about the feminist “movement,” at least as embodied online. There are far too many posts and reactions to cover comprehensively in these pages. But the criticism can be organized into roughly two camps: (a)

⁶³ Sylvia/M, “Don't Hate, Reappropriate” *ProblemChylde* (blog) (April 8, 2008), <http://problemchylde.wordpress.com/2008/04/08/dont-hate-appropriate/>. Sadly, because bfp's blog was later deleted, the links no longer function.

⁶⁴ *Ibid.*

those who thought Marcotte had deliberately used brownfemipower's ideas, and (b) those who tied it to larger structural issues of racism within mainstream feminist discourse (like Sylvia/M).

The views of the first camp are probably best represented by a post at Fetch Me My Axe, where blogger Belledame222⁶⁵ openly accused Marcotte of being “primarily concerned with self-aggrandizement,” even developing a narrative of Marcotte's motives:

For a year or two or more, you steadfastly ignore [brownfemipower], on the whole. Certainly you don't bother to link to the stories she's covering; that would be too much like giving someone else credit. No. You wait. Maybe you're even at the same conference as this other woman, not so long ago, wherein she speaks on these same issues. And then, you post the stories and the POV the woman has been eloquently -trying- to get you to listen to for all this time...without a hint that you know who this person is. Kudos rain in. For you. Applause, applause, there's nothing like applause.

The second camp's more structurally-based critique is best summarized by a blogger at

High on Rebellion:

Intellectual theft is still theft – Marcotte is, by her own account a regular reader of BFP's blog. Even if she genuinely believes she came up with the ideas in her article completely on her own, (which, I personally doubt given how widely BFP has blogged about this, and the fairly damning evidence of Sylvia's), she must realise the extent to which BFP was an influence, and at the very least should have made mention of the fine work BFP has done on this issue.

It's all too easy for white women to get away with stealing the ideas of women of colour. Women of colour often have less access to the mainstream media or mainstream academia, making it harder for them to become known to a wide audience. Adding to the temptation is the fact that white women will get credit for being remotely anti-racist in a way that women of colour will not. A white woman with an Audre Lorde quote for every occasion can build an entire

⁶⁵ This is the same belledame222 who commented on the Seal Press scandal above. I realize there is no empirically airtight way of verifying this. I can only say that in my experience, blog commenters are surprisingly consistent about sticking to one persona, and a certain code of honour prevails about never using a screenname that is not your own. To use more than one screenname, indeed, is viewed as dishonest and is sometimes called “sockpuppeting.” See “Sockpuppet (internet)” *Wikipedia*, [http://en.wikipedia.org/wiki/Sockpuppet_\(Internet\)](http://en.wikipedia.org/wiki/Sockpuppet_(Internet)) (last accessed July 15, 2011).

academic or media career out of being an “intersectional” feminist. A woman of colour who raises any of these points is just “angry” (ironically, the same thing that men say about feminists).⁶⁶

On April 10, after several of the initial posts criticizing Marcotte had appeared, including the now-lost post by brownfemipower herself, Marcotte’s defenders began to weigh in. The most notable and strident of these was Hugo Schwyzer, a white male professor of social sciences at Pasadena Community College, who maintains an eponymous blog.⁶⁷ His post, whose title demanded, “If It’s Stealing, You’d Better Prove It” argued that because Marcotte’s reputation as a writer was at risk, her critics had to come up with better evidence. Schwyzer conceded that “perhaps the Reality Check article ought to have had more links within it,” and that “[r]adical women of color have rightly suggested that ‘mainstream,’ predominantly white feminist bloggers need to do more to cover broader issues of social concern.” But Schwyzer also pointed to the recent controversy between Blackamazon and Seal Press, noting “larger issues here that may be driving some of the anger towards Amanda,” and noted that Marcotte had a new book coming out from Seal Press. Schwyzer still maintained that the charge was “very serious,” and:

There are some charges for which there are no proofs or disproofs: “clueless”, “racist”, “elitist.” But theft can be proven, and if you’re going to use the language of theft, you need a hell of a lot more evidence than you have so far produced.⁶⁸

⁶⁶ “Intellectual Theft is Still Theft” *High on Rebellion* (blog) (April 9, 2008), <http://highonrebellion.wordpress.com/2008/04/09/intellectual-theft-is-still-theft/>.

⁶⁷ Schwyzer’s blog can be found at <http://www.hugochwyzer.net>.

⁶⁸ Hugo Schwyzer, “If It’s Stealing, You’d Better Prove It: Amanda Marcotte, BFP, and AlterNet” *HugoSchwyzer.net* (April 9, 2008), <http://hugoschwzyzer.net/2008/04/09/if-its-stealing-you-d-better-prove-it-on-amanda-marcotte-bfp-and-alternet/>.

Schwytzer's post garnered 219 reader comments. Marcotte herself entered the fray for the first time, offering factual corrections and offering an account of where she herself got these ideas, and thus disputing that brownfemipower could claim to have originated them:

For the record, the overall inspiration behind my piece was going to an ACLU conference that focused on issues of immigration on March 8th. Apparently, a lot of people focus on these issues, enough to fill an ACLU conference that I attended. I hadn't really thought about the substantial (as opposed to symbolic) links between anti-illegal immigration sentiment and just plain anti-immigrant sentiment until I saw a panel of people working for voting rights talk about how legal citizens are getting purged from voter rolls. Ever since March 8th, I've wanted to incorporate some of these ideas into my writing, and the green card-blackmail case that I heard on NPR seemed to be the perfect starting point to connect women's rights and immigration issues.

In sum: These are not minor issues that only BFP is paying attention to. I went to a conference about just these issues.

Marcotte added that she "refuse[d] to play the game with the goal posts moving so fast. You can't even see them."⁶⁹ Marcotte's critics, including Sylvia/M and other bloggers who had posted elsewhere on the subject, continued to emphasize that the problem was less one of Marcotte's intent to plagiarize than it was of the overall implication that it was not necessary to cite the work of other activists. As one commenter put it,

I don't think there's any reason to suspect malice aforethought. [Marcotte] just happens to have written out ideas that have been discussed at great length for something like years at blogs just down the tubes from hers... And she apparently has no idea this is the case. Why is that? Why are certain feminist — i.e. white ones — totally blind to the lives, works, worlds, and words of others — i.e. women of color? How is it possible that BFP and others have been making this

⁶⁹ <http://hugoschwytzer.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-299583>

point daily, daily, and other people — people living and reading the same blogtown — straight up didn't notice?⁷⁰

Others began to question whether it was even appropriate for Schwyzer to cast himself as an objective arbiter to this dispute:

If there's one thing women of colour hate more than middle class white women's ossification of feminism, it's white men who threaten us when we take issue with the way white women go about things. You really have no place making a post like this, Hugo. To capitalise on the stereotype of angry and emotive woc to trivialise our concerns makes you the predatory one.⁷¹

Hugo, in the moment I read your "you'd better prove it", I heard, clear as a bell, the snarl of privilege. Someone has insulted you, or someone who looks like you and whom you identify with, and they'll justify it, or they'll pay. I also note the irony of your reference to these women as "radical"; radical as opposed to whom, Hugo?⁷²

And you, jumping in as the all-powerful white male arbiter, with your "you'd better be able to prove it" and your "oh poor white feminists"— you don't even have a stake in this argument. Why don't you just *listen* for once?⁷³

Belledame222 also reappeared to note that there had been discussions for years about appropriation of this kind in the feminist blogosphere generally and in Marcotte's case specifically: "Mostly people let it slide, because, well, they can't -prove- it, and they don't want

⁷⁰ <http://hugoschwyzner.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-299763>

⁷¹ <http://hugoschwyzner.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-300359>

⁷² <http://hugoschwyzner.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-300480>

⁷³ <http://hugoschwyzner.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-300609>

a reaction like this. It doesn't seem worth it, most of the time. A good chunk of this was that this felt like the final straw, in a number of ways."⁷⁴

At this point one of the vagaries of internet research forces an interruption to this account. From links and mentions in the comments to these and subsequent posts, it appears that brownfemipower herself wrote about the allegations on April 8, 2008, entitled "Intellectual Integrity." There was, clearly, some kind of heated discussion in the comments there, though apparently brownfemipower did not name Marcotte in the article, and changed her name to "X" whenever a commenter did. But at some point on April 9, 2008, brownfemipower took down her blog, and while some posts from it are recoverable through the Internet Archive, this particular one is not.⁷⁵

The disappearance of brownfemipower's blog, however, finally sparked mention of this entire controversy on larger, more trafficked blogs. First, blogger Holly wrote a post at Feministe entitled "This Has Not Been A Good Week For Radical Women of Colour Blogging," noting her dismay at the loss of brownfemipower's blog:

This space we all coexist in needs brownfemipower's words, her insight, her focus on women of color and her willingness to step up and talk about practically every issue that comes her way, no matter how brutal. She's inspired dozens of women of color to start blogging, including me. Without her, there would be a

⁷⁴ <http://hugoschwyzner.net/2008/04/09/if-its-stealing-youd-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-303918>

⁷⁵ Schwyzner's post and many others link to this now-lost post - <http://brownfemipower.com/2008/04/08/intellectual-integrity/> - but sadly it was not archived at archive.org or any other resource examined by this author.

conspicuous hush in the blogosphere... or at least, conspicuous to those of us who listen for certain kinds of voices.⁷⁶

But Holly tried to make the conversation about something other than personal speculation about Marcotte's motives or the details of the case:

Look, we all have a problem here in the feminist blogosphere. I hope that all of you bloggers will agree with me on this problem: some feminist bloggers have access to a bigger megaphone than others, and you have to be deluded to think that's based on anything remotely resembling a meritocracy. I'm sorry — no matter how talented you are, how good a writer, how intellectually sharp and beautifully passionate, there are other things about you that play a very significant role in how you're heard, who hears you, whether you get heard at all. That is the tough shit about the ugly world we live in — it's not truly fair to anyone, because true fairness would be getting evaluated solely on your own merits. Nobody is — but of course, some people get the long end of the stick, and others the short end. Others are marginalized. If you don't get that, please go read some racism 101 somewhere, okay?

The question for all of us is, what do you do when you're unavoidably [sic] embedded in a system like this? Where disproportions and inequities are become evident — getting called out, even? If you get handed the mike, who are you going to stand in solidarity with, and how?

[...]

I understand the desire to try to establish individual wrongdoing or innocence — to try and prevent the same thing from happening again, whatever position you're taking. But as I have tried to say at length before, I think the discussion of individual guilt often distracts from the bigger picture of racial injustice. I don't care if there was actual plagiarism or a more abstract kind of plagiarism, if one writer did or didn't get an idea from a conference or from another writer. What I care about is that when white feminists undertake to write about the issues of women of color — such as immigration, which is clearly a massively race-infused issue — they should do so in solidarity with women of color. In ways that give political voice to women of color, to immigrants, to those whose voice is generally not heard as loudly.⁷⁷

⁷⁶ Holly, "This Has Not Been A Good Week For Radical Women of Color Blogging" *Feministe* (blog) (April 10, 2008), <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/>.

⁷⁷ *Ibid.*

Marcotte appeared again in the comments of Holly's post to defend herself - noting, "[c]onsidering the severity of the accusations leveled at me... my right to defend myself with the much-maligned facts shouldn't be a matter of question, regardless of race."⁷⁸ Holly noted that she agreed that Marcotte had "responded to those specific charges." "But," Holly added, "the larger-picture issues are still there, still unresolved, still something that needs to be addressed, regardless of whether the specific details are lies or not."⁷⁹ Marcotte again brought up the ACLU conference she said had inspired her. Commenters pointed out that Marcotte had failed to cite the conference or its speakers either in her article. Marcotte suggested that her detractors were acting out of jealousy: "I keep finding myself in "messes" like this because I'm a blogger with a lot of traffic and a book deal." One of her defenders tried to suggest that brownfemipower had deleted her blog to destroy evidence so that outsiders could not evaluate the similarity of her work to Marcotte's article.⁸⁰ Attempts to broaden the issue were buried in ad hominem attacks.

The Feministe thread continued along similar lines to the prior discussions for 299 comments in just over 24 hours until Holly turned off the ability to comment. "I'd like to thank everyone who tried to respect the (somewhat naive) intentions of the original post and steer the

⁷⁸ <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/#comment-163358>

⁷⁹ <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/#comment-163365>

⁸⁰ <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/#comment-163492>

conversation away from finger-pointing and towards broader lessons,”⁸¹ Holly wrote in the last comment.

The second high-profile post appeared not at a specifically feminist blog, but one with a rather broader progressive mission known as “Alas! A Blog.”⁸² “I like and respect both BFP and Amanda Marcotte. This shit just sucks,”⁸³ the blogger, Ampersand, wrote, elaborating on that theme until opening the floor for comments. One commenter observed that on the Feministe thread, Marcotte largely responded to white female critics, rather than addressing the women of colour.⁸⁴ This prompted, from one of those critics, a blogger known as Ilyka Damen, a remarkably honest response,

I can’t answer “why Amanda” specifically without, I think, going against the comment guidelines here; nor do I think that would be beneficial to do.

I can answer why me, because I’ve ignored women of color in favor of responding to white people, even white people I disliked, and I doubt any of my justifications were unique:

“No sense feeding the trolls/fueling martyr complexes/rewarding negative behavior like this.”

“I don’t even read these people. Who cares what they think?”

“Okay, that POC has a point—but this white person over here agreeing with them is just being a self-righteous, holier-than-thou ass-kisser. That kind of slavish agreement, that’s the real racism. You shouldn’t have to coddle people like this.”

⁸¹ <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/#comment-163930>

⁸² *Alas, A Blog* may be perused at <http://www.amptoons.com/blog>.

⁸³ Ampersand, “Regarding Appropriation, Brownfemipower, and Amanda Marcotte,” *Alas, A Blog* (April 10, 2008), <http://amptoons.com/blog/2008/04/10/regarding-appropriation-brownfemipower-and-amanda-marcotte/>.

⁸⁴ <http://amptoons.com/blog/2008/04/10/regarding-appropriation-brownfemipower-and-amanda-marcotte/#comment-321808>

There was certainly more, but that's off the top of my head. And just as I'm sure those justifications for my behavior aren't unique, so am I sure they aren't universal, either. Amanda's reasons likely differ. They may have nothing in common with mine at all.

The assumption underlying most of my justifications, though, was that people of color were not people as I had traditionally understood the word "people" to mean. People of color were people, but not people I was used to, not people I felt safe around, and not people I could distinguish easily among. Not white people (though I tried never to let my thoughts go that far, because only a racist would think such a thing).⁸⁵

Another commenter at Alas! thought that the problem was also the "professionalization" of certain feminist bloggers:

It seems that certain people, because they're getting media attention, have suddenly become beyond reproach. They don't have communities willing to engage in debate anymore, they have fanclubs. And those fans are becoming so sycophantic and uncritical that their idols can be blatantly hypocritical and they won't make a peep. And just look what happens whenever someone does speak out: the fanclubs go berserk, slinging accusations along the lines of "you're just jealous of Famous Feminist's fame/book deal/cuteness/popularity". I mean, what the bloody fuck? Firstly, are we all 12? And secondly, aren't we supposed to be feminists? Since when is "yr jus jellus" an acceptable response to a woman raising an issue that's important to her?⁸⁶

Blackamazon appeared to agree, writing on her own blog on April 12 that she found it amazing that the entire issue of sexual abuse in the immigration context had now been subsumed by a discussion of Marcotte's professionalism:

Because rampant years long sexual abuse being written about by a white women even though that same work has been done

BY MANY BROWN WOMEN

⁸⁵ <http://amptoons.com/blog/2008/04/10/regarding-appropriation-brownfemipower-and-amanda-marcotte/#comment-159677>.

⁸⁶ <http://amptoons.com/blog/2008/04/10/regarding-appropriation-brownfemipower-and-amanda-marcotte/#comment-159697>.

is a zeitgeist and not a life or death situation.

That it's just a n emblem of smart people talking

not brown folks dying and being massacred.

That this is instead a way to make sure that no matter what happens it will be about a white woman's feelings or livelihood.⁸⁷

In an unusual move, other major feminist sites that had so far avoided the discussion seemed to feel compelled, after the Feministe post, to issue statements on the controversy. Most struck a conciliatory, even-handed tone, much like the Alas! post. “We want to say up front that Brownfemipower’s voice will be greatly missed. We also want to say that, yes, there is a history of white women (and white feminists) appropriating the ideas of women of color. It’s a problem that persists today. That doesn’t make Amanda a plagiarist, and we don’t believe she is,”⁸⁸ read the April 14 post at Feministing, which was signed by all of the site’s editors. They pledged to “do better in future,” as did a similar, all-hands-signed April 12 post at Shakesville.⁸⁹

Other women of color bloggers noted their growing ambivalence towards feminism as an identifier for their politics as a result of the incident. “Feminism is a privilege that I just don’t

⁸⁷ BlackAmazon, “A Soul Shaking Love Or...” *Having Read the Fine Print* (blog) (April 12, 2008), <http://guyaneseterror.blogspot.com/2008/04/soul-shaking-love-or.html>.

⁸⁸ Jessica Valenti, et al. “On Feminist Blogging, Community, and Privilege” *Feministing* (blog) (April 14, 2008), http://feministing.com/2008/04/14/on_feminist_blogging_community_1/.

⁸⁹ Melissa McEwan, et al. “We Write Letters,” *Shakesville* (blog) (April 11, 2008), <http://shakespearessister.blogspot.com/2008/04/we-write-letters.html>.

have... or want,”⁹⁰ wrote Sin Vergüenza. “There are times when I feel I could really quit feminism, and this is one of those times,”⁹¹ wrote karnythia at angry black woman.

On April 16, Brownfemipower did make one last set of remarks on the controversy which still appear on the web at a one-post blog she set up specifically to answer all the claims that had been made in the conversation.⁹² Reproducing some passages of her lost post, brownfemipower contended that she was not out to claim credit for the ideas in either Marcotte’s article or even her own speech so much as she wanted to make a broader point about racial hierarchies in feminism:

... it’s interesting that I wrote a whole post in which I clearly stated:

1. there are clear racialized reasons why women of color are never and will never be the sought after by big companies, named as the leader of feminist movements, asked for interviews etc
2. that white feminists bear a responsibility (that they are NOT accepting and in fact are actively rejecting) to negotiate power and create spaces (while working alongside or a step behind marginalized communities) in which power is decentralized
3. As a result I do NOT consider myself to be a part of any fucking “feminist movement” because to me, feminism requires diversity...

And even though I wrote this whole post about those three points—the only thing people heard was “She thinks she’s Freud and she wants money/power/recognition.”

No, actually, I know I’m brownfemipower and I want to end violence against women. And I wanted to do that with all the women who keep insisting to me that

⁹⁰ Sin Vergüenza, “Me vale madre tu porquería “Feminism.” ¿Y que?” *Sin Vergüenza* (blog) (April 13, 2008) <http://sinvergüenza.wordpress.com/2008/04/13/me-vale-madre-tu-porqueria-feminism-¿y-que/>.

⁹¹ angry black woman, “Standing In Solidarity With My Sisters” *angry black woman* (blog) (April 15, 2008) <http://theangryblackwoman.wordpress.com/2008/04/15/standing-is-solidarity-with-my-sisters/>.

⁹² brownfemipower, “[Untitled]” [*Untitled*] (blog) (April 16, 2008), <http://bfpfinal.wordpress.com/2008/04/16/3/>.

we are all in this together and we have common problems that we have to work against and we're all sisters, and there is such thing as a commonality of experience between us all—as I said in my original post—I thought feminism was important because it brought women together.

[...]

... the point was never to say I own this fucking material—but to say we must build a movement because the only way I and my community will ever have peace is if there is a movement. Those women of color who say they will not back down because they own the material—they are building a movement, just in a way that is different than I what I am doing. It may be different, but it's not directly conflicting with what I am doing. And if they choose to call themselves feminists—well, I have a mouth and eyes that I can use to find out what they mean.

“Feminists,” on the other hand, are not movement building, they are actively destroying women and blaming those women for the destruction. They are saying the point of feminism is “equality with men” without even thinking to acknowledge that “equality with women” is just as admirable of a goal and maybe even possibly the first step to achieving the goal of equality with men. They are saying, Just do it, just do it, JUST FUCKING DO IT.

And so I withdraw myself from this “movement”.

And I reject and rebel at the label “feminist.”

I reject and rebel at the label “feminist” because I reject and rebel against silence and erasure.

On April 17, another blog appeared, this time authored by a self-identified white feminist who did not give her name. Entitled “Dear White Feminists, Quit Goddamn Fucking Up,” the first post styled itself “An Open Letter to the White Feminist Community.” It quoted various comments in the Seal Press and brownfemipower controversies, mostly from white feminists, who were dismissive of the claims being made by women of colour. The blogger demands change,

There's a sick irony in the whole Marcotte case, too. Because really, the whole point of her article is to help women of color, right? It's to address issues pertaining to women of color and give them some kind of representation, some kind of voice? But as countless bloggers and commenters have pointed out, Marcotte has failed to actually acknowledge the voices already in existence. Most

tragic of all, the whole controversy has lead one of the most prominent of those voices to vanish into silence. And THIS is how we help WoC? And to add insult to injury, we rush to the white feminist's defense and accuse the WoC of being divisive?

No wonder so many WoC are through with us.

I'm sick of this cycle. I'm sick of seeing white women dismiss the concerns of women of color. I'm sick of our self-righteous claims of inclusivity while we marginalize the voices of women of color when they speak out. We marginalize them if they do it with anger, or do it in the wrong way, or do it while disagreeing with us, or #%\$@cking do it at all. I'm sick of us exercising our white privilege and then accusing our sisters of color of causing divisiveness when they refuse to submit to our racism. Mostly it's unintentional racism by white women who want to believe that we are saving the world. But we are not. We're oppressing and silencing the very people we talk so eloquently about being allies with. I'm sick of seeing so many of us refuse to take a stand for fear of alienating our white sisters.⁹³

4.3 **Late April 2008: "I Guess It's a Jungle In Here Too, Huh?"**

On March 25, 2008, just before these conflagrations started, Seal Press published Marcotte's book, *It's A Jungle Out There: The Feminist Survival Guide to Politically Inhospitable Environments*. The press materials for the book touted it as an irreverent take on feminism for young women: "Marcotte brings her wit and distinct lack of patience to the topic of surviving while feminist. She doles out priceless advice along the way on how not only survive but also thrive, and even how to carve out a space for your feminist self in these oft-times hostile environments."⁹⁴

⁹³ "An Open Letter to the White Feminist Community," *Dear White Feminists* (blog) (April 17, 2008), <http://dearwhitefeminists.wordpress.com/2008/04/17/an-open-letter-to-the-white-feminist-community/>.

⁹⁴ <http://www.sealpress.com/book.php?isbn=9781580052269>

Marcotte did a book tour to promote her work, and when she was headed to New York for a reading on April 22, Feministe blogger Jill Filipovic put up a post to promote the event.⁹⁵ The post made no initial mention of the recent controversy over Marcotte's work, and commenters swiftly pointed out that it probably deserved one. Filipovic responded,

I have a lot of issues with the whole way the Amanda debacle went down (on both sides), so I do hear you. And I also understand why some people would choose not to link to Amanda anymore or buy her book. That's a perfectly legitimate response. But it's not the one that I'm taking. And I'm not going to blacklist Amanda from Feministe. That doesn't translate into thinking everything is kosher. It doesn't translate into me forgetting that anything happened.⁹⁶

Another commenter then asked, "Wasn't the point of the appropriation conversation to point out systemic problems as pervasive and system-wide, not dwell on a single example?"⁹⁷

Ilyka Damen answered,

On the other hand, when several people tell you a wound is still open, it's inadvisable to pour salt on it and then snot at them to quit complaining.

There's a bad habit of wanting to put painful specifics behind us while ostensibly committing to work on resolving the larger issue. Unfortunately, the larger issue is composed of all those dirty, painful, nasty specifics that we don't want to revisit or have pointed out to us or, least of all, work to resolve because, GOD, everyone already knows about those, okay? Let's not dwell! That's really counterproductive.⁹⁸

⁹⁵ Jill Filipovic, "Today: Amanda Marcotte at KGB Bar in Manhattan" *Feministe* (blog) (April 22, 2008), <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/>.

⁹⁶ <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166395>

⁹⁷ <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166425>

⁹⁸ <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166438>

Damen's diagnosis of an open wound was apparently correct. The conversation continued to simply retread the earlier scandal until commenter Radfem, who had actually read the book, offered a new and different reason for objecting to it:

... there are pictures of darker skinned natives dressed up slinging spears and arrows at the fair-haired and skinned heroine. What are they representing? And the only woman is the blonde woman who's rescuing the White man from the dark-skinned natives which I guess is supposed to be some sort of progress for women?

I think I missed a lot of the discussions on the original book cover, but I have to say these drawings that did make it in make me cringe.⁹⁹

It turned out that in a misguided effort to give the book additional entertainment value, the editors at Seal Press had illustrated it with images drawn from a 1950s comic called *Lorna, The Jungle Girl*. The potential for racist illustrations had originally come to the attention of feminist blogs in August 2007, when Marcotte had posted a picture of the cover, which she characterized as a retro-Hollywood pulp cover of a gorilla carrying a scantily clad woman.¹⁰⁰ After commenters stated their concerns with the racialized imagery, Marcotte alerted Seal Press, and the cover was changed. But evidently, illustrations that carried the same problematic tropes remained in the first edition of the book. This seemed to escape the notice of many of the book's initial readers; Filipovic herself said she had "glossed over the pictures."¹⁰¹

⁹⁹ <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166599>

¹⁰⁰ Amanda Marcotte, "Book Cover" *Padagon* (blog) (August 20, 2007), <http://pandagon.blogspot.com/2007/08/20/book-cover/>.

¹⁰¹ <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166721>

Virtually every commenter thereafter - and the thread hit 387 comments before again having to be closed - agreed the images were quite racist. At first, Schwyzer appeared in the Feministe thread to defend them on grounds that “[g]iven how obviously dated the images are, and given the essential radicalism of the pop culture analysis within the text, it seems to me that the images themselves are used at least partly ironically.”¹⁰² Schwyzer backed off from that position, however, when another commenter pointed out that,

The “white woman menaced by evil dark people” meme is alive and well in our culture. While Lorna et al have slid into the realm of camp, that’s not because we all agree that the racist tropes from fifties pulp softcore are ludicrous. It’s about the leopard-print bikinis and the perfect Claudette Colbert coifs. We still see TV commercials featuring cannibals in grass skirts with bones in their septums. Remember? Capital One? Tourists in tribal kettles?

Schwyzer later posted to his blog conceding that he, too, objected to the images: “... there’s just no way that a white author can illustrate a book with images of a blonde woman in a jungle beating up dark-skinned natives and not have those images come across as indefensibly racist.”¹⁰³

While the conversation in Filipovic’s thread was still ongoing, on April 24, Holly, the blogger who had earlier written about the appropriation controversy at Feministe, added a new post on the subject of the illustrations in Marcotte’s book, entitled, “I Guess It’s A Jungle In Here Too, Huh?” Holly wrote that it was making her wonder if she really belonged to a feminist community at all:

¹⁰² <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/#comment-166728>

¹⁰³ Hugo Schwyzer, “On Lorna the Jungle Girl and the Dark-Skinned Natives: A Reluctant Challenge to Amanda Marcotte” *HugoSchwyzer.net* (blog) (April 24, 2008), <http://hugoschwzyer.net/2008/04/24/on-lorna-the-jungle-girl-and-the-dark-skinned-natives-a-reluctant-challenge-to-amanda-marcotte/>.

Like a lot of bloggers these days, I'm no longer even sure if I feel comfortable calling myself a feminist, since it seems like the popular definition of that word in so many circles has come to mean "feminism first, every other issue second." And that's a formula that inevitably leads to a feminism for the few. A feminism for the small numbers of women who don't deal with intersections of one, two or ten other kinds of shit getting heaped on us every day, too many to calculate "which is most important." It's not a kind of feminism that works for most of the women on this planet. But you know, brownfemipower already said all this in her sign-off, I don't need to repeat her thoughts. Just add my name to the list of those who are no longer sure if we can simply "take feminism back." Or even if it's worth it. It's not like there aren't other movements out there that actually respect women — that are led by women and folks of many other genders, that work to improve women's lives. This exodus from single-issue politics has been happening for a long time.

Many commenters echoed Holly's position. By April 25th, Marcotte and Seal Press both issued apologies for the images,¹⁰⁴ but the question of why so many white feminist bloggers, Marcotte, and Seal Press itself, had missed the issue entirely, continued to preoccupy many participants in this long conversation. In the aftermath, Blackamazon decided to shut down her blog temporarily,¹⁰⁵ posting a farewell message on Sylvia/M's blog Problem Chylde that read, in part,

I think the point where I went fuck it , is when a law student, a couple writers, and a professor basically endorsed a book and MISSED in reading something they were ATTACHING their names to .

[...]

Hey it's no expectation you be responsible and careful with what you endorse, write and publish, because it's a "friend" right.

They get the benefit of the doubts, the benefit of not having to be called on their evil racist condescending crap.

¹⁰⁴ Amanda Marcotte, "I'm Sorry" *Pandagon* (blog) (April 25, 2008), <http://pandagon.blogspot.com/2008/04/25/im-sorry/>; "Public Apology" *Seal Press* (blog) (April 25, 2008), <http://sealwomen.blogspot.com/2008/04/public-apology.php>.

¹⁰⁵ She is, as of this writing, blogging again at <http://guyaneseterror.blogspot.com/>

My friends while your protecting your friends are completely disrespected and it's okay right.¹⁰⁶

Angry Black Woman widened the critique:

And these recent blow-ups not only make me angry because of what these white feminist bloggers are doing to women of color, but because it makes me angry at feminism itself. As Aminah put it way back when, feminism just isn't made for us women of color. And as someone else (I can't remember who, but someone please tell me in comments if you know) said recently, it seems like what white feminists want is to become white men. They want what white men have going on, up to and including privilege and the ability to ignore voices of color unless it suits them.¹⁰⁷

And Lisa at My Ecdysis summed up her disillusionment with feminist blogging in elegant fashion:

It was never about one blogger. Not BFP, BA, or any one singular voice.

There never was a whole lot for me to say about these events. Somewhere inside, I wonder if I have become that Adult I most feared: the one who's seen too much to hope. I've got a list down my arm of what I wanted to write about: allies, racism, imagery, technology and accountability, invisibility vs. invincibility, and privilege

and then the list got too long and I suddenly

felt

tired.¹⁰⁸

¹⁰⁶ "From Blackamazon," *ProblemChylde* (blog) (April 26, 2008), <http://problemchylde.wordpress.com/2008/04/26/from-blackamazon/>.

¹⁰⁷ angry black woman, "On Feminism, Part 2" *angry black woman* (blog) (April 28, 2008), <http://theangryblackwoman.wordpress.com/2008/04/28/on-feminism-2/>.

¹⁰⁸ Lisa, "It was Never About One Thing, You Realize" *My Ecdysis* (blog) (April 26, 2008), <http://myecdysis.blogspot.com/2008/04/it-was-never-about-one-thing-you.html>.

5. Lessons Learned

My object in providing this account is not to adjudicate the substance of the dispute – disputes, really – that occurred on these blogs. Rather, as I stated at the outset of this chapter, what I think would be helpful is to draw from this inferno some observations about the advantages and disadvantages of the “marketplace of ideas” approach to public discussion. I have identified five themes in the conflagration that I see as meriting further consideration: (a) competing claims made about the nature of civility; (b) the issue of professionalization of some members of a discursive space; (c) problems of appropriation beyond the scope of copyright; (d) the continuing relevance of race and other social cleavages as obstacles to understanding in conversations; and (e) an expanded view of the phenomenon of silencing.

5.1 Competing Claims on the Matter of Civility

As I mentioned at the outset, the pervasive atmosphere of blogging, and feminist blogging in particular, is informal, but that informality does not appear to be a necessary impediment to some very substantive discussion. For example, it seems relevant to note that throughout my review of the blog posts and commentary in this dispute, I did not encounter comments correcting typos or demanding that participants use proper grammar. Nor were there any comments complaining that the language being used in any way impeded their understanding of the circumstances.

The closest anyone came to such criticism was Warner of Seal Press’s comment that the atmosphere on Blackamazon’s blog felt “informal.”¹⁰⁹ Both Warner and Zeisler, the *Bitch* editor

¹⁰⁹ <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html?showComment=1207172340000#c6443166971960161593>

who also weighed in on the controversy, also seemed to suggest that the main obstacle to understanding the criticism was that Blackamazon had been too blunt and opaque with her opening volley, “Fuck Seal Press.”¹¹⁰ Yet the discussion that ensued was a rich one that suggested instead the hostility came from Seal Press’ rudeness and defensiveness rather than any on Blackamazon’s part. As Blackamazon later clarified, she had not been seeking to open a dialogue of any kind with Seal Press – she was speaking to her own community, and that community did not read the bluntness of the language in the same way.¹¹¹

In other words, the issue was not that one party to this conversation had trespassed upon some universal standard of formality that all believed themselves subject to as a matter of civil discourse. The problem was instead that the parties, depending on their particular view of their place in this universe, each thought of civility and its attendant obligations quite differently.

5.2 **Professionalization and Privilege**

One dominant theme of the objections to Marcotte’s and Seal Press’s behaviour was the sense that having careers as “professional feminists” (either personally or as corporate entities) outside the online space imparted on them different responsibilities within the space. Put differently, despite the fact that everyone in this discussion was nominally equal, with equal access to the “ability” to speak, participants clearly believed that Marcotte and Seal Press had disproportionately large audiences for their views and consequently different responsibilities. As one blogger put it in a post somewhat sympathetic but ultimately critical of Marcotte,

¹¹⁰ Zeisler, *supra* note 46 (“There are very likely people out there who’ve said “Fuck Bitch magazine” for the same reasons Blackamazon said “Fuck Seal Press” — and, indeed, that would feel personal to me, no matter how much I wanted to get past that part of it. So I get it, Seal people, I do.”)

¹¹¹ BlackAmazon, “I Am the Firestarter,” *Having Read the Fine Print* (blog) (April 6, 2008), <http://guyaneseterror.blogspot.com/2008/04/i-am-firestarter.html>. (“It wasn’t an open statement. It also wasn’t kind or measured but I wasn’t intending it to be. This desire to have a dialogue was assumed.”)

Because of Amanda's A-list status — which status magnifies both her privilege and her responsibility whether she likes it or not — the event has transcended the usual *fucque-up du blogue*.¹¹²

Interestingly enough, both Marcotte and Seal Press appeared to believe that these large audiences actually imposed different obligations on their interlocutors themselves. Marcotte continually emphasized that her career and livelihood were at stake if she was widely believed to be a plagiarist, noting that she did not believe that she would be subject to such attacks if she did not have a book deal.¹¹³ As Schwyzer put it,

“to accuse someone who makes their living with words of stealing is a very, very serious charge — one that is normally subject to civil litigation or severe academic discipline. To make that charge without compelling evidence is to damage a writer's reputation in perhaps the most serious way possible. No amount of frustration or anger justifies it.”¹¹⁴

To some extent, Seal Press made this type of claim too, its small, “not-Wal-Mart” status to try and deflect commenters challenging it,¹¹⁵ the implication being that it could be brought down by the charges of racism and unprofessionalism. In both cases, the clear implication was that criticizing either Seal Press or Marcotte ought to be done carefully *because* they were in certain positions of power in the discourse, and more particularly, *as ambassadors of that discourse to the outside world*.

¹¹² Twisty, “Schooled,” *I Blame the Patriarchy* (blog) (April 23, 2008), <http://blog.iblamethepatriarchy.com/2008/04/23/schooled/>.

¹¹³ <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/#comment-163406>

¹¹⁴ Schwyzer, “If It's Stealing,” *supra* note 68.

¹¹⁵ “Seal and Women of Color,” *supra* note 39, April 3, 2008, 9:00 p.m.

5.3 *Appropriation Beyond the Scope of Copyright*

Another central problem in the discussion is that in free-for-all conditions there are few standards of attribution. The dispute between brownfemipower and Marcotte highlighted this in particularly stark fashion. It was clear that the issue went beyond what the law traditionally addresses through the mechanism of copyright – the problem was not a word-for-word lift. It was more diffuse, and one for which the community had difficulty developing a coherent standard. This confusion led to the emphasis on the “larger issue” of the appropriation of the work of women of colour in feminism.

Put simply, the issue is that intellectual property is not the only thing that the “free marketplace of ideas” threatens – it also, to use the words Sylvia/M often did in these discussions, “invisibilizes” the work of marginalized communities.¹¹⁶ Of course, appropriation of the kind discussed here occurred long before there was an internet; in fact at least one thread in this conversation evolved into a catalogue of such instances throughout the history of the feminist movement.¹¹⁷ But commenters on this issue often argued that the standards of citation on the internet are looser, though others did claim basic “netiquette” would have obligated Marcotte to acknowledge all sources of inspiration.¹¹⁸ The important takeaway here, however, is that no such standard emerged out of this discussion to address that very real issue.

¹¹⁶ Sylvia/M, “Don’t Hate,” *supra* note 63.

¹¹⁷ Schwyzer, “If It’s Stealing,” *supra* note 68, comments from April 10, 2008, 8:10 p.m., et seq.

¹¹⁸ <http://hugoschwyzner.net/2008/04/09/if-its-stealing-you-d-better-prove-it-on-amanda-marcotte-bfp-and-alternet/#comment-300434> (“People reacted to a clear violation of netiquette with the word “stealing.” Well?”)

5.4 *Continuing Relevance of Barriers Like Race to Understanding*

This particular point, which is related to the appropriation issue, may seem a little blunt. But then, some of the things which happened over the course of this discussion were very stark depictions of the ways in which social cleavages like race continue to shape and blind our worldviews. This is not a new observation to feminists, of course,¹¹⁹ but the point is that even with this enormous diverse community online, who were often engaged with each other, the problems persisted.

The most stark example of this, obviously, was when Jill Filipovic, the blogger at Feministe, admitted she had not noticed the images in Marcotte's book. She was not alone in this – at least two other white bloggers who promoted the book admitted similar oversight.¹²⁰ These are bloggers who spent much of their day engaged in what they thought was a diverse community, learning to do their work in ways that theoretically responded to that community. But when the test came in the form of those images, there was a kind of system failure, caused, one must inescapably conclude, by white privilege. In this case, it was the privilege not to see

5.5 *Real-Time Silencing*

The final observation I wish to make about this discussion is the way in which it concretized the notion of “silencing.” It gives us evidence of the ways in which people retreat from conversational spaces that do not fit with the traditional narrative of having been “priced out of the marketplace,” so to speak. In the aftermath of this conversation, feminists and their

¹¹⁹ Women of colour have been trying to point out the ways in which race shapes these discussions for years. For a representative text, see Audre Lorde, “An Open Letter to Mary Daly” in *Sister Outsider* (Berkeley, CA: Crossing Press, 2007), 66-71.

¹²⁰ Schwyzer, “On Lorna,” *supra* note 103; Twisty, “Schooled,” *supra* note 112.

allies did shut down blogs, renounce the community, and otherwise publicly withdraw from the conversation in frustration with what was being said. The concept of silencing is often used in the context of hate speech, but one learns in the blogosphere that the phenomenon is not so limited. The reason people disappeared from this debate had little to do with being persuaded, either. Their withdrawal is not the result of having been convinced of the rightness of some other idea. Often, as in this case, it comes out of a continuing frustration with feeling ignored and mistreated by dominant participants in the dialogue.

The disappearance of brownfemipower's blog was the most powerful example of the silencing in this instance, but one also wonders how many people silently reading this controversy threw up their hands and simply decided not to join in. There may not have been any costs in the pecuniary sense to getting involved, but throughout the whole discussion it was clear that there were very real emotional ones that were preventing any kind of real discussion from occurring.

6. *Conclusion*

The “mensis horribilis” described above is not the only such flare up in the feminist blogosphere. There are many others that display similar levels of rancor and frustration. This dispute simply provides, in my view, the best illustration of the current tensions in that particular online space between a desire for a sense of community and common aim (i.e. “feminism”) among participants in the discussion, and the complete freedom of speech that the internet is structured to enable in such contexts. What all of this says about our current understandings of online speech practices and deliberative value is the subject of the next chapter.

Chapter 2

Feminist Blogging and Pre-Internet Free Speech Theory

Fascinating though it may be on its own, you may be wondering what all this highly localized and specific in-fighting, has to do with theoretical justifications for freedom of speech and expression. It is precisely that distinction between theory and practice that I think requires deconstruction.¹²¹ As I note in the introduction, to engage in high-flown rhetoric about the marketplace of ideas has become so commonplace that it is almost a cliché. Bare invocations of the metaphor may serve the popular arena well enough. But for the purpose of a deeper understanding how and why we want freedom of speech to serve our societies, it seems to me important to consider the abyss between the aspirational image and the reality of how we speak to each other. This is particularly true in the case of the marketplace of ideas metaphor, because, as I will discuss below, what it is meant to represent specifically is the *social* value that speech has for us,¹²² i.e. our collective endeavour, as a political entity, to pursue some kind of truth. That very social dimension, to me, demands that our vision of the concept internalize some actually existing social reality, rather than remaining a purely imaginary end-goal.

The scholarly debate over the “marketplace of ideas” metaphor, as that discussion existed before the internet became ubiquitous in our lives, seems to me particularly guilty of the excessive abstraction I am talking about. Thus, in this chapter I set out the major themes of

¹²¹ Without wanting to endorse all sentiments in the same essay, on these matters I always come back to Catharine MacKinnon’s observation that, “It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it?” Catharine A. MacKinnon, “From Practice to Theory, Or What Is A White Woman, Anyway” in *Women’s Lives, Men’s Laws* (Cambridge, MA: Harvard U.P., 2005) 22-31, at 22.

¹²² As more fully detailed below, the observation that the marketplace of ideas metaphor as a stand-in for our conception of the social value of speech is not my own, but rather is drawn from the work of Stanley Ingber. See Stanley Ingber, “The Marketplace of Ideas: A Legitimizing Myth” 1984 *Duke L.J.* 1.

scholarly debate about the marketplace of ideas metaphor, as the debate existed more or less prior to the ubiquity of the internet in our lives, and then consider the validity of those themes, both descriptively and normatively, within the particular context of the feminist blogosphere as described in chapter one. The chapter first addresses the juridical origins of the metaphor, focusing on those commentators who have taken the “marketplace of ideas” to be an irreplaceable part of free speech theory and doctrine. The first section examines the parameters of the metaphor from within the text of its originator, Justice Oliver Wendell Holmes of the United States Supreme Court. The second section analyses the metaphor as it has been elaborated by theorists like Cass Sunstein, who, while expressing skepticism about the appropriateness of free market ideology in speech regulation, nonetheless retains tropes from economic theory to explain the way free speech might work. In its third section, the chapter turns to examine critical perspectives on the classical and neoclassical view, which it exemplifies through the critiques of Owen Fiss and James Boyd White. Theories of free speech which have developed after the advent of the internet will be addressed in Chapter 3.

1. ***Juridical Origins of Marketplace of Ideas Theory: Justice Holmes in Abrams***

1.1 ***Two Interpretations of the Doctrine***

The phrase “marketplace of ideas” is today so ubiquitous in academic and even popular discussions of freedom of speech that people seem to think of it as a concept with a long pedigree. It is true that a belief that a free and open exchange of ideas will lead to some conception of absolute truth finds an early iteration in Milton’s *Areopagitica* - which asked, “who ever knew Truth put to the worse, in a free and open encounter?”¹²³ - and John Stuart

¹²³ John Milton, *Areopagitica* (London, 1644), <http://www.gutenberg.org/etext/608>.

Mill's *On Liberty*. But as a tool used to delineate the meaning of the “freedom of speech” and “freedom of expression” enshrined in the constitutional orders of the United States and Canada, the concept is relatively young. It dates to a dissent authored by Justice Oliver Wendell Holmes of the United States Supreme Court in the matter of *Abrams v. United States*.¹²⁴ In that case, five Russian immigrants were charged under the Espionage Act with printing and distributing leaflets that criticized American reluctance to intervene in favour of Russia, claiming that America was afraid of the proletarian revolution and calling American workers to revolt. The majority upheld their convictions. Holmes dissented, while noting that he himself found the leaflets and their authors to avow “a creed that I believe to be the creed of ignorance and immaturity when honestly held”¹²⁵:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.¹²⁶

The clear implication of this paragraph and its imagery to many judges and legal scholars has often been that in evoking a marketplace Holmes necessarily demanded a “laissez-faire” approach to the market of ideas, in which government regulation is kept to an absolute

¹²⁴ 250 U.S. 616 (1919).

¹²⁵ *Ibid.* at 629.

¹²⁶ *Ibid.* at 630.

minimum.¹²⁷ As I will set out below, a good proportion of the major theoretical commentary on this famous paragraph has focussed on elaborating how one could set up this “market” and what the appropriate terms would be of its “trade.” But before I address those issues I want to note that the crucial connection made by Holmes in *Abrams* isn’t simply that he uses that imagery, but rather that he outright asserts that said market produces the social good of “truth.” In other words, the basis for the justification of free speech is not individualistic - the idea here is not that speech ought to be protected because it allows individuals or even groups of individuals to collect the benefit of the “truth” for themselves. Rather, as Stanley Ingber has pointed out, Holmes’ vision of the ideal space for public discussion justifies itself by reference to “the aggregate benefits to society, and not because an individual speaker receives a particular benefit.”¹²⁸

I highlight this distinction because at this late stage of capitalism in North America, it is difficult to think of market activity as being in the “public” interest. Empirically we are living in the shadow of the 2008 recession, which may very well be attributable to successive American governments of both parties pursuing deregulatory measures, such as or the Clinton era’s repeal of the Glass-Steagall Act.¹²⁹ And philosophically, to the extent that market practices are defended nowadays, it is usually done with the air of the aggrieved rugged individualist. The nascent Tea Party movement in the United States, for example, appears to support free markets

¹²⁷ See, e.g. Joseph Blocher, *supra* note 3 at 825 (“But while First Amendment doctrine has carried Holmes’ laissez-faire marketplace banner more or less faithfully since *Abrams*, economic theory has not.”); Derek E. Bambauer, “Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas” (2006) 77 U. Colorado L. Rev. 649 at 654 (“[Marketplace theory] advocates a laissez-faire approach to regulating information.”); Vincent Blasi, “Holmes and the Marketplace of Ideas” (2004) Sup. Ct Review 1 at 5-6 (“We may be confident that Holmes was familiar with and sympathetic to the general worldview and many of the specific observations of the laissez-faire economists,” but qualifying as to degree of sympathy.)

¹²⁸ Ingber, *supra* note 122 at 4.

¹²⁹ For a concise and well-written overview of the 2008 crisis and its relationship to demands for unregulated capitalism, see Peter Temin, “The Great Recession & the Great Depression” *Daedalus* (Fall 2010) 115-124.

and deregulation to the extent that they keep the government from interfering with the lives of autonomous individuals.¹³⁰ In this view there is no expected benefit to anyone but those who “work hardest”; the market is a tool for self-actualization rather than public betterment, and “greed is good,” as Gordon Gecko would say.¹³¹

It is possible to characterize that belief as mere misunderstanding of more sophisticated economic theory. For example, it may, indeed, be true that certain intellectual forebears of the rage for market de-regulation in the 1990s and 2000s, like Milton Friedman, saw no necessary opposition between individual autonomy and public good. Even his first political pamphlet advocating the end of rent controls, Friedman concluded that the benefit of an unfettered market in rents was that “It would hurt more persons immediately, but *each less severely*, than the existing methods.”¹³² Some idea of social good is operative there. A full analysis of the extent to which Friedman et al’s reconciliation of the autonomy of market actors and social good is philosophically or theoretically tenable is beyond the scope of this paper. For now I’ll limit my observation to the fact that the takeaway for so many late capitalists has been more Gecko than careful reading of Friedman suggests something might be awry there.

In any event, in our state of current skepticism about markets, it is therefore worth pointing out, as Vincent Blasi does in an important article on Holmes’ intellectual influences, that a fetish for self-actualization through individual speech may not have been Holmes’ own

¹³⁰ See Mark Lilla, “The Tea Party Jacobins” *New York Review of Books* (27 May 27 2010), <http://www.nybooks.com/articles/archives/2010/may/27/tea-party-jacobins/>

¹³¹ *Wall Street* (dir. Oliver Stone, 1987).

¹³² Milton Friedman & George J. Stigler, *Roofs or Ceilings? The Current Housing Problem* (Irvington-on-Hudson, New York: Foundation for Economic Education, 1946), http://www.fee.org/pdf/books/Roofs_or_Ceilings.pdf. For more on Friedman and the degree to which he may have encouraged this kind of reading of his work, see Paul Krugman, “Who Was Milton Friedman?” *N. Y. Rev. of Books* (15 February 2007), <http://www.nybooks.com/articles/archives/2007/feb/15/who-was-milton-friedman/?pagination=false>.

view of the goal of his dicta.¹³³ According to Blasi, Holmes thought himself to follow Adam Smith and other classic forebears of the market in believing that a social benefit accrues from market practices generally, and thus from this “market” in speech. Thus, much as some conception of a social good underlies even the most hard-line economic deregulation theorists, Blasi argues that the marketplace of ideas metaphor has, from its inception, had a wider aim than simply allowing rational actors to pursue their own ends in peace.

But what precise social benefit did Holmes imagine? The prevailing view of the classical literature is that Holmes’ thought of the good as the production of truth itself, through a kind of market-based but ultimately teleological process in which some Invisible Hand comes and sorts good ideas from bad.¹³⁴ In this interpretation the reason that the marketplace approach to ideas is appropriate is simply that it is the approach that it will eventually bring humanity to the well of truth. Certainly that is a fair reading of the *Abrams* passage, with its use of the phrase the “best test of truth.” But it is worth mentioning that an alternative exists. Blasi has suggested that in fact, Holmes’ view of the market metaphor did not rest on personal dogma about a failproof method for the production of truth. Blasi argues that Holmes instead wanted to convey a much more procedural view of democracy that saw the necessity of dissent as something democracies ought to encourage as a pragmatic, rather than epistemological, matter. Holmes, in Blasi’s analysis, thought of the metaphor of the marketplace of ideas as

... a much-needed counterweight, both conceptual and rhetorical, to illiberal attitudes about authority and change on which the censorial mentality thrives. It honors certain character traits - inquisitiveness, capacity to admit error and learn from experience, ingenuity, willingness to experiment, resilience - that matter in

¹³³ See generally Blasi, *supra* note 127.

¹³⁴ This is by far the most popular understanding of Holmes’ paragraph. See, e.g., Bambauer, *supra* note 127 at 651 (“The marketplace of ideas grew from an Enlightenment belief in progress: in time, people would sort truth from falsehood, making government regulation of the information environment unnecessary and even pernicious.”)

civic adaptation no less than economic. It devalues deference and discredits certitude, and in the process holds various forms of incumbent authority accountable to standards of performance. It offers a reason to interpret the First Amendment to protect some gestures of opposition and resistance that have nothing to do with dialogue or dialectic. **In these respects, Holmes’s arresting metaphor serves better as a cultural statement than as a mechanism of social or intellectual ordering.**¹³⁵

Blasi’s point, in other words, is that Holmes did not intend to elevate the marketplace of ideas to the status of an ideal mode of social organizing that would provide an abstract, absolute truth to guide humanity (or America) on its way. Instead, it was simply a methodological approach which would encourage a healthy amount of self-criticism in a well-functioning democratic state. Again, here, Holmes envisioned a social benefit in maintaining a so-called “marketplace of ideas,” but it was the procedure, rather than the end product, that recommended the metaphor.

1.2 *Situating the Holmesian Conception in Relation to the Feminist Blogosphere*

Applying the Holmesian “social benefit” conception of the marketplace of ideas, either in its classical “truth-seeking” formulation or in Blasi’s more procedural view, to the fierce debate in the feminist blogosphere of 2008, neither entirely proves or disproves the usefulness of the metaphor. It is probably necessary to begin by defining the “society” at issue so that we know to whom the alleged benefit is meant to accrue. I will suggest that it is best in this context to construe it narrowly, possibly as narrowly as the feminist blogosphere itself, though it may also be useful to think of the participants as viewing their work as affecting feminist thought and political organization more generally.¹³⁶ Given that so much of the 2008 conflagration directly

¹³⁵ Blasi, *supra* note 127 at 46 (emphasis mine).

¹³⁶ As pointed out in Chapter One, the feminist blogosphere thinks of itself as, at the very least, a satellite of the “real world” feminist movement, although that is internally contested. *See especially* Ch. 1, Section 2, *supra*.

considered what kind of “community” the feminist blogosphere was particularly, that seems to be the appropriate measure of the intended effect. I will also reiterate that although it is probably true that the “digital divide” presents some material obstacles to access, those are diminishing,¹³⁷ and once online there is little other regulation of the debate, or costs associated with entry to it, and everyone in the debate is accorded the status of a nominal equal. Thus, although those premises may be subject to some empirical qualification, for the purposes of this inquiry I’ll take them for granted here.

In the first conception of the social benefit gleaned from a truly free marketplace of ideas - the idea that it will be a “better test for truth” – we will have to first identify what the subject of the discussion was. Typically when that kind of question comes up, one thinks of people discussing something abstract, deciding, for example, on the goals the community might want to pursue. But in this case, as I said in chapter one, the discussion is probably best conceived as one about what kind of community had actually been built by the existence of this discursive space known as the feminist blogosphere. Though abstract discussions played a minor role here, no one was really arguing about whether or not there might be an intersection between gender oppression and the treatment of immigrants, or whether non-white women ought to, in an ideal world, be playing a serious role in the development of feminist thought. Theoretically at least, everyone could agree on those points. The issue was more one of how well the discursants themselves could be said to be living up to their goal.

¹³⁷ See, e.g., Lu Wei and Douglas Blanks Hindman, “Does the Digital Divide Matter More? Comparing the Effects of New Media and Old Media Use on the Education-Based Knowledge Gap” (2011) *Mass Communication and Society*. 14(2):216-235; Jim Jansen, 2010. *Use of the internet in higher- income households*. Washington DC Pew Internet American Life Project, Available at: <http://pewinternet.org/Reports/2010/Better-off-households.aspx>.

Here, then, in order to gauge any social benefit of “abstract truth” one would have to see an answer coming out of the discussion that was more or less shared by all participants – if total consensus is impossible, at least a sense of satisfaction that some degree of self-understanding had been advanced by merely having the discussion, to follow Holmes’ more procedural understanding of the market. And yet in the feminist blog community, even the latter clearly was not the case by the time the parties had largely abandoned the discussion, at the end of April 2008.¹³⁸ It was clear throughout that the WoC bloggers and their sympathizers thought that the incident revealed serious racism within the community. It was equally clear on the other side of the fence that most thought that Seal Press, Marcotte, and their supporters had been at worst thoughtless. From that supporting perspective, that there was no real problem here, or at least that the problems ought to be obviated by their own limited apologies. As an abstract matter one suspects the WoC bloggers’ position is closer to the mark, but the substance of that position was rarely addressed by the targets of their attack. That lack of engagement could be blamed on the competing notions of civility I mentioned at the end of chapter one - i.e., that the attacks on Seal Press and Marcotte were perceived, by them, as framed too aggressively to merit response. But even so the fact would remain that no agreed position or even a vague sense of needing to be cautious seemed to come out of this debate; eventually the participants simply ran out of emotional energy to continue going at it at such a quick rate.

Indeed, possibly the most plausible argument for any kind of advancement of truth in this debate is simply that it taught all the participants that no “community” of a real kind existed in the feminist blogosphere. The moment its participants’ sense of “working together” was tested,

¹³⁸ As I point out in the conclusion to this paper, in fact the particulars of this debate have resurfaced a few times in the context of other disputes. See Peterson, “On Being Feminism’s Ms. Nigga,” *supra* note 32.

the community fractured altogether. As bell hooks has written, “Divisions will not be eliminated by wishful thinking or romantic reverie about common oppression despite the value of highlighting experiences all women share.”¹³⁹ But whether this truth is of “benefit” to the feminist blogosphere as a community is far from clear - as hooks also notes, the idea that political solidarity among women cannot exist “weakens and diminishes feminist movement. Solidarity strengthens resistance struggle.”¹⁴⁰ And that solidarity is impossible seems to have been the takeaway, more or less, of these discussions, and thus the abandonment of the project of building a feminist blogosphere that *could* be said to include everyone. Thus this experience would seem to disprove the notion that in an open “marketplace of ideas,” participants are likely to produce some kind of abstract truth that could be called a “social benefit.”

That brings me to the second conception of the classic “marketplace of ideas” metaphor advanced by Blasi, where competing notions of civility I observed in the feminist blogosphere seem to me to be key. Again, Blasi argues that Holmes meant something far more procedural when he spoke of the value of a marketplace of ideas, the sense that a venue where ideas were endlessly checking and re-checking could itself provide the social benefit.¹⁴¹ Plainly, by the end of the 2008 discussions few seemed to feel the feminist blogosphere had been improved by the angry free-for-all that had convulsed it. Brownfemipower and Blackamazon had both taken hiatuses from the community¹⁴², as had other less central figures in the debate. Many who did continue blogging did so with explicit pronouncements of alienation from the feminist blogosphere particularly, and feminism more generally. Some bloggers that had formally been

¹³⁹ bell hooks, *Feminist Theory from Margin to Center* (Cambridge, MA: South End Press, 2000) at 44.

¹⁴⁰ *Ibid.*

¹⁴¹ Chapter 2, Section 2, *supra*.

¹⁴² Both are blogging again today.

admired or at least considered “big” feminist bloggers - like Marcotte herself, or Jill at Feministe - were seen in a new and not altogether flattering light. Indeed, to this day the rift engendered by these discussions continues to have an effect on the participants at the time, although there is occasionally a sentiment that it has been forgotten among the newcomers to this community.¹⁴³ So to the extent that one can gauge the *procedural* social benefit here by way of the feelings of the community, the dominant view seems to largely be in the negative. The freedom to say whatever one wanted in this discussion was led to each side perceiving the other as uncivil; there was little sense of this engagement or “test of truth” happening because of the widespread antagonism.

Of course, one could argue that there is value to the community in knowing that its current modes of engagement are toxic to productive discussion. But again, without agreement on precisely *which* norms or elements of the discussion produced these divisions, it was more or less impossible for the community to develop an agreement on the way forward. That experience suggests that instead of providing an obvious and set framework for the “checking” of ideas that Blasi argues Holmes intended, there was little agreement in this “free marketplace” on the appropriate parameters for the performance of these checks. One might be tempted to argue that the rules of the market would prefer that everyone avoid what Seal Press called “negative discourse,” because it is “irrational” and therefore inimical to the market. But the point is that the mere existence of a “free market” does not suggest that the behavioural norms one might associate with it will manifest, spontaneously, in a discursive space like the feminist blogosphere. So again, the experience of the feminist blogosphere suggests that Blasi’s vision of

¹⁴³ See, e.g., 30 (“It really isn’t fun to dredge up all the things that went on, particularly as I’d rather not think about it for too long, but it is necessarily [sic] to do so. Because people forget. Time went on, and this thing I remember so well as a pivotal turning point in the feminist blogosphere is history. Digital dust.”)

a procedural benefit to the marketplace of ideas - even if it can be said not to have developed an abstract truth - is somewhat dubious. And while it is possible that this is all only a matter of time – that after a while the participants will develop these agreed norms – it is hard to see how they can do so for as long as the community perceives itself to be fractured on those lines.

2. *Economic Elaborations of Marketplace Theory*

2.1 *Neoclassical and “Neoeconomic” Approaches*

As mentioned earlier, the bulk of much contemporary free speech theory does not actually dwell on measuring the “benefits” accorded by a marketplace approach so much as elaborates on the “economics,” thus extending the metaphor.

There are two potential strains of this kind of thinking. The first retains allegiance to the neoclassical economic theory thought to have informed Holmes’ dissent in *Abrams*, encouraging the “laissez-faire” approach of government non-interference.¹⁴⁴ This, as mentioned above, has been the dominant view in judicial doctrine.¹⁴⁵ But since Stanley Ingber wrote his seminal article deconstructing what he called the marketplace of ideas “myth,” few legal academic commentators have been interested in elaborating the analogy in terms of describing speakers as “buyers” and ideas as “products.” As Ingber wryly remarks, “current and historical trends have not vindicated the market model’s faith in the rationality of the human mind.”¹⁴⁶ Ingber identifies several key, but ultimately contestable, articles of faith in judicial marketplace doctrine. The first is the idea that truth is discoverable at all, that it is an “objective, rather than a

¹⁴⁴ See Ingber, *supra* note 122, at 5 (“The imagery of the marketplace of ideas is rooted in laissez-faire economics.”)

¹⁴⁵ See, e.g., Blocher, *supra* note 3; Bambauer, *supra* note 127.

¹⁴⁶ Ingber, *supra* note 122 at 7.

subjective, chosen concept.”¹⁴⁷ A second, related assumption holds that in the unregulated “free market” speaker/actors test arguments against a rational standard of truth that is uninflected on socialization or group membership.¹⁴⁸ These two assumptions about the nature of truth and the means by which it can be reached are what allow the classic marketplace model to style itself as “open,” and what allow it to view a free speech market as conferring the “social benefit” discussed above. Yet, as Ingber points out, even within a free market, “the truth” is a socially constructed entity:

Conflicts in the marketplace, therefore, are not likely to lead to conclusive agreement on what is "true" or "best." Rather, the market place serves as a forum where cultural groups with differing needs, interests, and experiences battle to defend or establish their disparate senses of what is "true" or "best." Official adoption and support of one group's position, allegedly due to its success in the marketplace, merely enhances through legal mechanisms the stature of that group's subculture; it does not represent a universal acceptance of that group's perspective.¹⁴⁹

Ingber alludes here to a third failed assumption of free market doctrine, which is that the only kind of power that matters in the marketplace is the power of your ideas. Indeed, the social stature of the group whose interests you are advocating may also play a role - the notion that your ideas have somehow triumphed as a result of their superior rationality merely serves to further entrench an already empowered position. And thus, Ingber points out, fundamentally in the market model the bias is towards the status quo, and most particularly towards the forms of speech dictated by those groups that have social power. In other words, the “free market” ideal for speech necessarily privileges “established norms and respectable proponents.”¹⁵⁰ Thus, the

¹⁴⁷ See *ibid.* at 15.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 27.

¹⁵⁰ *Id.* at 34.

neoclassical free market ideal is fundamentally unworkable, in Ingber’s view, and most theorists seem to agree.

As a potential answer, a second, more qualified but nonetheless “economic” approach has developed in the literature. What I will call this “neoeconomic” approach seeks to apply the newer insights of institutional and behavioural economic theories to speech markets. As Joseph Blocher puts it, the idea in these new theories is to apply a “thick understanding of real-world phenomena and institutions, an understanding that marketplace of ideas theorists have not developed.”¹⁵¹ Generally speaking, this variety of free speech theorizing does an end-run around the question of social benefit by refocussing the question on how to properly *structure* the market of ideas in order to achieve that presumed benefit. In other words, where the social benefit of speech does not materialize, these “neoeconomic” approaches to free speech theory characterizes this as a problem of “market failure,” and thus seeks to define appropriate interventions in the market so that the failure can be averted in future.¹⁵² Thus the primary project of the economic perspective is to use economic theory to solve the problems occasioned by the marketplace metaphor.

These writings are quite numerous and it would be impossible to cover them all within the confines of this paper.¹⁵³ Instead I will focus here largely on the writings of Cass Sunstein,

¹⁵¹ See Blocher, *supra* note 3 at 846.

¹⁵² See Ingber, *supra* note 122, at 5 (“The imagery of the marketplace of ideas is rooted in laissez-faire economics... Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.”)

¹⁵³ Blocher, *supra* note 3, for example, is writing specifically about the attempts of theorists like Frederick Schauer to consider the role of institutional setting in freedom of speech. *See, e.g.* Schauer, “First Amendment,” *supra* note 3; Frederick Schauer, “Towards an Institutional First Amendment” (2005) 89 Minn. L. Rev. 1256. Blocher himself attempts to tie the approaches of institutional economics, such as the Coase theorem, to Schauer’s theory. *See generally* Blocher, *supra* note 3.

whose (pre-Internet)¹⁵⁴ writings, I believe, are greatly inflected by behavioral economics, although he does not explicitly describe them as such.¹⁵⁵ In *Democracy and Free Speech*,¹⁵⁶ Sunstein posits himself as a critic of classical marketplace doctrine. Drawing on the ideas of James Madison, which he argues established the “central constitutional goal of creating a deliberative democracy,” Sunstein claims his aim is to develop a “well-functioning system of free expression.”¹⁵⁷ In order to do so, he proposes what he calls a “New Deal” for speech. The crucial philosophical commitment underwriting F.D.R. Roosevelt’s New Deal of the 1930s, Sunstein notes, was to upend the traditional skepticism of neoclassical economic theory about government intervention in the marketplace:

Before the New Deal, the Constitution was often understood as a constraint on government “regulation,” just as it is now with respect to speech. In practice, this understanding meant that the Constitution frequently prohibited government from interfering with existing distributions of rights and entitlements...

On the pre-New Deal view, existing distributions marked out the boundary between neutrality and partisanship; but this was not their only function. They also created the very division between inaction and action. Government inaction was defined as respect for existing distributions. Government action was understood as interference with them...

Roosevelt claimed... that the social and economic world was a product of human beings, rather than of nature and nature’s laws. People, rather than nature, had created economic markets and existing distributions. Laws underlay markets and

¹⁵⁴ I will return to Sunstein’s “post-Internet” writings on freedom of speech in Chapter 3, *infra*.

¹⁵⁵ Sunstein is, of course, widely acknowledged to be fascinated by the intersection of behavioral economics and the law; *see, e.g.*, Dan Slater, “Sunstein to Bring Law & Behavioral Economics to Washington” *Wall Street Journal* (blog) (8 January 2009) <http://blogs.wsj.com/law/2009/01/08/sunstein-to-bring-law-behavioral-economics-to-washington/>. Nonetheless, as described in this chapter and also when I take up his post-internet theorizing in Chapter 3, I believe he often oscillates between political theory and behavioral economics and seems to see little distinction between the two. Thus I’ve classified him as an “economic” theorist here.

¹⁵⁶ Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993)

¹⁵⁷ *Ibid.* at 18.

made them possible. If they had good reasons for doing so, people might change those markets and existing distributions.¹⁵⁸

Sunstein sees the New Deal perspective on government regulation as transferable to the freedom of speech realm. Again, he suggests that the aim of such government regulation should be political, with a strong sense of civic engagement. But it is nonetheless still the imagery and philosophical commitments of *economic* regulation that he sees as crucial to the development of that engagement. And even where Sunstein turns to political imagery it is often difficult to distinguish his conception of political value from economic. For example, his description of a well-functioning system of free expression includes the following statements:

The system of free expression is the foundation of this [deliberative] process. ... We might even define political truth as the outcome of this deliberative process, assuming that the process can approach or meet the appropriate conditions. These conditions include adequate information; a norm of political equality, in which arguments matter but power and authority do not; an absence of strategic manipulation of information, perspective, processes, or outcome in general; and a broad public orientation toward reaching right answers rather than serving self-interest, narrowly defined.¹⁵⁹

Sunstein appears to believe that this conception represents a radical departure from classical marketplace theory. But on my reading, it seems instead to share many of its premises. Here we have the predicted outcome of a kind of “truth,” even if it isn’t an abstract one. The actors are seen, formally, as equals, engaged in a struggle where rational argument is the means by which one buys and sells ideas in the service of the truth. Strategic manipulation is wrong because it interferes with the adequacy of available information, which enables people to make choices. Even the public orientation Sunstein demands recalls Holmes’ notion of “social benefit.” In other words, what Sunstein aspires to here is more or less indistinguishable from

¹⁵⁸ *Id.* at 29-30.

¹⁵⁹ *Id.* at 19.

Holmes' view, and even, I would argue, from that of most neoclassical economics. The only difference here is who and how these kinds of issues might be remedied.

2.2.2 The Failure of Economic Rationality to Describe the Feminist Blogosphere

It will perhaps come as no surprise to my reader that I do not believe that the economic elaborations of the marketplace metaphor entirely match the dynamics of the feminist blogosphere, either descriptively or prescriptively. At its most literal level, few in the course of this discussion regarded themselves as disinterested producers and consumers who arrived in the blogosphere's version of the "public square" to test out ideas. Most came to the discussion already equipped with particular allegiances. It is too simple, of course, to reduce those loyalties to racial or class or other lines. One of the aspects of blogging that seems rarely covered in academic literature is the close friendships people sometimes develop over the internet. When you are engaging with people on a near daily basis, and in a way that feels intellectually and emotionally fulfilling, a closeness develops.¹⁶⁰ This seems particularly true in feminist blog circles, which have not infrequently been analogized to the seminal - feminist consciousness-raising groups of the 1960s and 1970s.¹⁶¹ Just like those groups were sometimes reported to

¹⁶⁰ Much of the popular literature on the "Internet Age" is skeptical that these close bonds can exist. I can only speak to my own experience. There is a growing body of social-scientific studies whose outcomes suggest that the Internet can have a beneficial social effect for at least some people, including bloggers. *See, e.g.*, C. Steinfield, N. Ellison & C. Lampe, "Social Capital, Self-Esteem, and Use of Online Social Network Sites: A Longitudinal Analysis" (2008) 29 *J. App. Developmental Psych.* 434; Michael A. Stefanone & Chyng-Yang Jang, "Writing for Friends and Family: The Interpersonal Nature of Blogs" (2007) 13 *J. Comp.-Mediated Comm'n* 123; J. Moon et al, "Improving Quality of Life via Blogs and Development of a Virtual Social Identity" (2006) 17 *J. Inf. Tech. Mgmt* 26.

¹⁶¹ *See, e.g.*, Tracy L.M. Kennedy, "The Personal is Political: Feminist Blogging and Virtual Consciousness" (2007) 5(2) *S&F Online*, <http://www.barnard.edu/sfonline/blogs/printtke.htm>.

have positive emotional benefits for their participants,¹⁶² so the same seems to be true in communities like the feminist blogosphere.

But neither are social cleavages within the community irrelevant here. It can hardly be said to be mere coincidence that each side of debates I described in Chapter 1 could be said, in large part, to share certain demographic characteristics, particularly along racial lines. Marcotte, Filipovic, and Schwyzer all identified online as white. Meanwhile, brownfemipower, BlackAmazon, and Holly identified as women of colour. Though the correlation was not complete - there were self-identified white bloggers like ilyka damen who expressed strong support of the latter camp - that race was a fairly reliable predictor of where one stood on the various issues implicated in the March 2008 discussions suggests its continuing relevance, as I noted above. Moreover, it suggests that Ingber's argument that socialization has an effect on truth, and also that the "free market" can often merely be a battle of interests rather than a disinterested search for truth.

On the other hand, I think it is far too easy to leap from that assumption to one which thinks the situation can be rectified by a commitment to respect political equality and thus separate matters of power and authority away from the "real" arguments.¹⁶³ First of all, matters of power and authority were central to the arguments in March 2008. This is probably best illustrated by that portion of the discussions which touched on the theme of professionalization. Remember that from the point of view of Marcotte and Seal Press' critics, the very fact that they were viewed as speaking for the community imposed on them a higher level of responsibility, because to have that platform was to have a form of *social power* which the rest of the

¹⁶² See, e.g., Diane Kravetz, "Consciousness-Raising Groups in the 1970's" (1978) 3:2 *Psychology of Women Quarterly* 168.

¹⁶³ See *supra* note 156.

blogosphere did not share. Seal Press responded by trying to downplay its position - “we are not Wal-Mart.” Meanwhile, Marcotte argued that her status in fact imposed a higher obligation on her interlocutors to be careful with their criticism, while also arguing she would not have attracted the criticism if she was not so prominent a figure within their frame of reference. Thus not only were power and authority relevant to these arguments qua arguments, but they were also thought to be structuring how the discussion ought to proceed, imposing obligations on one or the other side of the fence. Everyone agreed that questions of power were absolutely relevant.

What this reveals about Ingber’s and Sunstein’s critiques of the free market model, it seems to me, is that simply identifying the presence of power in the market as a problem does not immediately suggest a solution for dealing with it. Ingber seems more realistic about this, insofar as he presents the problem of social power as an obstacle to “rationality,” and thus makes it a universal condition that will plague any discussion. In Sunstein’s analysis, however, it seems that he believes that the problem can be circumvented by way of a renewed commitment to “deliberation,” which, as I point out above, in his formulation sounds more or less just like the market: an arena in which formal equality is presumed even though empirically it does not, necessarily, exist. But the notion that one can simply “vault oneself out of power,” to use Catharine MacKinnon’s phrase,¹⁶⁴ is naive, whether it is by way of the alleged “rationality” of the market or a commitment to “deliberation” in the public sphere. Neither of those concepts are neutral on issues of social power and authority.

¹⁶⁴ Catharine A. MacKinnon. “Points Against Postmodernism” (1999) 75 Chi.-Kent L. Rev. 687 at 703 (arguing that this is what postmodern theorists are hoping to do by failing to give an account of themselves).

3. *Critical Perspectives and Non-Market Theories*

I now want to turn to modern (though also “pre-Internet”) free speech theories that step away from the dominance of the market metaphor. Of course, there are numerous critiques of this sort, and for reasons of length I have chosen just two to describe and apply here. For the purposes of this paper I have chosen the two that I think are most helpful in analyzing the events described in Chapter One, but by no means are these two the only ones I could have chosen.¹⁶⁵

3.1 *Owen Fiss and the Democratic “Irony” of Free Speech*

The first strain resembles, somewhat, the Sunstein model insofar as it views the primary value of freedom of speech as located not in the pursuit of abstract truth but rather in democratic ideals. As Owen Fiss puts it in *The Irony of Free Speech*, in that tradition free speech functions “as a protection of popular sovereignty.”¹⁶⁶ This sort of free speech theorizing has a long tradition stretching back to Alexander Meiklejohn in the 1940s,¹⁶⁷ and indeed Ingber views that tradition as a version of the marketplace of ideas theory insofar as it emphasizes social value over individual right.¹⁶⁸ I will focus here on Fiss’s notion for reasons of space.

¹⁶⁵ See, e.g., Bambauer, *supra* note 127 (suggesting marketplace of ideas doctrine to be discarded in communications regulations because of the phenomenon of cognitive bias); R. Delgado & J. Stefancic, “Images of the Outsider in American Culture: Can Free Expression Remedy Systemic Social Ills” (1991) 77 Cornell L. Rev. 1258 (arguing that free speech cannot remedy systemic ills like racism and sexism because of the constraints of language); Catharine MacKinnon, *Only Words* (Cambridge, MA: Harvard Univ. Press, 1994) (arguing that some kinds of speech - pornography particularly - are in fact actions and thus subject to regulation without free speech concerns).

¹⁶⁶ Owen Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard, 1996) at 2.

¹⁶⁷ *Ibid.* See also, e.g. Ingber, *supra* note 122 at 8-12; Alexander Meiklejohn, *Free Speech and Its Relation to Self Government* (New York: Harper Brothers Publishers, 1948).

¹⁶⁸ Ingber, *supra* note 122 at 8-12.

Fiss addresses marketplace of ideas theory primarily within the framework of his general view that classical free speech doctrine is overly focussed on autonomy.¹⁶⁹ In a 1985 law review article entitled “Free Speech and Social Structure,” Fiss noted that while his concerns about autonomy were not solely produced by the unequal mores of capitalism, and that he could admit other social cleavages were relevant when considering how the overvaluing of autonomy could prevent real speech:

... I think it fair to say that in a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful. The market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those that are advocated by the rich, by those who can borrow from others, or by those who can put together a product that will attract sufficient advertisers or subscribers to sustain the enterprise.¹⁷⁰

The central contribution of Fiss’s critique of “marketplace of ideas” doctrine thus is his introduction of the material realities of capitalism into the equation. His concerns are about the ways in which power is aggregated and reinforced through speech - including through the market, which in Fiss’s view makes its own demands on the content of speech - the maximization of profit influences press decisions, for example and what to report, and how to report it. In this age of reality television one might think the sole potential effect here is that we will be flooded with poor-quality and frivolous cultural product. But Fiss maintains that this could also be true on matters of public interest. For example, as he would later put it. “[t]he market, bearing down on the press, may cause it to be shy in its criticism of the government or of certain candidates for office, when the government policies or the candidates’ positions favor the

¹⁶⁹ See, e.g., Owen M. Fiss, “Free Speech and Social Structure,” 71 Iowa L. Rev. 1405 at 1410 (1985) (“The crucial assumption in this theory is that the protection of autonomy will produce a public debate that will be, to use the talismanic phrase once again, ‘uninhibited, robust, and wide-open.’”) Later in *The Irony of Free Speech* Fiss would term this sort of thinking the “libertarian view.” Fiss, *Irony*, *supra* note 166 at 3.

¹⁷⁰ Fiss, “Free Speech and Social Structure,” *supra* note 169 at 1412-13.

economic interests of the press.”¹⁷¹ Thus, in Fiss’s view, the market is at least as potentially dangerous a regulator as the state: “Just as it is no longer possible to assume that the private sector is all freedom, we can no longer assume that the state is all censorship.”¹⁷²

Fiss later expanded on these ideas in *The Irony of Free Speech*. First, Fiss refined his description of how power is aggregated. He argues that an unregulated speech market — with its implied suggested remedy for bad ideas of “more speech” — actually inhibits, rather than encourages, speech by way of preventing the state from mitigating silencing dynamics.¹⁷³ The “irony” he writes about is the ability of the more powerful to, by exercising their autonomous right to speak, thereby actually *undermine* others abilities’ to speak themselves. Second, Fiss thus proposes that one way in which one could justify state speech regulation to correct power imbalances is to position it as “furthering, rather than limiting free speech.”¹⁷⁴ Thus the idea for Fiss is to reframe the question so that courts can see themselves as promoting, rather than negating free speech values by when they step in:

In conceiving of state regulation of hate speech, pornography, and campaign finance in this manner, equality once again makes an appearance. But now the value is rooted in the First Amendment, not the Fourteenth Amendment. The concern is not simply with the social standing of the groups that might be injured by the speech whose regulation is contemplated. Rather, the concern is with the claims of those groups to a full and equal opportunity to participate in public

¹⁷¹ Fiss, *Irony*, *supra* note 166 at 52.

¹⁷² Fiss, “Free Speech and Social Structure,” *supra* note 169 at 1415.

¹⁷³ “It is asserted that hate speech tends to diminish the victims’ sense of worth, thus impeding their full participation in many of the activities of civil society, including public debate. Even when these victims speak, their words lack authority, it is as though they said nothing. This silencing dynamic has also been attributed to pornography. In this view, pornography reduces women to sexual objects, subordinating and silencing them. It impairs their credibility and makes them feel as though they have nothing to contribute to public discussion. In an even clearer case, unlimited political expenditures not only perpetuate the unequal distribution of wealth and put the poor at a disadvantage in the political arena but also may have the effect of silencing the poor. The rich may, for example, so dominate advertising space in the media and other public domains that the public will, in effect, hear only their message. As a result, the voice of the less affluent may simply be drowned out.” Fiss, *Irony*, *supra* note 166 at 16.

¹⁷⁴ *Ibid.* at 15.

debate—the claims of those groups to their right to free speech, as opposed to their right to equal protection. The state, moreover, is honoring those claims not because of their intrinsic value or to further their self-expressive interests but only as a way of furthering the democratic process.¹⁷⁵

Thus, what Fiss’s argument is that freedom of speech is itself a fundamentally *egalitarian* and social enterprise, but he does so by explicitly *contrasting* it to what happens in the private economic sphere.

3.2 **Irony and Silencing in the Feminist Blogosphere**

Fiss’s ideas about freedom of speech strike me as more helpful than the juridical and economic marketplace theories in untangling what happened in the feminist blogosphere precisely because of its focus on the problem of the aggregation of power in speech. To return again to the professionalization theme, Fiss’s notions that the demands of the marketplace themselves regulate speech in ways that do not promote “openness” casts a new light on the issue. Seal Press, in fact, plead a version of this argument in response to its critics: “Seal has changed over the years because we've had to. We could not survive publishing only the types of books that Seal used to publish.”¹⁷⁶ But this renewed focus on the way in which these pressures shaped the relationship between the narrower community of the feminist blogosphere and those those who had access to a larger audience is not necessarily exculpatory. More broadly, it provides a principled basis to object to professionalization of speech in a space where nominally, at least, equality and inclusivity are important. It’s not “just jealousy.” As Fiss’s analysis shows, this has to do with the fundamental incompatibility of a capitalist market — which the market for a “media career” plainly is — with a system that truly respects all its participants’ speech rights.

¹⁷⁵ *Id.* at 18.

¹⁷⁶ “Seal and Women of Color”, *supra* note 39.

One could relate that insight to a second theme that emerged from the March 2008 discussions, which is the problem of appropriation in a free speech space. Again, it became clear by the end of the debate that Marcotte had committed no generally recognizable modes of plagiarism. More importantly, from the perspective of copyright, which in both the American and Canadian contexts is regarded as primarily a property right designed to promote “innovation” in the marketplace,¹⁷⁷ Marcotte had done nothing objectionable. But simply because Marcotte had acted within the bounds of what was considered acceptable and even appropriately beneficial in the marketplace, that did not mean that what she had done in any way promoted openness. Indeed, Marcotte’s work had in effect (though not everyone thought in intent) hidden from view the work of women of colour that she had built it on. She had occupied what space there might be on immigration in the media, and to develop an account of why that is objectionable we clearly have to go outside market norms for speech.

Furthermore, the obscuring of prior work was not solely a matter of inadequate attribution. It was also a matter of social power. Marcotte’s professional success, and her consequent ability to access a wider marketplace was not simply a function of the ideas she promoted or how she promoted them, though those were both undoubtedly relevant. It also likely had to do with the privilege that is being white in a racist society. When white people speak on a subject they are heard first, and often more loudly, than non-white people. This has the unfortunate, even if unintended effect, of white feminists, even where they seek to address racism directly, making women of colour, as bell hooks has remarked “the ‘objects’ of [white

¹⁷⁷ In other intellectual property regimes such as France’s, an author’s right to self-actualization through their work is given legal effect through the institution of moral rights. For a good overview and analysis of the concept see Cyrill P Rigamonti, “Deconstructing Moral Rights” (2006) 47 Harv. Int’l L. J. 353.

women's] privileged discourse on race. As 'objects,' we remain unequals, inferiors,'¹⁷⁸ And thus "l'affaire Marcotte," illustrated, very starkly it seems to me, the reality of the phenomenon of silencing within even such a nominally open and egalitarian community as the feminist blogosphere.

That said, the March 2008 discussions also serve to illustrate failings in Fiss's work. Most specifically, it seems that Fiss has too narrow a view of "silencing," since he seems to associate it primarily with the "hard cases" of free speech law, namely hate speech, pornography and campaign finance. In the feminist blogosphere the problem of silencing was not so simple; the means which eventually forced brownfemipower out of the blogosphere were more subtle than simple hate speech. In her own words: "[t]here is no "feminist movement" because the work being done is not just conflicting with the work of other "sisters"—it's directly negating it." Moreover, even within his analysis of silencing, Fiss appears to prioritize the power of economic power to do so over social cleavages like racism or sexism.¹⁷⁹ But as Holly pointed out in one of her posts at Feministe, economic power is not entirely separable from those cleavages – sometimes one has the money, or the "megaphone," one has, precisely because one is male or white.¹⁸⁰ The issue of silencing is, I think, an important thing to take away from

¹⁷⁸ hooks, *Feminist Theory*, *supra* note 139 at 13.

¹⁷⁹ Fiss, *Irony*, *supra* note 164 at 16 (using passive voice to describe apparent silencing effects of hate speech and pornography, then when turning to campaign finance remarking that it is a "clearer case.")

¹⁸⁰ See Holly, "This Has Not Been A Good Week," *supra* note 74 ("I hope that all of you bloggers will agree with me on this problem: some feminist bloggers have access to a bigger megaphone than others, and you have to be deluded to think that's based on anything remotely resembling a meritocracy. I'm sorry — no matter how talented you are, how good a writer, how intellectually sharp and beautifully passionate, there are other things about you that play a very significant role in how you're heard, who hears you, whether you get heard at all. That is the tough shit about the ugly world we live in — it's not truly fair to anyone, because true fairness would be getting evaluated solely on your own merits. Nobody is — but of course, some people get the long end of the stick, and others the short end. Others are marginalized. If you don't get that, please go read some racism 101 somewhere, okay?")

Fiss’s analysis of freedom of speech. Possibly, it’s the most important thing. But if it is to be truly effective then it will have to be given a wider consideration than Fiss does.

One last point on which I think Fiss’s ideas could be revised in light of experience of the feminist blogosphere: I think he is a bit overzealous in discarding the notion of autonomy. This might seem like something of a reversal, but what I mean by that is to point out that in fact the ability to speak, and the psychological need to self-express, are just as vital to the disadvantaged as they are to the advantaged. To go back to the very roots of the March 2008 conflict, BlackAmazon said she was taken aback precisely because Seal Press seemed to want to dictate to her how she could speak in her “own” space at her blog.¹⁸¹ That feeling that one is entitled to speak “from the heart” — even if what you’re saying isn’t public-spirited or democratic — seems to me key to the incorporation of marginalized voices. It seems a strange measure, in other words, to use the measure by which equality is established to impose a *higher* burden on the less powerful than has previously existed for others. As such, I do not think I am as prepared as Fiss is to completely discard the emotional power that attaches to the ability to speak, when speaking of the theoretical justifications for freedom of speech itself.

3.3 **James Boyd White and the “Form” of Free Speech**

The second strain of critical perspective worth highlighting here touches precisely on issues of autonomy, though it does so through the prism of language. James Boyd White’s thesis is that the language one uses can be constraining, even where the participants all mean to encourage justice by way of their self expression. He calls this, after a quote of Simone Weil’s, resisting the empire of force:

¹⁸¹ See Chapter 1, Section 3.2, *supra*.

Once we begin to see what happens when people successfully claim power over the lives of others, when an empire of force is created in language and in life, we should of course try to find ways to resist it in our conduct: in our voting, our political and social action, our contributions of money and time and energy. But—and this is crucial to the power and meaning of her sentence—the problem she identifies does not go away when we act on the side of the poor and the oppressed, when we are reformers of the system, good as those things are. For when we explain and justify what we think, and what we do, we shall still be working with language, language will still be working with us, and our own formulations can quickly become the language of another empire, full of slogans, sentimentalities, falsities, and denials, of trivializations and dehumanizations. What we think and say can in a deep way replicate just what we should be most trying to resist.¹⁸²

Boyd White contends that modern norms of speaking in fact very much encourage these kinds of calcifications of language. His project, as he sees it, is to develop an account of writing and speaking that regards it as an “activity of political and ethical significance.”¹⁸³ In such an account, he sees the most crucial kind of speech to encourage as what he calls “living speech,” which is the kind of speech whose value is not measured by “some instrumental effect on the world,” but rather by its value “for the speaker and his or her audience: the value of speech that invites and deserves and rewards real attention, that makes possible the engagement of one mind with another.”¹⁸⁴ Put differently, one could say that what Boyd White seeks to encourage is the kind of speech that belongs in literature, that prioritizes meaning and power of conveyance over the mere stringing together of words.

What bearing does this have, however, on marketplace of ideas theory? Well, it will perhaps come as no surprise that one of the trivialities Boyd White sees as plaguing contemporary speech situations is the notion of the marketplace of ideas itself. Boyd White

¹⁸² James Boyd White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton Univ. Press, 2006), at 8.

¹⁸³ *Ibid.* at 12.

¹⁸⁴ *Id.* at 16.

points out that many institutions actively regulate speech in an effort to keep speech valuable; he uses the example of a courtroom.¹⁸⁵ He also points out that the metaphor is largely empty, insofar as few actually believe that the market will “winnow out truth” or encourage the “speaking of truth to power.” Instead, in Boyd White’s view, it merely encourages more advertising and commercial speech. Like Fiss, Boyd White believes there to be a need for free speech regulation, and does not, contrary to the juridical view, see it as dependent upon the absence of coercion: “We tend to assume that if the government just leaves the world alone, a garden of speech will spring into existence, but in some ways what we have made with our freedom is closer to a desert.”¹⁸⁶

Boyd White attributes the staying power of the image to a modern sensibility that democracy is in effect a series of consumer choices, that its purpose is to embody the maxim, “If I want it I should presumably have it.”¹⁸⁷ In this way,

The ideology of the market refuses on the surface to make “value choices,” supposedly leaving them to be worked out by consumers, but in fact it is deeply resonant of value, especially in its way of imagining what a human being is, its sense of what motives drive us, its limited conception of human reason, and its image of what would constitute a fulfilled human existence.¹⁸⁸

Thus Boyd White’s criticisms of the marketplace model rest on a humanist vision. This is to be distinguished from the “democratic” aspirations of an Owen Fiss or even a Cass Sunstein insofar as Boyd White’s view is, as earlier noted, both political and ethical. He is not solely concerned with the role of speaker when held by the citizen of a functioning democracy. He is interested, instead, in the whole speaking person. Thus even his notion of democracy is not

¹⁸⁵ *Id.* at 31.

¹⁸⁶ *Id.* at 33.

¹⁸⁷ *Id.* at 34.

¹⁸⁸ *Id.* at 36.

teleological, the result of “rational” debate: “for democracy to be real it requires what it makes possible, an identification of the individual with his government—his sense of pride or shame at the moral history of his nation, at what is said and done in his name. It is built upon, and requires, a sense of public responsibility leading to collective self-education.¹⁸⁹” In order to develop such real democracy, Boyd White explains that he believes that freedom of speech should be measured,

insofar as [our speech] is deep, original, self-testing, revealing awareness of the limits and resources of its language; insofar as it is truly composed, organized to call upon the reader or hearer to respond in a deep, not superficial, way; insofar as it has genuineness of voice, and character, and relation; and insofar as it has a life and shape of its own that work against the various reductive and dehumanizing forces in the world that I have been calling the empire of force.¹⁹⁰

3.4 *Living Speech in the Feminist Blogosphere*

Boyd White’s focus on language and form would initially seem to suggest that he would be disdainful of the feminist blogosphere’s discursive style, and thus find it uninteresting as a test case for speech. It is not a sphere populated by Dantes, or even lesser literary writers. It is a sphere in which, in fact, language norms are relatively relaxed and formalities — including, as mentioned earlier, typos and grammatical errors — fall by the wayside. Nonetheless I think his first suggestion, that language can be its own trap if it becomes full of slogans and sentimentalities that hold no real meaning for the speaker or the listener, is applicable to that precise potential critique of the “style” of feminist blogging. Boyd White, in fact, appears to avoid prescribing a particular form for his living speech. His point is that the language should

¹⁸⁹ *Id.* at 37.

¹⁹⁰ *Id.* at 43.

matter to the participants in the discussion, the value again being located in the value it has for the speaker and listener.

This is an important insight when thinking about the March 2008 discussions primarily because of the competing norms of civility it revealed. On the one hand you had Seal Press suggesting that BlackAmazon's address to them was too informal to require a polite response; since she had violated their expectations of the appropriate means of engagement, they felt free to violate hers. On the other you had BlackAmazon asserting that Seal Press ought not to come into her space so aggressively. But when reframed away from the terms of each parties' "expectations" of the other, gauging the presence of "living speech" allows one to ask who was providing actual discursive *value* in this debate. Funnily enough, it seems to me that the piece of writing in the debate that best qualifies for the status of "living speech" - that deserved and got attention, that eventually came to inspire what limited further understanding one could say came out of this debate - is actually the initial volley of "FUCK SEAL PRESS."¹⁹¹ I of course do not mean to suggest that the phrase inspired a meeting of the minds between BlackAmazon and the Seal Press editorial staff. I do, however, think that in that one succinct phrase there resided a whole host of ideas about power in the feminist blogosphere. Given the number of people who sided against Seal Press in the aftermath — recall that many white bloggers, including the editor of *Bitch* magazine, seemed to feel Seal Press was in the wrong, so it was far more of a unanimous community drubbing of the publisher than it was in the later Marcotte controversies — it certainly touched a chord.

That said, that sense of shared commitment did not, unfortunately, translate into a renewed commitment to the feminist community of the kind that Boyd White sees as informing

¹⁹¹ See *supra* Ch. 1, section 3.

“real democracy.” Instead, as people picked their sides over the course of the month, what became increasingly clear was that indeed a sort of consumer mentality was prevailing. In other words, even if one felt that Seal Press and Marcotte had stepped out of line with the larger commitments of the community, the question was framed as whether or not one would continue “consuming” their work. The issue became one of whether it was acceptable for Feministe to continue advertising Marcotte’s work in light of the allegations of appropriation. No one wanted to ruin anyone’s career, after all. But by relying on the notion that the community would be able to separate out the consumption of a cultural product like a book from any deeply felt upset over the events of the preceding days, Feministe sent the wrong message. That message was that the feminist blogging community was really a market in which the ability to sell one’s writing was literally held paramount over notions of public responsibility or self-education. And perhaps even more importantly, it meant that all the speech-effort that had gone into the posts and the comments explaining exactly what the problem was, exactly why it was important to address it, all that work, had gone ultimately unheard.

Consequently Boyd White is perhaps the free speech theorist who gets closest to the heart of the conflict that then plagued the feminist blogosphere and lingers in some form today. Not only does he understand the need for different voices to be heard as a matter of democratic principle, he views democratic ideals through the lens of human feeling. No matter the degree of sympathy for the position of the “big” feminist bloggers here, or no matter how well they meant, what caused a lot of the silencing and blog-shuttering and feminism-leaving was simply the sense among the WoC bloggers that they could no longer identify with it. And the main reason for their alienation was very much that the “feminist blogosphere” didn’t seem to be very interested in listening to them.

4. *Conclusion*

This survey of some major approaches to the “marketplace of ideas” conception of free speech, both supportive and critical, suggests that indeed some traditional accounts are able to both describe the state of the feminist blogosphere in March 2008 and provide some normative reasons why the discussions then became such a cataclysm. Indeed, the discussion bore almost no resemblance to a classical marketplace of ideas as depicted in the juridical sources of the doctrine, largely because little “social benefit” was achieved. Nor did it seem to much mirror the rational-debate model that stemmed from such an economic view of speech markets. Instead, the accounts of free speech that seemed to be most instructive of the failings of that debate came from outside the marketplace conception entirely, in the Fiss and Boyd White accounts, with their views that social power and language were the truly determinative factors.

That greater descriptive and normative powers came from those latter theories, ones that were quite explicitly critical of the economic framing imposed by the marketplace of ideas metaphor, suggests that a post-Internet theory of free speech will need to move away from the metaphor of the market altogether. As I will cover in my next chapter, however, much post-Internet theorizing has not quite managed to leave the economic framing of the question of speech behind. But bridging the gap between these old theories of how we speak to each other, and the social reality of how it actually occurs, and thus properly articulating the kind of benefit we want, socially, from the power of freedom of speech.

Chapter 3

Feminist Blogging and Post-Internet Free Speech Theory

1. **Introduction**

I am plainly not the first commentator to suggest that our experience of the internet may be telling us something about the true nature, and usefulness of, freedom of speech. The literature on this subject is, in fact, large and wide-ranging, and growing at a prodigious rate. But it is my belief that much of it remains paralyzed by the frame of what I call a “liberal-economic” frame. The liberal-economic frame is, I think, merely a lingering shadow cast by the dominance of the marketplace of ideas metaphor in traditional free speech theory – simply put, it analyses all speech problems under ideas about utility, productivity, and rationality that mirror certain tenets of laissez-faire economic theory. For the first portion of this chapter, I survey some representative theorists of what I call “post-Internet” free speech theory, specifically the writings of Lawrence Lessig, Yochai Benkler, Jack Balkin, and Cass Sunstein, all of whom share my interest in describing how the Internet has intersected – and diverged – with our traditional ideals about the role of speech in a democracy, but all of whom, I argue, fall prey to the false assumptions of the liberal-economic paradigm. Using the feminist blogosphere examples, I think it’s easy to see how lived experience of the internet suggests that theories of free speech that stem from even this milder version of the marketplace metaphor are inadequate to both describe and provide normative guidelines for our speech in future.

That said, one theme that emerges in the account below is that all of these theorists come closest to describing recognizable speech situations when they orient their work towards the “deliberative democracy” ideals traditionally associated with the thought of Juergen Habermas. The key, it seems to me, is not to interpret the nature of deliberation, either online or off, through

the lens of the market and associated tropes. As such, in the second section of this chapter, I turn to some more critical ideas about the nature of deliberation from non-Internet-focussed feminists theorists like Jane Mansbridge and Nancy Fraser. I use their ideas to analyze the deliberative faults of the feminist blogosphere generally, as well as to try and suggest some adjustments to the “deliberative” free speech ideal emerging from the Lessig/Balkin/Benkler/Sunstein axis that better reflect what the dynamics of the internet are teaching us about the proper principled approach to speech. And conscious of the fact that it’s always easy to be a critic, I conclude by an attempt to offer a new metaphor – that of a “critical democratic culture” – that I think will better help us both understand and solve the kinds of problems that arise when we try, as a community, to speak with each other.

2. *Free Speech Theory Goes Online*

Before I go on I want to clarify a little further the connection I am drawing between the critique of these post-Internet theories of freedom of speech and the critique of the marketplace of ideas metaphor I elucidated in the last chapter. This strikes me as especially necessary because few of the ideas presented by the four “internet speech” authors whose ideas are described in the following are self-consciously “marketplace” theories of free speech - in fact, they often eschew any real mention of the metaphor or position themselves against it. All term themselves concerned with what one might generally call “cultural” or “deliberative” models of free speech ideals, and in that sense are somewhat better able to account for the kinds of failings of speech noted in my first chapter. Nonetheless, each of these theorists even in their “deliberative” turns, continue to rely on some of the underpinnings of the marketplace metaphor in the way they describe the operation of public speech. They want the space to be, for example, “open,” in the same sense that markets are open, or “productive,” in the sense of producing

tangible cultural products, or committed to a single kind of “utility” for speech, in the sense that all parties are thought to share certain assumed “laws” of conduct. Thus, to highlight the failings of the liberal-economic paradigm is to make arguments analogous to those targeted more explicitly at the marketplace of ideas metaphor itself, I think.

One more caveat: of course, none one of the accounts below are comprehensive of everything the authors have said about the nature of the internet and the kind of public debate that it engenders. The idea is simply to survey the major themes major themes of their theories in order to suggest why broadly, the principles governing their approaches have thus far been inadequate.

2.1 *Lessig: Code*

Although his is not a theory of free speech per se, Lawrence Lessig’s ideas so dominate any kind of legal scholarship about the internet that it would be remiss of me not to address some of his ideas’ implications for the intersection of free speech principles and the internet. Moreover, Lessig has by far given the most principled account of the prospects the internet might posit for enhancing freedom writ large. Indeed, many of the contemporary arguments I describe in subsequent sections flow from Lessig’s observations about the nature of regulation in the online space, and specifically his contention in *Code 2.0* that “code is law.”¹⁹² Lessig is, of course, best known for his ideas the nature of the generation of “culture” – conceived of mainly as artistic and cultural products, both at the high and low ends – and his chief interest is thus the effect that the internet consequently should have on the norms of copyright law. But in *Code 2.0*, his seminal work on the nature of law in cyberspace, Lessig does examine the notion of free

¹⁹² See generally Lawrence Lessig, *Code 2.0* (New York: Basic Books, 2006).

speech in isolation from ideas about the nature of intellectual property. And in those reflections emerges what I think is an analogous view of free speech to that of a “classical” marketplace of ideas theorist, even if Lessig does not use that phrase specifically.

In brief and overgeneralized terms, Lessig’s argument in *Code 2.0* is that in the technological context, design choices represent choices about value that fundamentally *regulate* the space created by the relevant technology. In internet terms, this means that the way in which the internet is programmed is representative of a certain set of principles – thus, “code is law.”

This is probably easiest to illustrate by way of example. On the internet, Lessig argues, the principal architectural choice, for free speech purposes, is the TCP/IP protocol as the Internet’s fundamental building block. The technical details of the protocol are somewhat complicated and frankly the granular details are bother beyond the scope of this paper and this author. But for purposes of identifying the principle behind the programming choice, the key thing to remember is that the networked computers that convey the data packets are utterly indifferent as to the content of those data packets.¹⁹³ Put more simply: when your email is travelling through the internet, none of the servers it goes through “reads” it. They simply glance at the label and send it along its way to the intended destination. Thus the internet embodies a principle of complete and total neutrality as to content; it is indifferent to the nature of the information being conveyed.

There are, of course, other aspects of internet architecture relevant here, but the protocol is key to one’s understanding of how the internet is affecting the notion of freedom of speech specifically. The Internet protocol is simply not equipped, for example, to identify data packets

¹⁹³ *Ibid.* at 43 et seq.

containing, say, child pornography - is in itself a way to protect free speech, simply because we are allowing it to be conveyed far and wide without any *chance* of government interference. Seen this way, as Lessig himself points out, the internet embodies a wider protection for speech than one which is even contemplated under relatively absolutist interpretations of the First Amendment.¹⁹⁴ Even First Amendment jurisprudence, after all, regards child pornography as beyond the pale.¹⁹⁵

As earlier noted, Lessig does not really speak to the marketplace of ideas metaphor specifically. No doubt this is because Lessig himself seems to be agnostic on the question of whether the internet's embodiment of freedom of speech is the right implementation of the principle. His observations are limited to explaining the way that it works. He even admits that "[f]or all our talk about loving free speech, most of us, deep down, wouldn't mind a bit of healthy speech regulation, at least in some contexts."¹⁹⁶ Certainly, Lessig contends, this is probably true in an era of email spam and the wide proliferation of pornography.¹⁹⁷ His point is therefore not to depict this state of affairs as a radical free speech utopia, but rather to simply argue that a radical libertarianism is "built into" the internet. Despite that equivocation,

¹⁹⁴ *Id.* at 236.

¹⁹⁵ It is possible to overstate the scope of this exclusion in law, which at present writing is somewhat confused over the issue. *See, e.g., New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography, as a category, falls outside the protection of the First Amendment), but *contra Ashcroft v. Free Speech Coalition*, 535 US 234 (2002) (anti-child pornography law struck down as overbroad). It is worth noting here that the Supreme Court of Canada has taken a slightly different view than the United States on the degree to which freedom of expression might protect child pornography, inflected by the Court's overall commitment in to read rights broadly before holding their infringement justifiable under the limitations clause of section 1. *See R. v. Sharpe*, [2001] 1 S.C.R. 45 (holding possession of child pornography protected under right to freedom of expression, and criminalization of same unjustifiable under s.1, but choosing remedy of reductive reading to retain a narrower criminal prohibition of possession). *See also generally* Trevor Johnson, "Child Pornography in Canada and the United States: The Myth of Right Answers" (2006) 29 Dal. L.J 375.

¹⁹⁶ Lessig, *supra* note 192 at 245.

¹⁹⁷ *Id.*

however, it is clear in certain passages that he sees such a vision of free speech as inherently “freedom enhancing.” For example:

For over 60 years the United States has been the exporter of a certain political ideology, at its core a conception of free speech. . . And yet, as if under cover of night, we have now wired these nations with an architecture of communication that builds within their borders a far stronger First Amendment than our ideology ever advanced. Nations wake up to find that their telephone lines are tools of free expression, that e-mail carries news of their repression far beyond their borders, that images are no longer the monopoly of state-run television stations but can be transmitted from a simple modem. We have exported to the world, through the architecture of the Internet, a First Amendment more extreme in code than our own First Amendment in law.¹⁹⁸

This kind of triumphalist language reveals Lessig’s sympathy with the Internet’s particular instantiation of the free speech principle. It also makes it easier to see how Lessig’s views can lead others to conclude that the internet is the ideal embodiment of a free marketplace of ideas, given that that is the central metaphor of “our own First Amendment in law” under the traditional conception I described in Chapter 2. Online, because of the total neutrality as to content, in contrast to the most qualified content neutrality of the “real-world” law,¹⁹⁹ all ideas, no matter how bad or unpopular, are admitted to the discursive space. There is thus, in the abstract, a “perfect” competition about ideas online, insofar as there is no rule or entity that regulates either their entry into the market or the consequent dissemination of the ideas. Once you go online, Lessig’s account holds, you are effectively operating in a space that is, on a fundamental, architectural level, indifferent to the content of what you say. Thus, on the internet, everyone theoretically has the opportunity evaluate an idea by sole reference to its intrinsic worth. And suddenly we are back to the notion that discourse proceeds as a kind of bazaar in which people

¹⁹⁸ *Id.* at 236.

¹⁹⁹ I simply mean here that the law is not altogether indifferent to content, though that is subject to qualifications like those appearing *supra* note 195.

hawk their ideas to customer-listeners and evaluate them on their own terms. In this sense Lessig has more or less adopted the liberal-economic paradigm of the “marketplace of ideas” metaphor.

Yet as I have been pointing out, the example of the feminist blogosphere suggests that the ability to say anything you like on the internet is absolutely no guarantee that you will be heard - as I pointed out there are problems of social power interfering with our ability to hear each other. It is not even a guarantee that you will be perceived as equal participants in the conversation. It is certainly no guarantee that your idea will be evaluated on its own merits. Again, as I have tried to highlight, there are instead a whole host of other factors that layer into those questions. The problem is that the Lessigian conception of free speech on the internet, much like the marketplace theory, has trouble dealing with these questions because it has become enchanted with the “openness” of the architecture at the expense of a debate about what we mean by “openness” and how “openness” does or does not serve our purposes. In fact, if anything it seems to me the single-minded devotion to the maintenance of openness focuses on threats too narrowly.

A brief illustration by example might suffice. One of the chief concerns of Lessigian “architecture theorists”²⁰⁰ nowadays is the notion of “net neutrality.” A confusing concept that has been described several different ways, at its essence the concept advocates retaining the content-neutral structure of the Internet protocol at the level of code. The attack on that idea is due to many factors but is primarily driven by the desire of some internet service providers to provide “tiered” service, either in the sense of allowing some customers more bandwidth than

²⁰⁰ I would include in this group writers like Barbara von Schewick, *Internet Architecture and Innovation* (Boston: MIT Press, 2010) and Jonathan Zittrain, *The Future of the Internet and How to Stop It* (New Haven: Yale U. Press, 2009).

others (as is already the case in Canada) or in allowing some providers to block off other parts of the internet altogether. This is often presented by net neutrality advocates as a free speech issue, though it is equally sold as an issue of innovation policy, i.e. economic policy.²⁰¹ Without pronouncing on the value of net neutrality itself, the idea seems to be to prevent any regulation of content at the core of the internet in the name of “openness” without specifying what it is that “openness” serves, precisely, in enhancing freedom of speech. One does not have to disagree with Lessig or any of the other “architecture theorists” to see that this type of position is suspiciously close to the concerns of marketplace of ideas theory that the key goal of free speech policy is for public discussion to remain unregulated (except, perhaps, by code that keeps this “unregulated” nature as a key goal). “Open” information architecture seems to differ little from “open” market architecture.

Moreover, returning to my feminist blogosphere example, “open” internet architecture does little to provide an actual discussion in which people feel their ability to speak freely is actually worthwhile. There was, of course, almost no role in the discussions I described for chapter one to consider the more esoteric aspects of the way the internet was coded to function, largely because all participants seemed to take a sort of notional equality – at least as regards the ability to speak at all – for granted. But no kind of programming, it seems to me, could provide an architecture that necessarily encouraged a less bitter and divisive form of discourse, or at the very least one in which the participants felt more enriched by the experience than was the case there.

²⁰¹ See, e.g., Comments of the Electronic Frontier Foundation to the Federal Communications Commission (14 January 2010), [https://www.eff.org/files/filenode/nn/EFFNcomments.pdf](https://www EFFNcomments.pdf) at 3 (“If protocol- and application-based discrimination were to become more common, creators would have to seek advance permission from ISPs, and perhaps pay a premium or be blocked from providing new tools to customers. These hurdles would pose a serious threat to innovation on the Internet.”)

Thus Lessig's ideas about the radical embodiment of free speech principles rely on a paradigm of free speech that can neither descriptively nor normatively answer some of the concerns raised by the feminist blogosphere.

2.2 **Benkler: Networks**

Yochai Benkler's ideas about the nature of speech on the internet are derived heavily from Lessig's "code-is-law" paradigm. Thus, Benkler argues that that something *structural* about the nature of speech has changed with the advent of the internet.²⁰² In some sense this opens Benkler's ideas to similar objections as those I made to Lessig about the way in which, just like its legal "marketplace of ideas" counterpart, the so-called online First Amendment still leaves certain layers of social power fundamentally undisturbed. But Benkler's ideas differ from Lessig's in important ways. Benkler identifies the structural change wrought by the internet as an unquestionably positive development and sees it in a broader societal sense than the mere "ability to speak" that underwrites Lessig's discussion. Thus, Benkler both builds on Lessig's "code is law" insight and departs somewhat from Lessig's identification of those features of code-law most relevant to speech. In particular, Benkler's chief insight in this field is his emphasis not merely on the openness of the internet but also on the power of the "network" to enable people to participate in public discussion *together*. In that sense Benkler seems to have a somewhat less teleological view of how the internet advances "freedom."

There is nonetheless still something instrumental about Benkler's framing. That Benkler conceives of the societal value of "networking" in primarily economic terms is betrayed by his

²⁰² See Benkler, *The Wealth of Networks*, *supra* note 10 at 1 ("The change brought about by the networked information environment is deep. It is structural. It goes to the very foundations of how liberal markets and liberal democracies have coevolved for almost two centuries.")

influential book's title, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*,²⁰³ a play on Adam Smith's *The Wealth of Nations*. Despite that appeal to economic metaphor, however, Benkler posits that his theories of networks are explicitly in opposition to our "most basic Economics 101 institutions,"²⁰⁴ including the traditional economic trust in the power of the market. More specifically, his argument is that the internet has set in place "new patterns of production — nonmarket and radically decentralized" that now compete with more traditional "property and market-based production."²⁰⁵ This radical decentralization presents, in Benkler's view, a challenge to our "most basic Economics 101 institutions,"²⁰⁶ although, it is important to note, when Benkler says "nonmarket" he does not mean "non-economic-based production," necessarily. In keeping with his sense that the Internet has brought anarchy to the modes of production practiced by traditional "industrial" actors, Benkler's "nonmarket" activity simply seems to mean only that which is driven from outside the sphere controlled by those traditional market actors. While he implies that nonmarket methods are distinguishable also as "non-proprietary," he also sees it as having a necessarily salutary effect in "in an increasingly information- dependent global economy, as a mechanism to achieve improvements in human development everywhere."²⁰⁷

While Benkler's diagnoses about the benefits of that new challenge are wide-ranging, one of his contentions, and the most important for our purposes here on this basis that the Internet

²⁰³ *Ibid.*

²⁰⁴ *Id.* at 5.

²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.* at 5.

²⁰⁷ *Id.* at 2.

necessarily “democratizes” and improves the political public sphere.²⁰⁸ But one should note that despite the highly optimistic tone inherent to his claim, Benkler claims not to be an internet “utopian,” per se. He does not see the network as a panacea for all social ills. His idea is instead that these new modes of production, as engendered by the internet, improve on the prior structure of our public discussion, even as we may continue to be dissatisfied with the results.²⁰⁹

Benkler thus positions his ideas about the Internet’s effect on public discourse as falling within the “deliberative strand of democratic theory.”²¹⁰ Benkler borrows from Jürgen Habermas the phrase “public sphere,” whose “core role” he defines as “to provide a platform for converting privately developed observations, intuitions, and opinions into public opinions that can be brought to bear in the political system toward determining collective action.”²¹¹

Benkler’s contention is that our newly “networked public sphere”²¹² fulfills this core aspiration much better than the previous “industrial mode” of meaning production in the mass media age. In the latter, Benkler argues, the mass media have too much power in their role as gatekeepers, allowing them to control the terms of debate by acting as a “filter” of what ideas and facts are considered admissible. In the abstract sense,

... [a]n overly restrictive filtering system is likely to impoverish a public sphere and rob it of its capacity to develop legitimate public opinion. It tends to exclude views and concerns that are in fact held by a sufficiently large number of people, or to affect people in sufficiently salient ways that they turn out, in historical

²⁰⁸ *Id.* at 10.

²⁰⁹ *See, e.g. id.* at 227 (“Throughout the discussion, it is important to keep in mind that the relevant comparison is always between the public sphere that we in fact had throughout the twentieth century, the one dominated by mass media, that is the baseline for comparison, not the utopian image of the “everyone a pamphleteer” that animated the hopes of the 1990s for Internet democracy. Departures from the naïve utopia are not signs that the Internet does not democratize, after all. They are merely signs that the medium and its analysis are maturing.”)

²¹⁰ *Ibid.* at 15.

²¹¹ *Id.* at 185.

²¹² *Id.* at 182.

*context, to place pressure on the political system that fails to consider them or provide a legitimate answer, if not a solution.*²¹³

Benkler maintains that the Internet heralded two changes that prevented such over-filtration and thus fundamentally enriched the public sphere. The first was the redistribution of media power from its former “hub-and-spoke” character, with unidirectional links between the speaker and the audience to “a distributed architecture with multidirectional connections among all nodes in the networked information environment,”²¹⁴ and the second is the collapse in the “practical elimination of communications costs as a barrier to speaking across associational boundaries.”²¹⁵ With these two features, Benkler maintains, the sphere becomes more open to nonmarket (i.e. non-traditional) contributors, and they may consequently become “as a major new source of defining widely transmissible statements and conversations about the meaning of the culture we share, makes culture substantially more transparent and available for reflection, and therefore for revision.”²¹⁶ This newly “self-critical culture” he sees as a much better alternative to regulating culture from the top down.²¹⁷

²¹³ *Id.* at 207.

²¹⁴ *Id.* at 236.

²¹⁵ *Id.*

²¹⁶ *Id.* at 317.

²¹⁷ *Id.* at 322. (“Cultural discourse is systematically not amenable to formal regulation, management, or direction from the political system. First, participation in cultural discourse is intimately tied to individual self-expression, and its regulation would therefore require levels of intrusion in individual autonomy that would render any benefits in terms of a participatory political system Pyrrhic indeed. Second, culture is much more intricately woven into the fabric of everyday life than political processes and debates. It is language—the basic framework within which we can comprehend anything, and through which we do so everywhere. To regulate culture is to regulate our very comprehension of the world we occupy. Third, therefore, culture infuses our thoughts at a wide range of levels of consciousness. Regulating culture, or intervening in its creation and direction, would entail self-conscious action to affect citizens at a subconscious or weakly conscious level. Fourth, and finally, there is no Archimedean point outside of culture on which to stand and decide—let us pour a little bit more of this kind of image or that, so that we achieve a better consciousness, one that better fits even our most just and legitimately arrived-at political determinations.”)

Plainly the account of the feminist blogosphere I've given you poses some challenges for the Benklerian view. I want to highlight two in particular, because I think they best reveal the systematic flaw in Benkler's thought. The first challenge is that the argument in question centered around the production of at least one non-Internet-based cultural artifact - i.e., the book - and another produced by way of a "gatekeeper" of sorts in the form of RH RealityCheck.²¹⁸ That suggests that it is difficult for actual participants in the networked public sphere to evaluate the worth of their activities without reference to the so-called "industrial model." In fact, as demonstrated by the problem that the professionalization of certain members as "feminist writers" or pundits posed in the space, it was clear that for some participants the existence of this radically de-centralized space was primarily useful insofar as it allowed them to build a reputation online that they could then wield in the quasi-distinct "real world" to gain access to power. While in some sense that might be argued to fall under the purview of the platform for crystallizing opinion into public action, the salient observation here is that in fact the argument "from below," as it were, was precisely that Marcotte was in fact misrepresentative of the discussions as a whole. The argument was that the views of the feminist blogosphere, such as it could be said to exist, were precisely still not getting through the wall.

Second, the notion that the distributed nature of the network alone, as well as the "practical elimination" of cost, could provide a "more self-critical culture,"²¹⁹ even when phrased in terms of degrees, seems overly optimistic in like of the feminist blogosphere's experience. In particular, the contention of further reflectiveness is belied by the fact that the discussion about the Marcotte article and the book never did, in fact, get resolved to anyone's

²¹⁸ RHRealityCheck was the original publisher of Marcotte's piece on immigration. See Chapter 1, section 2.

²¹⁹ Benkler, *The Wealth of Networks*, *supra* note 10 at 15-16, 70-74.

satisfaction. The energy for the argument eventually flickered out before any of the issues felt resolved for any of the participants. Nor were the contributions of the women of colour bloggers in particular indicative of a view that they felt their concerns were being heard and fairly dealt with. (The key phrase “I guess it’s a jungle in here too,”²²⁰ more or less suggests the sense the women of colour bloggers had that the entire discussion had been more chaotic than productive.) Instead the entire mess dissolved into frustration. One supposes it might be possible to argue that in a more industrial mode of cultural production the women of colour might not have even had access to a medium to challenge Marcotte at all. And yet, as I noted at the outset of chapter one, some of these types of arguments are old and familiar to pre-digital feminist communities. The challenges to dominant ways of thinking Benkler hopes for thus somewhat predate the advent of the networked public sphere.

These are but two examples, of course, but I choose to highlight them because I think, again, as in Lessig’s case, the problem is that even in his description of the activities of the nonmarket, Benkler is relying on liberal-economic assumptions inherent to the marketplace of ideas model of public discussion. On the one hand we have arguments that seem to be at some fundamental idea about the need to liberalize competition for ideas - to break up “hub-and-spoke” monopolies in favour of a larger number of smaller sellers. On the other we have arguments that seem to suggest that we will reach a better notion of truth, even if a political version of truth, by encouraging a self-critical culture. The teleology of the market thus presents itself even within Benkler’s political frame quite clearly, and that is a large part of the reason why it is difficult to rectify with examples like the feminist blogosphere.

²²⁰ *Supra* note 24. See also Benkler, *The Wealth of Networks*, *supra* note 10 at 15-16, 70-74.

Unsurprisingly, as a result, most of Benkler’s suggestions about how to promote “democracy” and “culture” online are architectural in nature; his concern, he says, is with the “institutional ecology” of the environment, chiefly made up of intellectual property policy like the scope of copyright protection, and architectural regulation, like communications laws governing questions like net neutrality.²²¹ Again, while perhaps IP principles might have provided some guidance to feminist bloggers in March and April of 2008, at least as far as settling the matter of the alleged plagiarism is concerned, they provide little grounds to approach all the other problems – the relevance of race, the pervasiveness of silencing, and the problem of professionalization – that then arose. Again, even in Benkler’s self-confessed “deliberative” aims, his liberal-economic elaboration of the paradigm proves unsatisfactory as either a normative or descriptive framework for this particular speech arena.

2.3 **Balkin: Democratic Culture**

Following somewhat from Benkler’s ideas,²²² Jack Balkin’s writing on digital culture to be best representative of the “optimistic” vein of writing about the internet’s effect on free speech

²²¹ As an illustration, one need look no further than Benkler’s summary, in his Introduction, of the relevant questions to the future of internet regulation: “To what extent will resources necessary for information production and exchange be governed as a commons, free for all to use and biased in their availability in favor of none? To what extent will these resources be entirely proprietary, and available only to those functioning within the market or within traditional forms of well-funded nonmarket action like the state and organized philanthropy? We see this battle played out at all layers of the information environment: the physical devices and network channels necessary to communicate; the existing information and cultural resources out of which new statements must be made; and the logical resources—the software and standards—necessary to translate what human beings want to say to each other into signals that machines can process and transmit. Its central question is whether there will, or will not, be a core common infrastructure that is governed as a commons and therefore available to anyone who wishes to participate in the networked information environment outside of the market-based, proprietary framework.” Benkler, *ibid* at 23. Again, although positing himself as *outside* the market framework, Benkler continues to conceive of internet issues in primarily economic terms; note the entire lack of the use to the work “democracy” in this passage.

²²² In truth these two theorists cite and refer to each other so frequently there is a chicken-and-egg issue in identifying who follows who, so this is only a provisional statement. See, e.g. Benkler, *The Wealth of Networks* at 15, 45, 256, 276, 284, 294-95; Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Speech for the Information Society” 2004 N.Y.U. L. Rev. 1 at 13 n.18, 15.

values. Unhappy to remain at a descriptive level about the nature of the internet, Balkin advances a view that sees the inherent features of the internet - diagnosed as its openness coupled with its collaborativity - as providing an opportunity to build a “healthier” speech culture than that available under previous technological arrangements. Balkin tends to be somewhat less driven by economic terms than either Benkler or Lessig, but I argue that he still remains safely within a liberal-economic paradigm both descriptively and prescriptively.

Balkin is cautious about advancing the idea that the advent of the internet has somehow changed the nature of freedom of speech, certainly more cautious on that score than either Lessig or Benkler. In Balkin’s view, it is not necessary to claim that the internet is significant for free speech because it represents an “utterly new”²²³ arena for speech, but rather because it allows us to re-examine and re-interpret free speech problems in light of those elements which the technology underlying the internet “makes salient.”²²⁴ Put more simply, the internet simply gives us a clearer lens through which we can continue to develop our understanding of free speech. In that sense Balkin’s words more or less animate much of my project in this paper, insofar as his notion of salience is how I think accounts of freedom of speech in the Internet Age ought to be directed. The idea is not to have the internet *determine* how we conceive of freedom of speech in the future, but instead to provide us with observations about the nature of free speech that will help us understand how and why to implement that value.

What Balkin believes to be the *content* of what the internet makes salient for us, however, is where his theory is less convincing. In particular, Balkin claims, the internet gives us the chance to view free speech as promoting a “democratic culture,” which he defines as follows:

²²³ Balkin, “Digital Speech,” *ibid.* at 2. See also Jack M. Balkin, “The Future of Free Expression in a Digital Age” (2008) 36 *Pepperdine L. Rev.* 101.

²²⁴ Balkin, “Digital Speech,” *ibid.* at 35.

*A democratic culture is more than representative institutions of democracy, and it is more than deliberation about public issues. Rather, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture.*²²⁵

There is, of course, something appealing about that standard, insofar as it envisions both a collective role for free expression as well as an individual autonomy. Moreover, Balkin's vision articulates political values beyond the flat ability to speak, or even the ability to collaborate, in terms exceeding either Benkler's or Lessig's conceptions. Balkin also seems interested in who we recognize and listen to when they speak, which brings him into alignment with some of my own, feminist-blogsphere-inspired concerns.

The issues with Balkin's approach arise more in the context how exactly Balkin connects the internet to it. For in justifying his account, Balkin lists a number of characteristics he finds in internet speech and that he identifies as being particularly indicative of the need to embrace this standard of a democratic culture, which I have separated out into a numbered list for ease of parsing:

1. *Speech ranges over a wide variety of subjects, including not only politics but also popular culture.*
2. *The speech of ordinary people is full of innovation and creativity.*
3. *That creativity comes from building on what has come before.*
4. *Speech is participatory and interactive as opposed to mere receipt of information. It merges the activities of reading and writing, of production and consumption.*
5. *Finally, speech involves cultural participation and self-formation.*²²⁶

²²⁵ *Ibid.* at 3.

²²⁶ *Id.* at 32.

With these features in mind, Balkin claims, the future of speech regulation on the internet resides not so much in the articulation of judicially-created free speech rights as it does with “legislation, administrative regulation, and the design of technology.”²²⁷ Thus Balkin believes there is a role for speech regulation online, even in the context of a First Amendment jurisprudence highly suspicious of state action. Balkin connects with his notion of “rights dynamism,” citing his belief that “[i]f we do not, from time to time, rethink the scope and extension of our basic liberties, their scope and extension will change anyway.”²²⁸

Considered in both the abstract and the concrete contexts, a few of Balkin’s premises here hold up quite well when viewed through the lens of the feminist blogosphere. The discussions in the feminist blogosphere were primarily concerned with the production of cultural artifacts, specifically a book and an article. Although those artifacts were themselves aimed at what one might call “hard politics,” that content was largely irrelevant to the discussions that arose. Few argued that the content produced was stale or uncreative. Most people understood the discussions, at least initially, as participatory and interactive; the sheer length of the comments threads involved certainly demonstrated that.

Nonetheless, it is hard to reconcile the kind of argument that occurred - and the hard feelings which followed it - with these supposed features of internet speech. Balkin’s account comes off, in this way, as a sort of utopian view. For example, his third premise, about the aggregative feature of creativity, takes on a new and loaded meaning in the context of the suspicions that Marcotte had either consciously or unconsciously lifted from activists who had a smaller platform than she did. Can one call something like that an innovative or creative act? It

²²⁷ *Id.* at 49.

²²⁸ *Id.* at 53.

seems it would probably have satisfied the standards of copyright, as no word-for-word copying was alleged, so perhaps we could have. But then, as I highlighted in the first chapter, there is a dimension here where social power is in fact invisibilizing some parties' contributions to "the forms of meaning making that constitute them as individuals." And in which case, can that power-driven state of affairs be properly squared with the idea that speech is "participatory"? Of course, this kind of concern could quickly be rectified with a universally-agreed standard of attribution and citation; on the other hand, as I pointed out in the first chapter, it became rapidly clear as the debate raged on that no such standard existed, as far as the feminist blogosphere went.

This is where the tension between aspiration and description in Balkin's account comes in. It is of course probably the case that when Balkin describes these as the main features of Internet speech, he means that these are the best kind of speech practices we can expect to see on the internet, rather than the character of the entirety of internet speech. Still, even when viewed as a partially prescriptive mode of analysis, Balkin's prescription of a democratic culture still envisions remedies that are much the same as those of the Lessigian architectural and Benklerian network theories described in prior sections. Building on his analysis, Balkin has recently argued that the future of speech regulation lies with "technological design, legislative and administrative regulations, the formation of new business models, and the collective activities of end-users,"²²⁹ rather than the elaboration of constitutional principles per se. These "non-constitutional" actors, in Balkin's view, will be the drivers of what he calls the "infrastructure of free expression."²³⁰ And the chief threat they pose, Balkin claims, pointing to debates about

²²⁹ Balkin, "Future of Free Expression," *supra* note 223 at 101.

²³⁰ *Ibid.* at 117.

network neutrality and liability for service providers, is that they may lead us to “propertize” speech instead of promoting “participation.”²³¹ Balkin believes as a result that free speech principles will “increasingly meld with a larger set of concerns about how best to produce knowledge and promote innovation in information technologies and services” and thus “be part of a larger set of concerns that I call knowledge and information policy,”²³² rather than pure issues of civil liberties in the way we have traditionally thought of them.

Thus although the term “democratic culture” would suggest that Balkin sees some role here for principles beyond the language of economics and “innovation policy,” he still retreats to what I have been calling the market concern. As with Benkler and Lessig, Balkin’s emphasis on “participation” and “culture” seems to be reduceable to the amount of “information” it produces for society. And a certain logic of the market – and of the liberal-economic paradigm – is necessary to maintain this view, insofar as it views the creation of new meaning as a necessary concomitant of internet speech activities. But as I have pointed out, when confronted with the example of the feminist blogosphere this kind of logic difficult to maintain. The notion that “information” of any kind came out of the fractured discussions of March/April 2008 strains interpretation – there was no Invisible Hand, just a large number of frustrated people having difficult speaking across the boundaries of social power. Perhaps, again, this is just an “innovation failure,” per Balkin’s analysis, but if so then one must ask why his idea of the future of free speech in the age of the internet seems to have no answer for these failings.

²³¹ *Id.* at 115.

²³² *Id.* at 117.

2.4 *Sunstein: Polarities*

Thus far the theorists I have been highlighting have been largely optimistic about the ability of the internet to improve public discussion. There is one major exception here in the recent writings of Cass Sunstein. As you may recall, from the last chapter, Sunstein frames his views about freedom of speech as emerging from the Madisonian tradition. Thus, when he is analysing speech problems he frames them more or less explicitly in terms of their contribution to “democracy.” Sunstein finds the contributions of the internet inadequate largely because he worries that instead of resulting in the kind of broad collaborative speech that a Benkler or a Balkin might envision, and that instead the internet’s potential for “perfect filtering” of information will promote a polity that is “fragmented” (because the Internet does not direct people’s attention to any one thing) and “polarized” (because people will largely tend to speak only to their like-minded fellows). Thus far my analysis of the “optimists” may suggest that I would sympathize with Sunstein’s views, insofar as I have expressed skepticism about these optimistic theories. But in fact I again find Sunstein too reliant on the liberal-economic view that characterizes the “marketplace of ideas” metaphor and thus not adequate for formulating a principled approach to speech regulation under new conditions.

Like Benkler, Sunstein views himself as explicitly denying a “market” character to the internet generally and blogs more specifically. Sunstein is skeptical of claims that these represent a marketplace of ideas, he says, because within the context of blogs there is no aggregative mechanism like price. Sunstein notes that price, in the sense in which it was used by Friedrich Hayek to justify markets, was primarily an informational device, as sort of receptacle into which all the diverse facts the market knew about a product were aggregated in one

“astonishingly concise and accurate coordinating and signaling device.”²³³ There is no easily identifiable and analogous metric online, Sunstein argues. And it is this lack of price, in Sunstein’s estimation, that prevents blogs from being able to “adequately separate falsehoods from facts,”²³⁴ because they provide no metric that aggregates everything the market might know in order to enable the blog-viewer to determine what is correct.

That Sunstein even diagnoses the lack of “price” as a flaw of the internet is indicative of the way the language of the market nonetheless underwrites his normative aspirations for public debate. It is hard to imagine what kind of metric could possibly fulfill the aggregative function he attributes to price in any kind of speech context, online or off.

That said, curiously, Sunstein doesn’t offer much comment on the fact that there is no price mechanism operative in discussions *off* the internet either. One can conjecture that he believes instead that the aggregative function could be performed by what he calls, in *Republic 2.0*, “general-interest intermediaries.”²³⁵ In the Sunsteinian view, a general-interest intermediary is something like the six o’clock news. The perusal of such intermediaries, Sunstein argues, first of all provides certain “common experiences” that encourage a sense of social cohesiveness, as well as a “modest, backdoor cosmopolitanism.”²³⁶ Second, they also provide information to which people might not have previously exposed themselves that will encourage the formation of more socially-desirable preferences, insofar as the information might encourage an individual to

²³³ Sunstein, *Republic.com 2.0* *supra* note 8 at 142; *see also* Cass R. Sunstein, *Neither Hayek nor Habermas*, (2007) 134 *Public Choice* 87 at 89.

²³⁴ Sunstein, “Neither Hayek nor Habermas,” *ibid.* at 90.

²³⁵ Sunstein, *Republic.com 2.0*, *supra* note 8 at 8, 12. Sunstein also speaks of “public fora” as providing some of the same functions as general-interest intermediaries.

²³⁶ *Ibid.* at 31.

make choices that are more driven by the desire to help others.²³⁷ Sunstein admits that these general-interest intermediaries have some bias, but still thinks they have an overall positive effect on the available information in the polity in question,²³⁸ again, it seems, because of their ability to “spread information” that will enable better choices.

Of course, it is not only the fragmentation of “common experience” that troubles Sunstein; he also worries that to the extent people are only participating in those internet fora that match their already-held views, a degree of political polarization will occur. Sunstein cites both the linking practices of right-wing and left-wing blogs, arguing that they show a tendency for each side to debate only amongst themselves,²³⁹ as well as social science studies that have indicated that as like-minded people engage in discussion, they are more likely to end up with a more extreme position than that with which they began the conversation.²⁴⁰ (That this is hardly a phenomenon limited to blogging is given little comment here; it is hard to know whether Sunstein believes Fox News is somehow a better representative of “common experience” simply because it is offline.) Sunstein is concerned that if citizens’ views become too polarized, they will find themselves unable to negotiate agreements over issues of compelling social concern because “mutual understanding might be difficult.”²⁴¹ Sunstein is, of course, not wholly consistent on that issue. He admits that extremism has occasionally been useful in the service of democracy:

Indeed, group polarization helped fuel many movements of great value- including, for example, the civil rights movement, the antislavery movement, and the

²³⁷ *Id.* at 108-09, 126-27.

²³⁸ *Id.* at 109.

²³⁹ *Id.* at 51-57.

²⁴⁰ *Id.* at 60-67.

²⁴¹ *Id.* at 56.

*movement for equality between men and women. All of these movements were extreme in their time, and within-group discussion certainly bred greater extremism; but extremism need not be a word of opprobrium.*²⁴²

Nonetheless Sunstein seems to find that circumstance exceptional:

*In the extreme case, enclave deliberation may even put social stability at risk. And it is impossible to say, in the abstract, that those who sort themselves into enclaves will generally move in a direction that is desirable for society at large or even for its own members.*²⁴³

To the extent that Sunstein is actually addressing issues of concern beyond mere ability to speak and connect with others, there is admittedly a degree to which his theory seems to explain some features of the arguments in the feminist blogosphere I have described. For starters, it was obviously true that mutual understanding between both sides of the argument was quite impossible at times. This was true not merely because the parties at issue disagreed substantively over the nature of the problem causing discord – i.e. whether or not Marcotte’s actions caused “erasure” – but also because they could not even bring themselves to operate according to agreed standards of civility. At first glance one can see how that might accord with some of the Sunsteinian concerns about the potential for the internet to encourage people to retreat only to areas in which their own opinions are widely shared.

Nonetheless, the descriptive power of the Sunsteinian paradigm is only partial here. His contention that general intermediaries necessarily contribute to the public discussion is particularly problematic when considered in light of the role played in the feminist blogosphere debacle by Seal Press. Taking a reduced view of the relevant sphere - let’s call it “contemporary feminism” - in theory, Seal Press is precisely the kind of “general-interest intermediary” that could provide access to a wide range of views. In practice, as became clear

²⁴² *Id.* at 76.

²⁴³ *Id.* at 78.

through its generally clumsy handling of the entire set of discussions taking place, Seal Press had severe difficulties with incorporating the views of women of colour into its work. That Seal Press often justified itself on this score by reference to market demands suggests that in fact the exclusion of a certain swath of opinion from the books they published was more or less deliberate, if not enthusiastic, and responsive to a wider societal disinterest in seeing those kinds of voices heard. Overall, the point the Seal Press example poses for the Sunsteinian view is that the biases of general-interest intermediaries can be understated, that in fact one's definition the content of "general interest" is not itself apolitical. As such, general-interest intermediaries do not necessarily have the salutary effect of "modest, backdoor cosmopolitanism" Sunstein imagines.

Another part of the problem with Sunstein's views is that the relevance of disparities in social power - in this case along the axis of race - to the maintenance of conflict in the feminist blogosphere casts an unsettling sort of light on the notion that the problem posed by internet deliberative spaces is the encouragement "extremism." To illustrate by way of a question: who, in this paradigm, are the extremists? Marcotte? Brownfemipower? The women of colour bloggers more generally? That the answer is by no means clear is not the only salient issue; the fact is that identifying *any* position in that debate as "extremist" is a loaded gesture, and particularly so in Sunstein's paradigm, since extremism is viewed as an impediment to group action. That the extremism at issue here might be said to be of the positive kind, like the civil rights or antislavery movements, is no answer to the confusion, insofar as there are no criteria internal to Sunstein's view that would allow us to distinguish between the "good" and the "bad" types. Instead, as Sunstein himself acknowledges, the accusation of extremism is basically an accusation that one is disrupting social stability. And while it is potentially the case that some feminist activists would look upon such an accusation as a compliment, overall it is difficult to

imagine the usefulness of prioritizing “social stability” when that stability acts to conceal deep concerns about the aims and directions of the community. The result is a kind of dedication to the center and status quo that ultimately feels opposed to a *truly* robust public discussion.²⁴⁴

Thus, just like Lessig, Benkler, and Balkin, Sunstein’s theories have difficulty both normatively and descriptively accounting for the deliberative practices we see online, if the feminist blogosphere is to be taken as an example of those practices. Although Sunstein might not share the optimism of his colleagues, his view of the appropriate modality of public discussion still relies on a paradigm that presumes that in a *proper* public space, certain values and norms of behaviour for engaging in public speech are widely shared. And if the internet –let alone the feminist blogosphere - has shown us nothing else, it has made crystal clear that these values and norms are by no means the subject of a wide consensus.

2.5 *The Promise and the Flaws of Post-Internet Free Speech Theory*

In sum, the most attractive development of legal theories of free speech informed by the internet are twofold, though I could collect both under the umbrella of the introduction of a “deliberative” paradigm of speech. The first is these theories’ implicit acceptance of what I have called the inherent effect of structure on the manner in which public discourse proceeds.

Whether formulated as Lessig’s “code-law,” Benkler’s the “wealth of networks,” or “free speech infrastructure,” or Sunstein’s fear about “enclaves,” the import is clear: speech in the public space is not “free” in the sense that it is independent of the structure that enables it to happen.

The second and related benefit is that all of these theories appear to adopt a less laissez-faire

²⁴⁴ My argument here is inspired by the abstract critique of Sunstein made by Lincoln Dahlberg: see L. Dahlberg, “Rethinking the Fragmentation of the Cyberpublic: From Consensus to Contestation” (2007) 9 *New Media & Society* 827.

attitude towards speech regulation than that implicit in classical marketplace of ideas theory, insofar as they all seem to recognize, following on Lessig, that the dichotomy between regulation and “non-regulation” of speech is a false one. Instead, all four of these theorists seem, whether optimistic or pessimistic, to recognize that the development of a free speech culture can be a subject of the common good within the modern political space, whether or not they have an optimistic or pessimistic view. This is clearly an improvement over the more individualist ethos that seemed to pervade prior theories.

That said, the inadequacy of prior attempts to develop a theory of speech commensurate with our experience of the internet is clearly still evident. I have argued that these faults can be boiled down to each theorist’s devotion to what I call a liberal-economic paradigm of the nature of speech in a free and democratic society. To summarize my findings above: in the liberal-economic paradigm, certain initial barriers of access to the public sphere are more or less presumed to have sorted themselves out. In market terms, for internet optimists, the imperfections are located almost solely in the costs of entry to the market. Once those are brought low, in the liberal-economic view, the nature of power in deliberation will be decentralized, and we will consequently see a new flowering of speech that will lead us, depending on the author, towards “freedom” or “democratic culture” or an “enriched public sphere.” In each of those cases the main area of concern for future free speech analysis is centered on the removal or maintenance of these barriers to entry, conceived almost exclusively in terms that rely on economic rationality. And even where some skepticism about those optimistic views is expressed, as in Sunstein’s case, his identification of a need for central sphere where some unified citizenry can debate their views over the common good still relies on a liberal-economic conception. Sunstein simply wants to construct a pseudo-marketplace in which general-interest intermediaries function as lubricants to keep the wheels of discussion turning, and to prevent the

irrational “extremists,” who threaten the stability of his speech paradigm’s view of itself as “rational,” from overwhelming what he views as appropriate speech.

And just as we saw in Chapter 2 that the economic rationality of the marketplace of ideas metaphor was insufficient in the abstract to capture the nature of online discussion, so too the liberal-economic paradigm of internet speech. In the feminist blogosphere, the correct norms of behaviour were not already on the scene when these feminist bloggers came to interact with each other. There was not one agreed-upon definition of civility and there was little vocabulary for address of problems like silencing and other social forms of power. As such, the March-April 2008 discussion was not at all reminiscent of the kind of speech utopia these accounts prepare us to expect, or even, in Sunstein’s case, worry about.

3. *Finding Solutions in Critiques of Deliberative Theory*

So now what? We know that what we are learning about the nature of healthy public deliberation is reflected neither in the marketplace of ideas metaphor nor in the liberal-economic paradigms of internet speech that are so far reflected in the literature. How does one derive a metaphor that does, in fact, capture the nature of the online discussion I have described, as well as provide us with guidelines for how to engage in public speech that leaves us feeling more politically and ethically satisfied with the activity? I want to suggest in this section that some of the critical literature about the nature of deliberation in “actually existing democracy” guides us towards an answer to these questions. Obviously I cannot consider the whole of that literature here. I have chosen to concentrate instead on two authors, Nancy Fraser and Jane Mansbridge, who have provided the most salient points of entry into the matter, both from a feminist perspective. The argument I wish to make is that these theorists suggest that the nature of

deliberation itself is a relevant point of inquiry in the consideration of the development of a healthy speech culture.

Both of these theorists are responding more or less explicitly to Habermas' theories of the public sphere. Habermas's own writings I consider to be somewhat beyond the scope of this paper, and it may seem strange to draw from his critics and/or fellow travellers without presenting more than a brief sketch of his ideas in what follows. My reasons for proceeding in this manner are twofold. First, I do not want to get into esoteric interpretive debates about what Habermas has or has not said that I consider largely exogenous to free speech theory and policy overall, pre- or post-Internet. Others have covered that ground, noting that even Sunstein has a tendency to over-read some of Habermas's ideas.²⁴⁵ But the degree of fidelity to Habermasian thought is largely irrelevant, it seems to me, to the question of whether or not some of the ideas that he has inspired might be useful for free speech theory. Second, and partially as a result of some reading in my first area here, it is my belief that a hazy analogy to Habermas underwrites the justificatory account that at least Benkler, Balkin and Sunstein provide. Indeed, as I have noted, some of these authors have made their indebtedness to Habermas' notions of "deliberative democracy" explicit, although often cursorily so.²⁴⁶ Thus, insofar as their description of Habermas's ideas are short and conclusive in nature, I think it fair to skip over his thought and simply use some of the criticisms and qualifications of Habermas I list below against those authors themselves.

²⁴⁵ See Peter Dahlgren, "The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation" (2005) 22 Pol. Comm'n 147; Dahlberg, *ibid.*

²⁴⁶ Sunstein mentions Habermas on only two pages of *Republic.com 2.0*, *supra* note 8 at 56-57; Benkler gives him five in *The Wealth of Networks*, *supra* note 10 at 181, 184, 205, 281, 412.

3.1 Fraser: Social Status

Fraser's contribution to the critique of a liberal model of deliberation emerges more or less directly from Habermas. Again, Habermasian theories are somewhat beyond the scope of my present exploration. In a brief sketch, however, Fraser believes that Habermas's conception of the "public sphere" - in her description, "a theater in modern societies in which political participation is enacted through the medium of talk"²⁴⁷ - suffers from an overly "bourgeois masculinist" conceptualization. By "bourgeois masculinist," Fraser means to indicate that the sense of the function and character of the public sphere in Habermasian terms is too reliant on a particular worldview of the dominant class - here bourgeois men, though in my reading it is not necessary that the dominant class be of this particular character in order to adopt this view of the nature of public debate. Fraser identifies four assumptions that are particularly salient for this view, two of which are particularly relevant for present purposes:

1. the assumption that it is possible for interlocutors in a public sphere to bracket status differentials and to deliberate "as if" they were social equals; the assumption, therefore, that societal equality is not a necessary condition for political democracy;

*2. the assumption that the proliferation of a multiplicity of competing publics is necessarily a step away from, rather than toward, greater democracy, and that a single, comprehensive public sphere is always preferable to a nexus of multiple publics.*²⁴⁸

²⁴⁷ Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy" (1990) 25/26 *Social Text* 56 at 64.

²⁴⁸ *Id.* at 62. Fraser actually adds two other observations to these:

"3. the assumption that discourse in public spheres should be restricted to deliberation about the common good, and that the appearance of "private interests" and "private issues" is always undesirable;

4. the assumption that a functioning democratic public sphere requires a sharp separation between civil society and the state." I have not covered these two observations in this paper for individual reasons. As to the third observation, the only relevance it seems to have for my present purposes is as a subsection of the second observation about the multiplicity of perspectives, below, insofar as the "private interests" argument seems to me to come into play primarily to try and dismiss the propriety of disaggregated deliberation. See section II, *infra*. As to the fourth, I think in the free speech context that speaks to a distinction between regulation and non-regulation,

I want to first focus on Fraser's first identified assumption in this section and come back to the second in the context of my discussion below of Jane Mansbridge's commentary. The notion that status differentials are relevant and in fact crucial component governing the outcome of any given "conversation" in the public sphere is an important one for my purposes. It enlarges the question of *access* to the conversation from its present restriction to the mere ability to speak. It suggests that full engagement in the debate will depend on a full recognition of the power dynamics actually at play. To put it into the terms I have been using to describe both "marketplace" theory and the more deliberative internet-based theories of free speech, it suggests that the costs of entry are not solely monetary or even logistical. They are also social.

That prior internet theories about free speech seem to find it difficult to talk about the problem of social standing suggests they share a similar deficit to Fraser's reading of Habermas. Despite being focused, ostensibly, on the promotion of "deliberation," these theories assume that, post-Internet access, the participants in the debate are effectively, social equals. Again, other kinds of equality than equality of internet access are seen as irrelevant or at the very least external questions. As such they have difficulty accounting for those instances, like the fight in the feminist blogosphere, where the networks do not provide a forum for collaboration and "democratic culture" so much as they provide one for rancor and divisiveness. I think this is precisely because they too are relying on a conception of speech that somehow occurs in a liberal mode where speaker can simply talk about the "issues" abstracted from any of these troublesome status markers.

Considering the problem in concrete terms, however, social power holds a lot of explanatory power for the feminist blogosphere's conflagrations. The impossibility of "bracketing" one's social status for purposes of engaging in public debate is undeniable. In some sense this was because the arguments were more or less explicitly about the nature of social

status. Again, the problems between the participants in the debate were rarely substantive - it was not that anyone thought that the lack of women of colour in Seal Press's catalogue, or that violence directed at women particularly in the context of immigration was not worth highlighting, or even that the images in Marcotte's book were benign. The issue around which most of the disagreements coalesced was whether women of colour bloggers were seeing their ideas and even their existence acknowledged in the nominally equal, and theoretically community-oriented, discursive space called the "feminist blogosphere." It was also, as I have emphasized, an argument about what it meant to achieve "professional" social status - insofar as such status might have fundamentally altered one's relationship to the space. Thus, to pretend that all participants to that debate were social equals in that space would have been to erase the debate itself.

The explanatory power of Fraser's observation was also evident in the observations I have made in the competing notions of civility. As Fraser notes, to a certain extent "discursive interaction within the bourgeois public sphere was governed by protocols of style and decorum that were themselves correlates and markers of status inequality."²⁴⁹ This explains, for example, why Seal Press could try and posit criticisms against it, whether phrased as "Fuck Seal Press or otherwise," as "negative discourse," and be seen to be speaking objective truths about the appropriate boundaries of the debate. Similarly, it explains why much criticism directed at white feminists could be discarded as "harassment" or "bullying" if not framed in acceptable terms. The notion that there was one standard according to which participants in these debates must behave concealed that the power of the standard was a function, in some sense, of one's individual comfort in the discursive sphere in the first place. One is more apt to be "polite," in

²⁴⁹ *Id.* at 63.

other words, if they do not suspect that “politeness” is being wielded as a club to chase their views out of the exchange.

The key takeaway here is not, nonetheless, that there is no point in granting access or diminishing the costs of entry into the Internet sphere. The point is more that in order to have the public sphere live up to the character we want it to have, the formal equality the internet promises will not be enough. It is not, after all, that Fraser believes that the concept of a “public sphere,” or the role of talk in the construction of an “actually existing democracy,” are not useful. It is that she insists that a full account of the function and character of that space would recognize that equality is needed in more than the “bourgeois masculinist” sense. This is as true of the online discursive space, it seems to me, as it would be of any more abstract Habermasian “public sphere.” That provides the prescriptive mode, it seems to me, that could have served as useful guidance to the participants in the feminist debate. Had all of the participants been able to fully and self-critically understand, from the beginning of the conversation, that social power was at work in constructing even the very terms of engagement of the conversation, it might have been possible to get past some of the less helpful accusations about “bullying,” “negative discourse,” and other vague words used to indicate “behaviour that is beyond my personal line of acceptable conduct.” But without that full understanding, the discussion proceeded instead with continual gestures towards the idea of social power in the space that had more in common with rote recitation – a sort of formulaic obligation to pay lip service to racism, etc, and then quickly drop the subject – than actual, meaningful, recognition and engagement.

3.2 **Mansbridge: Multiplicity**

A second crucial insight into the nature of deliberation comes from Jane Mansbridge. In some sense Mansbridge is inspired by Fraser’s second identified assumption of the bourgeois

public sphere, namely that there is potential for the proliferation of many discursive “publics” to actually contribute to, rather than disturb, democracy, contrary to the Sunsteinian focus on “social stability.” Departing from there, as well as the work of number of other deliberative theorists, Mansbridge suggests that it is more appropriate to conceive of a deliberative system as proceeding in a “distributed” fashion, with “disaggregated deliberative standards.” Put more simply, like Fraser, Mansbridge is comfortable conceiving of the nature of public debate in a deliberative democracy as distributed, or fragmented, into different deliberative groups or “moments.”

As formulated in the work of deliberative theorists like Sunstein, disaggregation was regarded as regrettable but necessary. It was a response to a need for certain “enclaves,” like the women’s movement to exist as retreats in which enclave members can develop their ideals in isolation from the demands of the entire polity, or even of treating each other fairly. But Mansbridge takes the argument a step further, contending that a disaggregated conception of deliberation “can approach regulative ideals of epistemic value, fairness, and respect that may be unachievable in any single instance or institution of deliberation.”²⁵⁰ While the regulative ideals of respect and fairness seem more or less self-defining, Mansbridge’s identification of “epistemic fruitfulness” requires slight further elaboration for our purposes. Epistemic fruitfulness is the quality of producing, from a deliberative process, a good, or at the very least a mutually satisfactory, decision. A distributed system, Mansbridge notes, may be thought to provide better standards for deliberation simply because the diversity of input will produce

²⁵⁰ Jane Mansbridge, “The Deliberative System Disaggregated” (2010) (unpublished), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641848 at 4.

“either decisions that are objectively more correct or decisions that, because based on more alternatives... will be more useful to the society.”²⁵¹

That said, Mansbridge argues that the embodied content of criteria of respect, fairness and epistemic fruitfulness “need not be congruent within the deliberative system as a whole any more than within a given deliberative moment.”²⁵² In other words, it is not necessary that what looks like “respect” in one deliberative enclave be identical to what is called “respect” in a second enclave (or, indeed, a deliberative system as a whole). There are, Mansbridge agrees, certain “classic” standards for the proper parameters of the debate, including though not necessarily limited to, “open participation, justification of assertions and validity claims, consideration of the common good, respect, aim at a rationally motivated consensus, and authenticity.”²⁵³ Deviations from these standards, however, could always be justified by reference to the three goals of respect, fairness and epistemic fruitfulness as a whole. Mansbridge believes that this even applies to the relatively stable characteristic of “respect,” insofar as the maintenance of “respect” at all costs within the larger debate may sometimes actually block, rather than enhance, the debate overall. In fact, Mansbridge maintains that

*... we might say that a good deliberative system might and perhaps must include certain highly non-deliberative spaces, just as a good single deliberation might and perhaps must in certain circumstances incorporate non-“deliberative” inputs, such as angry moments in which participants do not fully weigh or respect the arguments of others, in order to increase both deliberative fairness (Sanders 1997, Gutmann and Thompson 1996) and perhaps also epistemic accuracy, by including perspectives that can be accessed only through, e.g., anger and disrespect.*²⁵⁴

²⁵¹ *Ibid.* at 5 (internal citations omitted).

²⁵² *Id.* at 7.

²⁵³ *Id.* at 9.

²⁵⁴ *Id.* at 14.

It is perhaps not surprising as a result that she does not share Sunstein's skepticism about the usefulness of enclaves, which are vital counterhegemonic forces in Mansbridge's view:

The intellectual ferment in the enclave stems in part from a degree of material protection, as some organized activists in the enclave take jobs connected with the movement while others take work compatible in other ways with a movement life – jobs such as waiting tables or temporary clerical work that can be expanded or contracted relatively easily and require little emotional investment, leaving energy and free time for the movement. Such protected or replaceable jobs form a slight shield against material pressures that can inhibit departures from mainstream thinking.

The creativity of movement enclaves also stems from intense, highly tuned, emotionally salient interaction in pursuit of a mutual goal. Working and talking together in an atmosphere of sustained commitment and sometimes quite unrealistic hope, organized activists dream up a cornucopia of new ideas, words, songs, symbols, and other cultural products -- some generative, some contradictory (given the internal differences among the activists), some bordering on the fantastic. Sometimes the energy that fuels the generation of these ideas stems from or is inextricably mixed with, intense disrespect for adversaries, enemies, or those perceived to be clueless.²⁵⁵

Mansbridge's endorsement of these processes is not whole-hearted, of course; as she admits, in her *Why We Lost the ERA*,²⁵⁶ a central problem of pro-ERA activists was their inability to convey their ideas in terms that were accessible beyond the community that already was supportive of the ERA, i.e., they were unable to preach to anyone but the converted. Mansbridge admits that this constituted "both epistemic failures and failures of respect."²⁵⁷

Like Fraser's, these ideas of Mansbridge's translate well into addressing some of the more troublesome aspects of the arguments in the feminist blogosphere. First of all, the notion of a "disaggregated" deliberative space overall here makes sense, particularly if we use the umbrella term "feminist blogosphere" to cover the relevant discursive community. Within that

²⁵⁵ *Id.* at 17.

²⁵⁶ Jane Mansbridge, *Why We Lost the ERA* (Chicago: University of Chicago Press, 1986).

²⁵⁷ Mansbridge, "Disaggregated," *supra* note 250 at 19.

space you can the identify smaller discursive groups and “moments” with ease - like, for example, the WoC bloggers, or the “mainstream white” feminist bloggers. And it is also easy to see how the presence of these individual enclaves within the space was in some sense essential to the development of the overall deliberations in the community. For example, the conflict of the Marcotte article about immigration was produced in a small number of blogs who began discussing the issues among themselves, culminating in Sylvia/M’s linked-critique.²⁵⁸ Were these bloggers to have considered themselves accountable to the *whole* of the feminist blogosphere for anything they wrote on the controversy, it’s easy to understand why many might never have spoken at all. If nothing else, the departures of both brownfemipower and BlackAmazon from the space once the controversy became “blogosphere-wide” suggests that subjectively Marcotte’s critics did not feel that the larger audience would be receptive to the critique.

Similarly, the lack of necessary congruence between the discursive standards governing a larger discursive sphere and a smaller one was effectively embodied throughout the conflict in the differing arguments about civility. As I have already pointed out several times, whatever one might think of the “tone” Blackamazon took towards Seal Press, her choice to phrase her criticism in the form of “Fuck Seal Press” produced an avalanche of intra-community commentary. It put in stark relief the difference between how Seal Press was viewed by the small “feminist establishment” it served, and the way it was viewed by women of colour. Such “negative discourse” might have seemed rude to the publishers themselves, but it was not negative in the sense of causing silence. It engendered what I think is an indisputably rich set of conversations, even if those conversations did not result in some kind of agreement that satisfied

²⁵⁸ See Sylvia/M, “Don’t Hate” *supra* note 63.

all parties. The disrespect, in other words, was productive in terms of helping the discussion achieve some modicum of epistemic value. Arguably, that one epithet was the departure point for all of the conversations about the nature of power and privilege within feminist spaces that followed.

I think you can overemphasize how much value that conversation held, of course; as I have repeatedly noted, it is clear that the parties felt they had walked away at the end from an open wound, rather than a productive engagement with a difficult problem. This is a problem in Mansbridge's concept of epistemic fruitfulness, after all: one element of the "more correct" solution reached might be abstract but another clearly has to do with the emotional satisfaction the community derives from reaching that answer.

But even if its helpfulness is not without qualification, however, Mansbridge's paradigm clearly holds descriptive power here. I would further argue that it holds prescriptive power as well, insofar as it would have forced a recognition among the participants that a "unified" feminist blogosphere was not necessarily the goal of these discussions. In Mansbridge's paradigm of the disaggregated public sphere, one sees that in fact the only unity – indeed the only "larger public sphere" that is possible among the fragmented sections of the discursive space is built, piece by piece, through conversation and contestation. And as such it must be clear that one party to that conversation cannot be wholly in charge of the "appropriate" terms of engagement. Those deliberative standards must, too, as Mansbridge herself emphasizes, be open for debate. And I think it is fairly easy to see how much less heated the whole March-April 2008 debate could have been if the participants were more universally self-aware and self-critical about the way in which their very mode of engagement could be undermining the conversation, apart from the intrinsic substantive merit of their arguments.

3.3 *Synthesis of the Fraser and Mansbridge Critiques*

The demands that Fraser and Mansbridge's critiques place on an internet-based theory of free speech posited with respect to deliberation are threefold. First, a conception of the possibilities of internet speech must internally consider the role of social status in what is able to be said and what is able to be heard in a given conversation. It is not tenable to simply presume that open access – to the internet, or to the public sphere writ large – will result in the inclusion of more perspectives in a debate, because the terms of that debate are governed by social power. Second, it must consider the potentially positive role of fragmentation, insofar as the divisions, and even the potential disrespect, between the various parties at issue does not. Third, it must consider, as a result of both the first and the second observations, that there are standards internal to the way we all speak to each other than are in fact relevant to our reaching some kind of utopian vision of the deliberative democracy that Benkler, Balkin and even Sunstein seem to desire so fervently. These standards must, as Mansbridge and Fraser argue, also be open to contestation.

The feminist blogosphere, I think, would be better served by a theory so informed because it would recognize that even the terms of engagement – ideas about what kinds of claims about plagiarism might be made and the appropriate forms thereof, ideas about what kind of obligations other members of the feminist blogosphere had to the careers of those seeking to make their names as “professional feminists” specifically, and ideas about what kind of civility was necessary to keep participants from feeling silenced – were (a) contingent on one's position within the community – i.e. as a white feminist blogger or as a woman of colour blogger, and (b) could, insofar as they solidified certain power disparities between those positions, serve as obstacles to the kind of conversation the community needed to have about the various incidents of that spring. Making the problem of social power, and the ways in which it could be

consolidated *by deliberation itself*, a more explicit element of the public discussion, and of self-understanding in the deliberative space more generally would, it seems to me, have enabled the community to understand why the mere formal equality of being able to speak to each other on each others' blogs was not actually building a *felt* solidarity between the groups. After all, it seems, in some sense **to** epistemic value such conversations strain for is not so much some particular, definitive and articulable view of what the community *is*, but rather for the sense that it is a community *at all*.

4. Conclusion

My aim in this chapter has been twofold. First, I have tried to highlight that the failure of post-Internet free speech theory to provide a satisfactory account of online deliberation, either as a descriptive or an aspirational matter, is mostly due to its continued entanglement with a liberal-economic – some might say “bourgeois masculinist,” but we can retain my more neutral term without losing anything, I think – paradigm of speech that retains many of the bad assumptions of the marketplace of ideas metaphor. Thus, while Lessig, Benkler, Balkin and Sunstein have put in important work here, the ways in which the internet can and will continue to expand our understanding of freedom of speech are deserving of more nuance and careful examination than they tend to provide in their work.

Again, because I see so much of the value of their work can be summed up in their reframing of the value of freedom of speech as its encouragement of a “deliberative democracy,” I think some of that nuance can be provided by looking at elaborations on Habermas coming from writers like Fraser and Mansbridge who emphasize that there are disparities of power within deliberative spheres that necessarily shape their ability to produce actual value for deliberative communities. That value can, indeed, be termed “epistemic fruitfulness,” although I think it has

an emotional dimension that isn't quite captured in the term, which again seems to imply a kind of ability to measure "correctness" by abstract reasoning. It seems to me that the central value of the deliberation goes beyond its mere existence, that it goes to being a kind of engagement with itself that all participants to the conversation *value*. Fraser and Mansbridge's critiques, I think, allow us to see why the deliberative moment of the feminist blogosphere left the participants so upset and bereft, precisely because they do not treat deliberation – or even individual speech – as a good in and of itself.

In my next chapter, I'll focus on further illustrating what I mean by that in a sphere where the relationship of emotion to speech is particularly pronounced than it was in the feminist blogosphere, that of hate speech.

Chapter 4

Putting “Critical Democratic Culture” into Practice: The Case of Hate Speech Regulation

So often, critical analyses of freedom of speech – like the one I set out in the last two chapters – leave the reader convinced that I wish, to put it bluntly, that speech were not so quite so valued in our political and legal systems. (This is undoubtedly why any kind of critic of speech is immediately accused of hating civil liberties.) But I do, still, believe in speech as a valuable activity despite some of the problems I’ve outlined – I share James Boyd White’s conviction, as I’ve said, that speaking is, indeed, an activity of “ethical and political significance.”²⁵⁹ As such, I am of course prepared to say that legal protection of it has an important place in a free society – I only think that our traditional understanding of that protection, through the lens of the marketplace metaphor and the liberal-economic “deliberative” paradigm, is not the ideal way to either understand or to evaluate our own speech.

Conscious, therefore, of such potential accusations, I want to offer, in this final chapter, some notes towards what I think would be the ideal standard for understanding the social value we attach to freedom of speech. I call my suggested metaphor, distilled from the theoretical insights I have developed in Chapters Two and Three, a “critical democratic culture.” By replacing the liberal-economic paradigm of the marketplace metaphor with a more malleable and self-reflexive notion of a “critical democratic culture” seems to me not only better reflects the way we speak to each other, but provides a better framework with which to work when disputes

²⁵⁹ Boyd White, *supra* note 182 at 12.

arise in the arena of public speech.²⁶⁰ As I am wary of merely justifying my proposal abstractly, I've chosen here to present and elucidate the concept through the lens of hate speech, which, as I have earlier alluded to, I consider a problem connected to the feminist blogosphere conflagration described in Chapter 1.

This chapter therefore proceeds in three points. First, I want to place “classical” hate speech doctrine in Canada and the United States in context of the more recent debates about the appropriate mode of regulation of “cyber cesspools” and hate speech on the internet. The issues involved are traditionally presented as distinct questions. But I will show that they are in fact interrelated results with the same root cause, hatred. I will also show some conceptual problem in present free speech doctrine: the implicit acceptance of the liberal-economic marketplace of ideas paradigm, both descriptively and prescriptively, as appropriate for speech regulation. Second, I will more concisely define and briefly justify my proposed alternative metaphor for freedom of expression: a “critical democratic culture.” Third, I will explain how I expect that my proposed metaphor of a “critical democratic culture” enables us to untangle some of the problems that have been snarling progress on hate speech regulation.

1. **“Offline” Hate Speech Regulation, Before the Internet**

Before exploring the new wrinkles the internet has introduced to the hate speech debate, I want to give a brief overview of how both Canada and the United States approach the question of hate speech, doctrinally-speaking, to explain how both jurisprudential traditions, albeit somewhat differently reasoned, have couched their analysis of the problem of hate speech firmly in the liberal-economic paradigm of the “marketplace of ideas” - and thus have had difficulty

²⁶⁰ I use the phrase “public speech” here to indicate speech that has been published in some way, i.e. online, or otherwise made public, and not in the narrower sense of “speech about public issues.”

presenting a convincing normative approach to hate speech. I will do this by giving a critical reading of the leading cases in each jurisdiction: *R.A.V. v. St. Paul*²⁶¹ in the United States, and *R. v. Keegstra*²⁶² in Canada.

1.1 *United States: Hate Speech as “Low-Value” Speech*

Though American jurisprudence has a reputation for “absolutism” in the sphere of speech regulation, viewing the First Amendment as permitting any and all speech, as Lessig pointed out in *Code 2.0*,²⁶³ there are certain categories of expression that it views as constitutionally proscribable. The three categories of speech answering this description have been described by the United States Supreme Court itself as “obscenity, defamation, and fighting words.”²⁶⁴ The basis for these exclusions from the ambit of First Amendment protection, which has endorsed by no less a constitutional textual absolutist than Justice Scalia himself, is that these kinds of speech are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁶⁵ The liberal-economic paradigm of “speech value,” and its allegedly causal relationship to the discovery of truth, is plainly a rationale rooted in the imagery of the marketplace of ideas.

Commentary on hate speech within American jurisprudence, both scholarly and judicial decisions, has primarily focused on the struggle to fit hate speech within one of these categories of constitutionally proscribable content, and specifically within the notion of “fighting words.”

²⁶¹ 505 U.S. 377 (1992).

²⁶² [1990] 3 S.C.R. 697.

²⁶³ See Lessig, *Code 2.0*, *supra* note 192.

²⁶⁴ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

²⁶⁵ *R.A.V.*, *supra* note 264 at 383, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 at 572 (1942).

In the still-leading 1991 case of *R.A.V. v. City of St. Paul*,²⁶⁶ the Supreme Court was concerned with a local ordinance which provided that

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.²⁶⁷

R.A.V. was charged under this ordinance after he and several teenagers burned a cross on a lawn in St. Paul. The ordinance had survived review by the Minnesota State Supreme Court because it was seen to be worded sufficiently narrowly to cover only “fighting words,” insofar as it was limited to expression that aroused “anger, alarm or resentment in others.” Standards of deference to state supreme courts dictated that the Supreme Court must abide by this construction of the ordinance, and thus the question under consideration was whether an ordinance that penalized “fighting words” but was limited to those uttered with reference to “race, color, creed, religion or gender” was constitutionally permissible. Justice Scalia, writing for the majority, reasoned that it was not. Scalia noted that it was not so much that the

content [of proscribable speech like fighting words] is in all respects ‘worthless and undeserving of constitutional protection,’ ... We have not said that they constitute ‘no part of the expression of ideas,’ only that they constitute ‘no essential part of any exposition of ideas.’²⁶⁸

As such, Scalia reasoned, even fighting words are entitled to limited constitutional protection, insofar as they possess a dual character, one uncovered by the First Amendment (as fighting words). Any regulation of such speech may not distinguish an instance of this kind of utterance on any other basis. To do so would be to engage in regulation that impermissibly

²⁶⁶ *R.A.V.*, *ibid.*.

²⁶⁷ Quoted in *id.* at 379.

²⁶⁸ *Id.* at 385 (emphasis in the original), quoting *Chaplinsky*, *supra* note 265.

discriminates by content, Scalia argued, not because the First Amendment’s aversion to content discrimination was absolute, but instead because it was not made by reference to the constitutionally proscribable features of the speech itself - it did not prohibit “abusive invective” *qua* “abusive invective.”²⁶⁹ “St Paul has no authority to license one side of a debate to fight freestyle,” Scalia wrote, “while requiring the other to follow Marquis of Queensberry rules.”²⁷⁰ The only permissible regulation of “fighting words” would thus be one that regulated the *mode* and not the *content* of the expression, in Scalia’s view.²⁷¹ Constitutionally permissible speech regulation would not, in his view, gauge the value of the speech itself; it would merely prevent it from happening at certain times, in certain places, in certain forms. As such, he reversed the Minnesota Supreme Court and remanded the case.

Of course, the problem with Scalia’s attempt to separate form from content here is that to prohibit “abusive invective” involves a judgment of value anyway – the line between merely angry speech and abusive talk is quite hard to draw. The decision in *R.A.V.* thus bears the marks of the struggle to characterize the problem of hate speech as a problem of *speech value*. Putting aside the whole question of whether racist speech ought to be seen to have a *de minimis* “value” in any deliberative culture, it is indeed difficult to imagine what kind of coherent gauge of said value one could develop. To echo some earlier remarks I made about Sunstein’s attempt to find a “price” in speech markets,²⁷² there is no obvious metric for this sort of thing. But when a marketplace of ideas type of response to that problem simply holds that at the regulatory level we eschew the question of value entirely, and “let the market decide,” it does, in fact, seem to be

²⁶⁹ *R.A.V.*, *ibid.* at 391.

²⁷⁰ *Id.* at 391.

²⁷¹ *Id.* at 393.

²⁷² *See supra*, Chapter 3, Section 1.3.

making a kind of value judgment, if a negative one by simply abstaining from the question. That is how, in modern hate speech case law, American courts are in the not terribly satisfactory, if not wholly bizarre, position of terming an interaction between the people who burn crosses on lawns and the people who are understandably intimidated by the gesture a “debate.”

Until, that is, we don’t want to let the market decide this non-decision anymore. It may be representative of the internal tenuousness of the idea of “speech value” that there has always been an element of arbitrariness about the precise identification of “fighting words.” The Supreme Court itself has only upheld one law on that basis, and it was the one at issue in the case that originated the doctrine, *Chaplinsky v. New Hampshire*.²⁷³ The speech/act distinction is occasionally identified as a justification for the proscription of fighting words.²⁷⁴ But as the name implies, the idea behind the speech/act distinction is not so much to identify speech that is legally proscribable as it is to argue that the speech is not really speech at all, but rather incitement to action, and thus regulable on that basis as “not-speech.”²⁷⁵

It is thus clear that what is at issue in the matter of hate speech has little to do with any agreed-upon metric of “value” of speech in a polity, and is rather the result trying to adhere to a metaphor which is not only descriptively but also normatively unsatisfactory.

²⁷³ *Supra* note 265.

²⁷⁴ *See, e.g.*, Lynn Mills Eckert, “A Critique of the Content and Viewpoint Neutrality Doctrine in Free Speech Doctrine” (2011) 7 L., Cult. & Hum. 264.

²⁷⁵ *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (classifying seditious libel effectively as a speech-act and therefore regulable on that basis; *Warren v. Mitchell*, 508 U.S. 476 (1993) (upholding hate crimes legislation on grounds it regulated conduct, not speech).

1.2 Canadian Doctrine: Hate Speech As Violative of “Equality”

Canadians have not chosen to follow the American approach to hate speech, in fact explicitly criminalizing hate propaganda in s. 319 of the Canadian Criminal Code.²⁷⁶ The justificatory architecture that the Supreme Court of Canada has offered to explain the constitutionality of this provision nonetheless relies on a surprisingly similar liberal-economic paradigm of speech regulation to that of their American colleagues.

The leading case is *R. v. Keegstra*,²⁷⁷ which concerned a s. 319 conviction of a secondary school teacher who took it upon himself to instruct his students in the rudimentary elements of Holocaust denial, the bloodthirstiness of Jews, and other assorted anti-Semitic tropes. Keegstra challenged his conviction on grounds that his right to freedom of expression, as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms, was violated by the imposition of criminal sanctions under s. 319. Writing for the Court, Justice Dickson upheld Mr. Keegstra’s position. But due to the particular structure of the Charter, he did so while holding that the provision did indeed violate Mr. Keegstra’s freedom of speech - he held simply that said violation was “justified” by reference to s. 1 of the Charter, which provides that the Charter’s guaranteed is absolute, “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”²⁷⁸

Without getting too deeply into the minutiae of the practices of Charter jurisprudence and the *Oakes* test,²⁷⁹ Dickson’s holding in *Keegstra* may be summarized as follows: on balance, the

²⁷⁶ R.S.C. 1985, c. c-46.

²⁷⁷ [1990] 3 S.C.R. 697.

²⁷⁸ Canadian Charter of Rights and Freedoms, s. 1.

²⁷⁹ The *Oakes* test was developed in order to give some abstract shape to the “balancing” analysis the Canadian Supreme Court thought that s. 1 of the Charter demanded of it. See *R. v. Oakes* [1986] 1 S.C.R. 103.

violation of freedom of expression presented by the existence of s. 319 was justified because to do otherwise would be to ignore Canadian values of equality and multiculturalism that were fundamental to its instantiation of a “free and democratic society.” Dickson did not draw these values from thin air; he couched his identification of them in international human rights instruments,²⁸⁰ as well as ss. 15 and 27 of the Charter itself.²⁸¹ In other words, Dickson wielded the value of equality, and of multiculturalism as values *external* to the value of freedom of speech, and simply weighed them in competition with each other.

Dickson’s reason for making the constitutional justification of hate speech regulation in Canada one based on equality is readily apparent when one looks at what he did have to say about the freedom of expression guarantee in isolation in *Keegstra*. To put it bluntly, as Lorraine Weinrib has, “Dickson C.J.’s conception of the right is surprisingly dessicated.”²⁸² Citing prior case law, Dickson describes freedom of expression, as guaranteed by the Charter, as animated by the following values

(1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom a meaning is conveyed.²⁸³

That said, Dickson endorses the view that the “weighing of competing values” that reconciliation of these three occasionally antagonistic aims requires ought to occur in the ambit

²⁸⁰ *Keegstra*, *supra* note 277 at 749-55, ¶¶65-73.

²⁸¹ *Ibid.* at 755-58. ¶¶74-79.

²⁸² Lorraine Eisenstadt Weinrib, “Hate Promotion in a Free and Democratic Society: *R. v. Keegstra*” (1990-1991) 36 McGill L.J. 1412 at 1419.

²⁸³ *Keegstra*, *supra* note 277 at 728, ¶27, *citing Irwin Toy*.

of the s.1 analysis and the *Oakes* test.²⁸⁴ These three principles allegedly inherent to freedom of speech, by Dickson’s own account, are thus left to dangle in the air. He seems to justify this by a fear that to include a balancing perspective within the construction of the freedom itself would be to engage with “the danger of balancing competing values without the benefit of a context.”²⁸⁵ Thus he instead concludes, extremely abstractly it would seem, that s. 319 violated the guarantee of freedom of expression as intended “to restrict the content of expression by singling out particular meanings that are not to be conveyed.”²⁸⁶

This all undoubtedly seems like a very technical point, but in moving all “balancing” and “weighing” to the ambit of the s. 1 analysis, Dickson ends up endorsing a vision of freedom of speech that is not so very far from American absolutism. Despite the identification of, for example, the need to “cultivat[e] a tolerant and welcoming environment” as a reason for having a freedom of expression guarantee at all, no explanation is given of how s. 319 may or may not satisfy that end. Similarly, the degree to which the absence of hate propaganda might encourage “participation in social and political decision-making” goes unaddressed, at least in Dickson’s definition of what “freedom of expression” requires, which seems to be the absence of content restriction.

These values do reappear when Dickson comes to discuss the “proportionality” of s. 319’s restriction of freedom of expression, and ultimately help lead Dickson to his conclusion

²⁸⁴ *Ibid.* at 728, ¶28.

²⁸⁵ *Id.* at 733, ¶40.

²⁸⁶ *Id.* at 730, ¶33.

that s. 319 is constitutional. But as Weinrib also pointed out, to make these values relevant only in the balancing stage is to “undermine the normativity”²⁸⁷ of freedom of expression itself.

I do not share Weinrib’s version of what that normativity ought to be, of course – she would prefer the court to explain why speech acts must not be “hindered by the state,”²⁸⁸ and I am less enamoured, as I have hopefully made clear, with such bare libertarian premises about the power of speech. But I nonetheless agree that Dickson’s “large, liberal” interpretation of the freedom of expression guarantee leaves one with, in effect, a default liberal paradigm that does not much differ from the American one. All expression is protected from all content regulation under this interpretation. Dickson does express some doubt that rationality will prevail in the “marketplace of ideas,” but he seems nonetheless wedded to the essence of the paradigm when talking about the very idea of freedom of speech itself. Again, one understands that he is not a theorist, *per se*, but a jurist trying to interpret a constitutional document that already allows him to limit such rights if “demonstrably justified in a free and democratic society.” But as I have been trying to emphasize throughout this paper, the problem with leaving undisturbed the definition of freedom of speech along a marketplace, or liberal-economic lines, is that it leaves us without a good way of understanding why speech is important to us, and what kinds of values we ought to be engaging with when speaking. As such, it’s hard not to share in Weinrib’s wish that Canadian courts would be less afraid of advancing a deeper and more qualified understanding of speech.

²⁸⁷ Weinrib, *supra* note 282 at 1425.

²⁸⁸ *Ibid.*

1.3 **Conclusion**

Neither *R.A.V.* nor *Keegstra* provided us with a particularly satisfactory judicial approach to the problem of hate speech. The problems are, of course, somewhat different: the American approach tends to rely on a distinction between form and content that is difficult to maintain under scrutiny, and the Canadian approach simply tries to eschew any real scrutiny at all. But in my view, the dissatisfaction has the same root: the inability of the marketplace imagery to properly articulate what we feel is wrong with hate speech, which is to say the kind of exclusion, and silencing effect it engenders. It is a bit easier to illustrate what I mean by that by way of showing how these principles have continued to dissatisfy in light of the newly strong online presence of hate speech.

2. **Hate Speech Goes Online**

Virtually every scholarly commentary on hate speech regulation in the internet age begins by noting that the arrival of the internet has been something of a boon for hate groups. In the post 9/11 age, virulent dislike of minorities and other disadvantaged groups in society now has taken on an international dimension, which Kathleen Mahoney has aptly called the “globalization of hatred.”²⁸⁹ The internet’s newly awakened potential for anonymous participation, ease of publication, and dissemination of hateful views to a wide audience is thus understandably a cause of no small amount of concern,²⁹⁰ at least when considered in the specific context of hate speech.

²⁸⁹ Kathleen Mahoney. “Hate Speech, Equality and the State of Canadian Law” (2009) 44 Wake Forest L. Rev. 321.

²⁹⁰ These three factors are drawn from James Banks. “Regulating hate speech online” (2010) 24 Int’l Rev. L. Comp. & Tech. 233.

2.1 *The Strengthening of “Global Hate”*

The paradox of this new concern, of course, is that if the marketplace of ideas metaphor held more descriptive and normative power than I have ascribed to it in this paper, the internet should theoretically act as a *dampener*, not an accelerator, of hateful speech. It would, after all, provide a forum in which the targets of the hateful speech would directly confront their harassers on theoretically equal turf. Then, if, indeed, as Scalia posited in *R.A.V.*,²⁹¹ there is some “debate” to be had with the likes of the Ku Klux Klan and the Holocaust denial set, then one might assume that online we would have seen the gradual sidelining of hate groups of various kinds, and the emergence of an ethic of toleration and engagement that eventually would have led everyone to discard “low-value” ideas like cross-burning.

That this did not happen, of course, is clear. Instead, the online space has been one in which virulent sexism, racism, and other forms of discriminatory and hateful thought play a prominent role. This observation is so widespread it barely needs to be attributed to any particular source; articles in the popular press about “online hate” are ubiquitous and frequent.²⁹² In particular, advocacy groups have traced the propensity of hate groups use the internet to coordinate their activities, as well as recruit new converts, and have done so even on social networking platforms who present themselves a politically neutral and benign, such as Facebook and YouTube. Some scholars have even argued that the internet has actually accelerated the ability of certain hateful movements to become multinational in scope by creating a “virtual community” of hate online. In a faint echo of Sunsteinian ideas about the nature of “enclave

²⁹¹ *Supra* note 269.

²⁹² See, e.g. Theresa Wolf, “Online Hate Speech: Difficult to Police... and Define” *USA Today* (2 October 2009), http://www.usatoday.com/tech/webguide/internetlife/2009-09-30-hate-speech_N.htm; Christopher Wolf, “The Web Fuels Hate Speech” *New York Times* (15 November 2007), <http://www.nytimes.com/2007/11/15/opinion/15iht-edwolf.1.8351023.html>.

deliberation,”²⁹³ the argument effectively holds that hate movements have become more cohesive as a result of their enhanced powers of communication. As Barbara Perry and Patrik Olsson have put it,

... the Internet is especially crucial to right-wing adherents to the extent that the relevant websites provide ‘information, a sense of belonging, and social identity’. We think there is telling evidence of these dimensions as well, in terms of the convergence of ‘mythic ideals’ and especially appeals to one nation, or White Pride WorldWide. Granted, virtual hate groups are no more homogeneous than their ‘real world’ counterparts; they too are characterized by the same fractures and divisions. The movement, generally, is rather fractured but the glue that nonetheless holds it together is its ideological core, and the vision of the common identity that this imparts... Internet communication helps to close the social and spatial distance that might otherwise thwart efforts to sustain a collective identity. Given the geographical dispersal of hate groups across the country, and the globe, the medium of cyberspace allows members in Maine, and Mississippi as well as Munich, Toronto and Oslo to engage in real time conversations, to share the ritual and imagery that bind the individuals to the collective without having to travel great distances or incur great costs. Digital communication allows them to form ‘reimagined social configurations’ (Fernback, 1997, p. 39). Virtual conversations and ready access to webpages aggressively asserting the shortcomings of the Other strengthen the resolve of individual members by creating the framework for a shared sense of both peril and purpose. Such sites provide at least the façade of cohesion and collective security, but even more importantly for isolated and atomized members, a collective vision of shared fears, values, and ideologies.²⁹⁴

Thus the internet’s effect on hate groups has been more or less a one-hundred-and-eighty degree pivot from what a marketplace metaphor for speech might lead us to expect. Low-value ideas have perhaps been *strengthened* by their widespread dissemination. It is difficult to measure that, of course. The metrics traditionally presented are arbitrary. Most favoured among these metrics is some measure of the number of hate sites available on the internet, drawn from reports from advocacy groups like the International Network Against Cyber Hate.²⁹⁵ But as I

²⁹³ *Supra* note 263.

²⁹⁴ Barbara Perry & Patrik Olsson, “Cyberhate: The Globalization of Hate” 18 *Inf. & Comm. Tech. Law* 185-99 (2009) at 191-92.

²⁹⁵ *See, e.g.*, International Network Against Cyber Hate, *2010 Annual Report*, Amsterdam: INACH.

have noted elsewhere in this paper, such metrics are necessarily limited - some propagators of hatred on the internet, for example, may exist only as commenters on various blogs, and thus not be included in that account. In any event, if taken alone, if correct, this descriptive account of the role of the internet in fomenting hate groups would be concern enough to cause us to rethink our faith in a marketplace of ideas.

2.2 *Cyber-harassment as a Secondary Effect of Hate*

It is also important to recognize that the internet's effect on hate speech does not solely exist at the level of logistical and spiritual support for organized and identifiable hate groups. A subtler case of the dissemination of hatred is the wielding of what is often called "cyber-harassment" against targeted groups, usually women and racial, sexual, and other relatively disenfranchised groups in society. Danielle Keats Citron, for example, has repeatedly highlighted the prevalence of gender-based harassment online.²⁹⁶ In the cyber-harassment context, there may be no organized entity planning to burn a virtual cross. Instead, it is a more diffuse phenomenon, although frequently one that leaves its victim feeling as terrified and alone as if she had been the target of a more concretized hateful display. Citron uses the metaphor of "cyber mobs" who wield multiple tools to get under their victims' skin:

They terrorize individuals with threats of sexual violence and doctored photographs, often encouraging others to physically assault individuals and providing their home addresses. Online mobs invade individuals' privacy, hacking into their personal computers and email accounts to obtain confidential information and then posting it online. Attackers post reputation-harming statements online, accusing individuals of having mental illnesses and sexually-transmitted diseases. They send the damaging statements to employers and

²⁹⁶ See, e.g., Citron, *supra* note 12; Danielle Keats Citron. "Law's Expressive Value in Combating Cyber Gender Harassment" 108 Mich. L. Rev. 373 (2009); Danielle Keats Citron. "Cyber Civil Rights" 89 B. U. L. Rev. 61 (2009). See also Ann Bartow. "Internet Defamation as Profit Center: The Monetization of Online Harassment" 32 Harvard J. L. & Gender 101 (2009).

manipulate search engines to ensure that the statements appear prominently in searches of targeted individuals' names.²⁹⁷

To these tactics I would also add the practice of harassing bloggers in their comments sections, either by directly attacking them or by engaging by what on the internet is termed "trolling." Trolling consists, in essence, of anonymously posting deliberately inflammatory, offensive or provocative content in a comments section or a discussion board in order to stir up outrage among participants, spurring an avalanche of angry comments, and thus create a management problem for the blog owner.²⁹⁸ While that may sound like a trivial offense to those unfamiliar with blogs, to anyone who has watched a trolling situation develop online, it is amazing how quickly these situations can spiral out of control and how much time and energy they can take to monitor.²⁹⁹

Taken individually each of these actions might seem trivial compared to the spectre of a burning cross on one's front lawn. But when aggregated into a full-fledged cyber mob event, the results can be devastating, emotionally. "Targeted individuals," Citron notes, "feel a sustained loss of personal security. They fear that online threats of sexual violence will be realized."³⁰⁰

²⁹⁷ Keats Citron, "Civil Rights," *supra* note 12 at 33.

²⁹⁸ See "Troll," *Wikipedia*, [http://en.wikipedia.org/wiki/Troll_\(Internet\)](http://en.wikipedia.org/wiki/Troll_(Internet)) (last accessed July 18, 2011).

²⁹⁹ There is not much literature on the topic of the art of comment moderation, little of it scholarly. Most blog proprietors I've followed have had to struggle mightily with figuring out how to keep these discussions on track. For representative examples of prominent commentators grappling with the problem of how to moderate comments, see, e.g., Ta-Nehisi Coates, "Reposting Commenting Rules" *Ta-Nehisi Coates* (blog) (26 February 2010), <http://www.theatlantic.com/entertainment/archive/2010/02/reposting-commenting-rules/36745/>; Nick D. Kristof, "How Should We Moderate Comments?" *On the Ground* (blog) (5 March 2008), <http://kristof.blogs.nytimes.com/2008/03/05/how-should-we-moderate-comments/>. One of the most-read bloggers on the web, the commentator Andrew Sullivan, formerly of *The Atlantic* and now of *Newsweek/The Daily Beast*, refuses to allow comments on his blog at all. See, e.g., Andrew Sullivan, "No Comments," *The Daily Dish* (blog) (4 March 2008), <http://www.theatlantic.com/daily-dish/archive/2008/03/no-comments/219343/>.

All of which is to say that despite it being beyond the scope of this paper to go into the particulars of an ethical blog commenting policy, given the sudden prominence of commenting as a mode of public debate, it deserves more study from the standpoint of ethical and political theory.

³⁰⁰ Keats Citron, "Civil Rights," *supra* note 12 at 36.

Contrary to the newly popular theory that human interaction on the internet produces only weak social ties between individuals,³⁰¹ the reports of the targets of cyberharassers suggests that the effects of these attacks are deeply felt by their targets. And in some cases the division between the existence of these online threats and the so-called “real world” is not a purely intellectual question. In one case, described in a recent article in *Rolling Stone*, a 14-year-old woman who had developed a kind of cult following online under the name “Kiki Kannibal” experienced cyber-harassment that culminated in her waking up one morning to find “neon-green words spray-painted across the front path: ‘Regal Slut.’... Her parents' home was splattered with ketchup, chocolate syrup and eggs. And across the garage door, big as a billboard, was scrawled the word ‘SLUT.’”³⁰² The girl and her parents eventually felt forced to move away.

While these tactics are perhaps more indirect than those we have traditionally come to associate with hate speech, it seems to me they are cut from the same cloth. As Citron emphasizes, when targeted at women and other minority groups, these tactics take on a dimension that isn't limited to individual relationships between attacker and attackee - other members of the targeted group also feel the chill.³⁰³ In the “Kiki Kannibal” case, it was clear that the objection to her behavior was gendered, insofar as she was seen to have an overly sexualized persona, and was, hence, a “slut.” That is a specifically gendered form of speech policing, insofar as it is directed at women who are seen as too sexual and therefore objectionable.³⁰⁴ One cannot help but assume that other young women, seeing what happened to

³⁰¹ Gladwell, *supra* note 10.

³⁰² Sabrina Rudin Erdeley, “Kiki Kannibal: The Girl Who Played With Fire” *Rolling Stone* (28 April 2011) <http://www.rollingstone.com/culture/news/kiki-kannibal-the-girl-who-played-with-fire-20110415?print=true>.

³⁰³ Keats Citron, “Civil Rights in Our Information Age,” *supra* note 12 at 40.

³⁰⁴ For representative arguments in that debate, see Sinikka Elliott, “Parents’ Constructions of Teen Sexuality: Sex Panics, Contradictory Discourses, and Social Inequality” (2010) 33 *Symbolic Interaction* 191; Amanda Keddie.

Kiki, felt more restrained in their self-presentation on the internet. Whatever one's personal opinion of the appropriateness of the Kannibal persona given the young age of her puppeteer, the message the online world sent to young women who wished to present themselves in any analogous way was clear: don't speak, or if you do, accept the consequences. In that context, the harm identity-based cyber-harassment causes becomes a social one:

If working and expressing opinions online subjects someone to the risk of assault, even if the damage is only temporary, the result will change the kind of people who engage in cyber discourse. Members of a targeted group will experience stigma and go offline.³⁰⁵

In other words, the effect of this kind of harassment is silencing, and it silences more than just the individual target. It keeps entire communities – and particularly disenfranchised groups like non-whites, the transgendered, and teenaged girls – from openly and honestly engaging online in what is an increasingly crucial forum of the public sphere. Fiss, in writing on silencing himself, called the silencing effect a “subtle psychological dynamic,”³⁰⁶ but it could hardly be less subtle in the case of cyber-harassment fuelled by hate. As such, it seems to me that when it carries these gendered or racialized implications, or references to a host of other axes of identity that contribute to political marginalization, the intent and effect of cyber-harassment is more or less the same as that of a cross being burned on a lawn, and thus should be subject to the same regulatory treatment.

“Some Of Those Firls Can Be Real Drama Queens: Issues of Gender, Sexual Harassment and Schooling” (2009) 9 Sex Education 1.

³⁰⁵ Keats Citron, “Civil Rights,” *supra* note 12 at 38.

³⁰⁶ Fiss, *Irony*, *supra* note 166 at 25.

2.3 **Inadequacy of Currently Proposed Solutions**

Left to sort out these new issues in hate speech with the marketplace paradigm hanging over their heads, legal scholars have struggled to come up with a satisfactory approach to mediate the various interests at issue. Comically, at least as far as scholarly commentary is concerned, the Americans and the Canadians have somewhat exchanged positions on this question. As I shall describe below, the former are now reaching for equality standards and tort norms external to speech law in order to regulate speech without self-consciously “regulating speech.” The latter are suddenly evincing concern that prohibitions of hate speech are leading to a more diluted approach within criminal law. This team-switching is no doubt attributable to the general need to criticize each country’s own approach, but at the same time it demonstrates the unsatisfactory aura of the current position of the law on each side of the border. That uncomfortableness, I would argue, is directly related to the continued inability of these scholars to break free from certain tropes and assumptions of the marketplace paradigm.

2.3.1 **United States: Borrowing from Tort and Civil Rights Laws**

In America, stymied by what they see as the intractability of First Amendment doctrine, have started to look to tort liability as a means of regulation. The first is to encourage intermediaries like internet service providers and social networking platforms (Facebook, Google, etc.) to develop their own habits of regulating speech. These solutions are often framed as allowing individuals to protect their “privacy” rather than as hate speech per se. In a representative example of this kind of proposal,³⁰⁷ Brian Leiter, a University of Chicago law professor and a prolific and well-linked blogger,³⁰⁸ calls for the repeal of section 230 of the

³⁰⁷ Brian Leiter, “Cleaning Cyber Cesspools,” in Levmore & Nussbaum, *supra* note 12.

³⁰⁸ Leiter’s blog is accessible at <http://leiterreports.typepad.com/>.

Communications Decency Act,³⁰⁹ which is often referred to as a “safe harbor” provision for intermediaries. Section 230 holds that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³¹⁰ In effect this means that intermediaries cannot be held legally responsible for any tortious harms their users commit. For Leiter, this kind of differential treatment makes no sense - newspaper editors, for example, enjoy no such exemption.³¹¹ And while one might be tempted to argue that the difference here is a measure of editorial control, Leiter argues that in fact the way Google structures its search engine makes it one of the main propagators of “cyber cesspools”:

It is Google that retrieves the rantings of a friendless madman typing away on his hate blog, or the anonymous smears directed at a female law student by a vicious misogynist in a chat room, and associates those rantings and smears with the victim’s name for any Google user to find.³¹²

With the repeal of Section 230, Google would be forced, Leiter believes, to better account for the tortious and dignitary harms it enables by this process. Leiter even proposes that the appropriate course of action would be for Google to self-regulate by appointing a “panel of neutral arbitrators”³¹³ empowered to provide remedies such as (a) a delisting of the objectionable material; (b) a right of reply that would see an asterisk of some kind added to the search result;

³⁰⁹ 47 U.S.C. §230.

³¹⁰ *Ibid.*

³¹¹ Leiter, *supra* note 307 at 167.

³¹² *Ibid.* at 162.

³¹³ *Id.* at 170.

and (c) requiring from the speaker in question “to provide evidence to the panel that the material in question is neither actionable nor a dignitary harm.”³¹⁴

These sorts of proposals seem to me unsatisfactory on two grounds, both related to the liberal-economic conception of speech that is implicit in accounts like Leiter’s. First, in the case of Leiter’s “vicious misogynist,” it is true that an individual harm has been perpetrated. But as I, following Citron,³¹⁵ have pointed out elsewhere, the harm involved here is not simply an individual one. The female law student does not appear to the vicious misogynist as her own person. She appears as part of a class of people he hates, and this independent of any perceived strengths or failings of character on her own part. The misogynist’s misogyny is internal, in other words, to the comment he places on the internet. And characterizing the harm he causes as a purely “private” one thus obscures what I noted above is a central effect of the growth of hateful cyber-harassment: the chasing of certain communities from the blogosphere generally, like the radical women of colour identified in my account of the feminist blogosphere, who shut down their blogs. Leiter’s conception of the primary actors of this system is thus suspiciously close to the rational individual central to the marketplace of ideas metaphor.

My second objection has to do with Leiter’s strange faith that “neutral arbitrators” appointed and presumably paid by a private corporate entity are going to somehow do a less objectionable job than government in screening out “cyber cesspools.” This seems to me to too easily accept the market-inspired laissez-faire principle that the government ought not to sort between viewpoints, and that private actors are best equipped to make such determinations. I

³¹⁴ Leiter, *id.* at 170. The “right of reply” idea is drawn from Frank Pasquale, “Rankings, Reductionism and Responsibility,” 54 *Clev. St. L. Rev.* 115 (2006).

³¹⁵ See, e.g., Keats Citron, “Civil Rights in Our Information Age,” *supra* note 12 at 39 (“Traditional criminal and tort law cannot reach the harm experienced by individuals, their groups, and society due to cyber mobs’ interference with their right to equal treatment.”)

understand that these proposals are seeking to provide remedies in the face of apparently intransigent judicial doctrine, as enshrined in *R.A.V.* Nonetheless, it is unclear to me how the elevation of a Google, or a Facebook, to the status of quasi-government regulator, without attaching democratic accountability to these institutions, is somehow any less of a threat to freedom of speech. Given the choice between employees of a corporate, economically driven entity and people I vote for and elect trying to sort out whether my speech is acceptable, I frankly would rather take my chances with the latter.

Citron appears to be responding somewhat to these concerns in also proposing an avenue for approaching hate speech online that *does* rely on government interference, albeit not through the vehicle of hate speech laws. Her notion is that one could encourage norms of “digital citizenship” in online communities by pursuing remedies for hateful speech and cyber-harassment through the use of existing American civil rights and anti-discrimination legislation. The wielding of these laws, Citron believes, is within the confines of First Amendment cases like *R.A.V.* Because anti-discrimination laws seek to regulate conduct rather than expression.³¹⁶ She points out that in *Wisconsin v. Mitchell*³¹⁷ the Supreme Court upheld a hate crimes statute on similar grounds, and argues that when wielded against online cyber mob behaviour, anti-discrimination legislation “falls clearly on the Mitchell side of this line.”³¹⁸

The problem, however, is that there is an inescapably expressive dimension of the kind of harassment Citron describes online, one that Citron herself highlights by pointing to the fact that there is a social quality to the harm engendered to supposedly “personal” attacks on women and

³¹⁶ Keats Citron, “Civil Rights in Our Information Age,” *supra* note 12 at 44-45.

³¹⁷ 508 U.S. 476 (1993).

³¹⁸ Keats Citron, “Civil Rights in Our Information Age,” *supra* note 12 at 45.

minorities online. One can go back and forth about questions of intent here, about whether indeed “vicious misogynists” are self-consciously expressing hatred of women in their attacks. But regardless of intent, the point is that even “cyber mob” behaviour has the dual character of attacking the person herself as well as effectively issuing a warning to people who share her relevant identity characteristic. In essence they are, expressing an opinion in the same way someone burning a cross on a lawn could be said to do – but because their “act” is done by way of expressing themselves, in words, on the internet, the speech-act distinction becomes especially hard to hold here. The Supreme Court has, in fact, recently held that the tort of intentional infliction of emotional distress could not be wielded against a hate-filled protest held at a funeral, because the “theme” of the protest was directed at a public issue.³¹⁹ I am not sure how one could make a very principled distinction between the gathering of hateful people in a public place protest and what is often called, on the internet, the “pile-on” effect that occurs when a mob of angry commenters arrives to throw invective at the object of their displeasure. As such it’s less clear than Citron contends that the conduct at issue in hateful cyber-harassment would also fall squarely under *R.A.V.* Thus Citron’s proposal would be subject to the usual criticisms about maintaining open access to the marketplace of ideas.

2.3.2 *Canada: A Return to Free Speech Absolutism?*

By contrast, in Canada, the hate speech debate has been framed around s. 13 of the Canadian Human Rights Act,³²⁰ which terms the communication by phone or telecommunication of any kind of “any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited

³¹⁹ *Snyder v. Phelps*, 130 S. Ct. 1737 (2010).

³²⁰ R.S.C., 1985, c. H-6.

ground of discrimination” a “discriminatory practice”.³²¹ The Act then allows the Canadian Human Rights Commission to award to a person bringing a claim of a discriminatory practice injunctive relief, as well as potential monetary compensation. Originally intended to cover a practice of disseminating hatred by way of recorded phone messages in the 1970s,³²² section 13 has now provided a new means of imposing liability on online hate speech. Relying heavily on the principles enumerated in *Keegstra*, the Canadian Supreme Court upheld the constitutionality of this provision under the Charter in *Taylor v. Canada (Human Rights Commission)*.³²³

Even so, section 13 has been consistently attacked as overbroad and thus subject to abuse. Critics find it troubling, for example, that the provision contains no intent requirement, and also that “hatred and contempt” are too vague a standard.³²⁴ The controversy over the provision became particularly clamorous in 2007, when the Canadian Islamic Congress brought a complaint against the national magazine *Maclean’s* for publishing a column that argued that the “Muslim world” was supplanting the “Western world,” arguing that it exposed the Islamic

³²¹ The full text of s. 13 reads: “(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

(2) For greater certainty, subsection (1) applies in respect of a matter that is communicated by means of a computer or a group of interconnected or related computers, including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.

(3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of a telecommunication undertaking owned or operated by that person are used by other persons for the transmission of that matter.”

³²² Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (October 2008), http://www.chrc-ccdp.ca/pdf/moon_report_en.pdf (“Moon Report”).

³²³ [1990] 3 S.C.R. 892.

³²⁴ For a summary of these criticisms, *see generally* Julian Walker, “Section 13 of the Canadian Human Rights Act, Anti-Hate Laws and Freedom of Expression” Library of Parliament Background Paper, Publication No. 2010-31-E (1 September 2010), <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2010-31-e.pdf>.

community to prejudice.³²⁵ Though the case was later dismissed, it inspired the Human Rights Commission to appoint the University of Windsor professor Richard Moon to prepare a report and recommendations on Section 13.

In that report (the “Moon Report”), Kathleen Mahoney has observed, Moon seemed to endorse principles virtually identical to the “American absolutist view”³²⁶ - which, as above, I connect with the marketplace of ideas metaphor - in eventually recommending that section 13 be repealed or at the very least amended substantially to give it a restricted scope.³²⁷ For example, one of Moon’s main concerns with the rationales in both *Keegstra* and *Taylor* is that they seem to imply that hate speech bears a strong causal relationship to the dissemination of hatred. Moon worries that this causal link is overly reliant on a critique of human reason that ultimately goes too far:

The implications of downplaying this faith in reason are enormous. Upon what is our commitment to freedom of expression based, if not on a belief in human reason and its power to recognize truth? What restrictions on expression are not acceptable once we have lost faith in human reason? If we are unwilling to trust, or give space to, individual judgment and public reason, then the question of censorship will turn simply on whether the particular expression conveys a good or bad message or whether we think that public acceptance of the message will have good or bad consequences. But this amounts to a rejection of freedom of expression as a political/constitutional principle. A commitment to freedom of expression means protecting expression for reasons more basic than our agreement with its message, for reasons independent of its content.³²⁸

One hardly must do much excavation to find here an echo of the marketplace metaphor’s view that individual reason must be a paramount principle of speech regulation, that there is no function for expression other than Abrams’ social value of “truth.” In this passage it is not

³²⁵ *Ibid.* at 10.

³²⁶ Mahoney, *supra* note 289 at 338.

³²⁷ See Moon Report, *supra* note 322 at 31-39.

³²⁸ *Ibid.* at 25.

merely, Moon's concern that truth be one value of freedom of speech - indeed, it is the entire basis of our commitment to it, he implies.³²⁹ With this in mind, Moon advocates instead for the creation of "more avenues for marginalized views to express themselves."³³⁰

In other words, just as marketplace advocates believe that more competition leads to better products, more speech is the remedy Moon recommends for hateful speech, apparently confident that in that context human reason will triumph over all. Mahoney sharply observes that this is "a view neither history nor the present state of the world supports." (Nevermind the experiences of the feminist blogosphere.) Nevertheless, it bears noting that Moon did not advocate similar changes for section 319(2) of the Criminal Code - the provision at issue in *Keegstra* - and indeed states repeatedly in the report that it is his view that the criminal law is a more appropriate forum to regulate speech.³³¹ This would not, of course, pass muster under the marketplace view itself. Yet mostly Moon seems to support it because "[t]here have been very few cases brought under section 319(2)"³³² and because it would impose higher burdens of proof than the civil measures of section 13.³³³ He offers no more substantive justification for keeping hate speech regulation in the ambit of the criminal law. In which case, it is fair to accuse the Moon Report of more or less advocating a complete reversal of the prior Canadian approach of

³²⁹ Ironically, Moon himself admits at the outset of the report that there are two other values by which free speech is often defended – democracy and autonomy. *See ibid.* at 20.

³³⁰ *Id.*

³³¹ *See id.* at 31.

³³² *Id.* at 33.

³³³ *Id.* at 31-33.

allowing equality rights to qualify freedom of expression - in other words, as Kathleen Mahoney puts it, “ensur[ing] that the two fundamental rights can coexist and not collide.”³³⁴

3. ***A Brief Definition and Briefer Defense of a “Critical Democratic Culture” Theory of Free Speech***

In advocating for the standard of a “critical democratic culture” I am relying on four interrelated claims about the nature of speech in a democratic society that follow from the analyses I made of pre- and post-Internet free speech theory in Chapters 2 and 3, briefly stated as follows:

1. Neither the power nor the social function of speech can be adequately described by analogizing to an economic transaction in which a buyer-listener purchases the most “valuable” idea from a seller-speaker.³³⁵
2. Trying to force speech into a market paradigm by holding it up as a normative ideal risks an overemphasis on “rationality” that obscures the role of power in shaping who and what is heard in a debate, as well as who speaks and what is said in one.³³⁶
3. Attempts to construct a speech utopia out of the current structure of the internet - even when posited as driven by a “deliberative” rather than a “market”

³³⁴ *Id.* at 348. Post-Moon, the debate continues to rage. One case brought before the Canadian Human Rights Commission under section 13 was denied on the basis that it abridged section 2(b) freedom of speech, and is as of this writing pending appeal before the Federal Court of Canada. See *Warren v. Lemire*, 2009 CHRT 26

³³⁵ See Chapter 2, Sections 1 & 2, *supra*.

³³⁶ See Chapter 2, Section 3, *supra*.

ideal - continue to rely an overly rationalistic and economically-driven evaluation of speech and its functions in a democratic society.³³⁷

4. A properly “deliberative” free speech ideal would thus have a self-critical view of the nature of deliberative standards, drawn both from the recognition that those standards are sustained by social power and that disaggregated standards may be necessary in order to achieve epistemic fruitfulness, and the emotional satisfaction and sense of community that epistemic fruitfulness can bring.³³⁸

The chief benefit of “critical democratic culture,” in my view, would be that it would hold these concerns close to its heart. The common theme of these four claims, it seems to me, is that what is required is a metaphor for Holmes’ “social benefit” of freedom of speech that is self-aware. What I mean by that is that within the metaphor itself there must be some understanding that a metaphor only approximates what one might like to see and thus should be constantly revised in context. My contention here owes a strong debt to James Boyd White’s concern about the human penchant to foil one’s own best intentions by rigid adherence to cliché.³³⁹ Which is, I agree with him, what the “marketplace of ideas” became, through time and repetition.³⁴⁰ Any new metaphor proposed, it seems to me, must be aware that it faces the same risk, of coming to be the phrase invoked without feeling or delving into what it actually means.

That covers the “critical” portion, but what of the “democratic culture” part? The echoes of Balkin³⁴¹ and Benkler³⁴² here are only half-intended. I agree with him THEM? that the ambit

³³⁷ See Chapter 3, Sections 1 & 2, *supra*.

³³⁸ See Chapter 3, Section 3, *supra*.

³³⁹ See Boyd White, *supra* note 182 at 8.

³⁴⁰ See *ibid.* at 34.

³⁴¹ See Chapter 3, Section 2, *supra*.

of any protection of freedom of speech ought now more than ever clearly extend them beyond the production of speech related to what one might call “hard politics” – i.e. the kind of talk that revolves around the literally institutionalized power structures of parties, elections, and parliaments. Indeed, the debate in the feminist blogosphere appeared to be about just that - no elections of any kind were at stake. I also agree with him, and Benkler for that matter, that an egalitarian imperative attaches to the creation of meaning in a democratic polity. Where my version of “democratic culture” parts ways with theirs is in its willingness to recognize that the space for social discourse is already riven with cleavages - of gender, of race, and of class, just for starters. Simply providing more freedom to speak in that context does not, in my view, meaningfully enhance the ability of those groups to participate in the creation of meaning.

That something more will be required of our judgment in speech conflicts - that it is not enough, simply, to stand back and let speakers have at it and expect a satisfactory result - will be, I think the practical effect of incorporating a standard of “critical democratic culture” into our understanding of freedom of speech. One might be tempted to reply that that seems to demand a high degree of expertise from judges in particular. But then what one asks them to parse, in service of a critical democratic culture, are not complicated questions of science or historiography, but rather to analyze rhetoric and argument. That seems to me to be plainly within the realm of a judge’s expertise; after all, the embodied practice of law - i.e. what lawyers,

³⁴² See Chapter 3, Section 2, *supra*.

judges and courts do - could be quite aptly described, it seems to me, as the scrutiny of rhetoric and discussion.³⁴³

4. *Evaluating the Regulation of Hate Speech By Reference to a Critical Democratic Culture*

As I explained in section 1 above, the hate speech debate that has proceeded under the traditional metaphor of free speech doctrine - the marketplace of ideas - is rather snarled. As I noted before, I think that the relatively energetic tenor of the debate – and the flip-flopping one sees in the academic literature – is indicative of just how distressing everyone finds the present state of affairs. I believe that by removing the marketplace metaphor from this discussion, and shedding some of its attendant assumptions and prejudices, it will be easier to work out a solution that better respects the competing interests involved. In this section I shall describe how I think this paradigm shift would affect free speech doctrine itself, as well as the kinds of solutions it might endorse.

4.1 *Doctrine*

A critical democratic culture, I think, would not dictate the same result in *R.A.V.* as reference to a marketplace of ideas did. First of all, a critical democratic culture would not adopt a measure of ideas that related to their “truth-value,” as though truth were unitary and discernible, like the price of an apple. Being critical of claims to objective truth - given that the identification of such is necessarily caught up with social power - a critical democratic culture would be interested more in considering the value of truth to the furtherance of real, deeply felt dialogue. Put in that light, the cross-burning is not troublesome speech because it is evidence of

³⁴³ I am again here drawing heavily from Boyd White’s ideas about law as fundamentally a “branch of rhetoric.” Habermas too seems to suggest this in his formulation of a “discourse theory of law.” To explain and/or justify this idea further is perhaps beyond the scope of this paper.

idiocy on the part of the cross-burner. The cross-burning instead is troublesome expression because it is not an invitation to engage in a debate of any kind, as Scalia tried to argue it was, but rather an attempt to either encourage silence or force withdrawal of some parties to the debate.³⁴⁴ In fact, if anything, it is a threat to withdraw from the debate altogether. Under that analysis, in *R.A.V.* the ordinance does not seek to punish individuals for the content of their expression at all. It seeks to punish individuals instead for *infringing* on others' rights to freedom of expression by pushing them out of the debate on grounds that they share some allegedly objectionable characteristic.

Following upon that, I do not think that the reasoning of *Keegstra* would look the same either if we began to imagine the purpose of freedom of expression as the furtherance of a critical democratic culture. One of the central contributions of a critical democratic culture standard I describe is that it emphasizes that the realm of social power is in fact *internal* to the process of speech. It is not an external value to expect that people will have an equal ability to participate in a discussion. It is part of the entire notion of having a discussion itself. As such, were *Keegstra* decided under such a standard, it would be impossible to keep the definition of s. 2(b) freedom of expression in as reductive a state. For one thing, because the determination would be made by reference to the process of speaking itself, rather than by the external “balancing” implied by section 1, the decision would have to account for and justify the actual value of expression in a free society in deeper terms, thus satisfying Lorraine Weinrib’s concern that some normative account of it be given. For another, it would necessarily import the whole notion of why and how speech works into the evaluation of *Keegstra*’s claim. It would provide, for example, a conceptual opening through which the decision could address how *Keegstra*’s

³⁴⁴ See *R.A.V.*, *supra* note 264 at 391. See also discussion accompanying same, *supra*.

power in the particular speech situation he was in, as a teacher in charge of young minds, inflected the expression of his views. While it might lead to the same result, an affirmation of the constitutionality of s. 319(2), I still maintain that this would represent a more satisfactory way to approach hate speech problems, precisely *because* their dissemination depends partially on the power of the speaker.³⁴⁵

4.2 **Solutions**

Similarly, when reframed as questions of the promotion of a critical democratic culture, I do not think it is possible to retain the same approaches to these problems as have been suggested in the literature I described above.

On the matter of suggested impositions of intermediary liability, a critical democratic culture standard would necessarily be heavily dissatisfied with the relegation of the crucial quest of hatred to so-called “private” authorities. On the one hand, the standard demands that we not regard the practice of speaking as an activity that has no “public” dimensions. Whether it’s a matter of having entire communities feel silenced by their opponents, or even just the simple fact that speaking to an audience implies obligations of attempted intelligibility and careful listening, in the critical democratic conception of speech there is a strong resistance to attempts to move the adjudication of speech disputes to private hands exclusively. If individual users of a system are to have their speech restricted on some basis, a critical democratic culture standard sees it as crucial that that the standards emanating from that basis actually be publicly and politically, as opposed to privately, chosen. Whether or not the appropriate body to do this would be

³⁴⁵ The question of whether judges are appropriately qualified to make such an assessment is an important one, of course, but then we ask, in the law of equality, for judges to make these sorts of determinations about social status all the time in making determinations about discrimination. I do not see how the consideration, in speech law, of the social power of the speaker, is all that much different.

legislative, regulatory, or judicial, is beyond the scope of these initial remarks, but it seems to me crucial that the evaluations be subject to at least the veneer of democratic discussion and consensus. Which is not to say that in a critical democratic culture there would be no room for anything less than positive law in regulating speech, in the sense of encouraging speech governance outside the strict sphere of government action. But accompanying those efforts would be a serious effort to engage with these kinds of speech problems.

Another, related demand of the standard is that speech disputes be adjudicated as such, i.e. as speech disputes. Thus the notion of framing the hate speech and cyber-harassment questions as matters of “privacy” or “reputation,” or even of “equality” qua “equality,” are equally objectionable under the aegis of a critical democratic culture precisely because they do not recognize the particular value of expressive activity in a democracy. To illustrate the result of such an emphasis on speech as opposed to some other value, a critical democratic culture would be attuned to the problem of reducing all personal commentary to invasions of some inviolable private sphere. First of all, no person’s reputation is truly “private,” in the sense that one develops a reputation specifically within the context of social interaction - the entire concept of a reputation is meaningless without it. One’s reputation thus necessarily involves the experiences of other people. And once those experiences are incorporated into the challenged attack, what we have is a speech problem, not a privacy issue, insofar as the question becomes about whether one person has a better right to speak about the experience than the other.³⁴⁶

³⁴⁶ For example, as of this writing the United Kingdom is engaged in a struggle over “super-injunctions,” or, more colloquially, gag orders, creatures of statute designed to protect the privacy of their applicants. In one case, the subject of the gag order is a relationship between a footballer and a reality television star. The footballer filed for the order, claiming the reality star was blackmailing him, but has left the reality star in the strange position of being unable to properly defend herself because she too is subject to a gag order - a gag order which touches on her own experience - and she could not afford one to protect her own name. See “Imogen Thomas: From Miss Wales to High Court” *BBC News Online* (23 May 2011), <http://www.bbc.co.uk/news/mobile/uk-wales-13503444> (Quoting

With respect to silencing and harassment that is driven by social power, however that notion of speaking from experience may be less of a concern. But a critical democratic culture standard would still reject framing these as solely “equality” questions, insofar as it does not see the use in classifying certain kinds of expressive conduct as “acts” and others as “speech.” Remember that a critical democratic culture is inherently concerned with the production of meaning as a central part of human existence. Consequently, it broadly defines the kinds of actions that form that process.³⁴⁷ In sum, speech has an active and constitutive quality in the critical democratic conception, including in constructing what it is we mean when we say that we would like people to be equal. Thus “equality” itself is a subject that is subject to speaking conditions. As such, it cannot be the basis for adjudicating speech claims themselves.

Consequently, a critical democratic culture would see the maintenance of provisions like section 13 of the Canadian Human Rights as crucial to free speech, rather than as a compromise between it and some other goal. By that I do not mean that section 13 as it is currently formulated and implemented as a matter of institutional practice is perfect. I mean simply that one of the benefits of having such a section, is that it provides a flashpoint around which some kind of discussion of the effects of hateful speech in a democratic society will necessarily occur. A critical democratic culture is one that is fundamentally committed to an ongoing discussion about these issues, about the appropriate boundaries of speech, about public deliberative standards, is crucial to maintaining open lines of dialogue. This a marketplace model cannot do,

alleged blakmailer as saying ‘I have read the judgement and I am stunned by how I’m portrayed. Yet again my name and my reputation are being trashed while the man I had a relationship with is able to hide. What’s more, I can’t even defend myself because I have been gagged. Where’s the fairness in that? What about my reputation? If this is the way privacy injunctions are supposed to work then there’s something seriously wrong with the law.’”

³⁴⁷ I am indebted to Jack Balkin for this point. *See supra*, Chapter 2.

because it assumes that the only regulation of the space necessary is that of the competition of ideas, but given our collective historical experience with the propagation of hate, it is plain that such ideals are not enough.

Thus I think the standard of a critical democratic culture, understood in the way I described in Section 2, would as applied here represent a fundamental step forward for our ability to analyze, understand, and respond to the problem of hate speech, online or off, in a democratic society. It is true that the standard provides no hard and fast prescriptions for the proper regulation of speech, but that, one would argue, is its strength. What a critical democratic culture demands is less some idealized speech situation than one in which we all recognize its value and its imperfections, and attempt to act self-consciously when and where we feel someone - perhaps the government, perhaps not - must intervene to keep the lines of communication between members of a society open. So to speak, of course.

Conclusion

In advocating for the standard of a "critical democratic culture" in these pages, it is my aim to encourage everyone to adopt a great deal more self-criticism into both the way we talk about speech as an abstract matter as well as the way we talk to each other at all. I do think, plainly, that the standard poses great possibilities for the improvement of the nature of our public debates over matters that are generally agreed to have civic importance. I believe it would be a more helpful way to look at areas of the law, like hate speech, that have been snarled by the liberal-economic underpinnings of the marketplace of ideas paradigm. I think it would give us a more reasonable, experience-based set of criteria by which we could begin to adopt a principled attitude towards the place of the Internet in free and democratic societies.

But I also think it is simply a more realistic way of viewing the role of speech itself in both the law and life generally. The tendency of some personalities to enjoy the sound of their own voices aside, to speak is to, at some fundamental level, attempt to communicate, to engage other people. What the internet, and fora like the feminist blogosphere have shown and documented for us, is that the communicative nature of speech is not always obvious and straightforward. It is not just a matter of weighing in, even weighing in loudly and vociferously, on every question put to a group of discussants. It's not a matter of adhering to some kind of grand standard of rationality or "truth" or "good idea"-ness. Instead, a good debate takes work - from both the speaker and the listener - to ensure that some transmission of ideas actually occurs, that the transaction is productive. It takes a great deal of good faith and humility, much of the time. It takes attention to particular context, even to minutiae of phrasing and language, to how they will affect your audience. It takes, in short, a measure of self-awareness and generosity and

openness and patience that the marketplace of ideas metaphor has never quite seemed capable of capturing.

So my suggestion of this standard isn't merely one that is meant for judges or even just for legislators. In fact I often think what would make the metaphor most valuable is if it "trickled down" into everyday conversation much as the marketplace of ideas metaphor has. By way of offering an illustration, and having built my proposed perspective of a "critical democratic culture" out of the bones of the debates in the feminist blogosphere of March 2008, I want to conclude with a few reflections on how that standard would have served those discussions specifically.

I suspect that few people who still linger in that space would argue with me when I propose that the gradual withering and death of those debates was only illusory. This discussion is not a past that is past, so to speak. I do have some factual support for that proposition. As I was in the process of writing this thesis, Latoya Peterson, who blogs at an anti-racist pop culture analysis site known as Racialicious, wrote a post entitled "On Being Feminism's 'Ms. Nigga.'"³⁴⁸ Peterson has occasionally written for Jezebel and other outlets that are viewed as being more strictly "feminist" than Racialicious, and thus has the somewhat curious position of being a crossover figure, uneasily straddling the distance between a Feministe or Feministing and the radical women of colour communities.

The title of the post in question refers to a song by the hip-hop artist Mos Def in which he resists what he sees as a sort of tokenism in praise of his work by whites: "They say they want you successful, but then they make it stressful / You start keeping' pace, they start changing' up

³⁴⁸ Peterson, *supra* note 30.

the tempo." Peterson describes feeling more or less the same way about the fact that feminist organizations frequently invite her to speak, often as the only woman of colour on the panel.

Among the causes of her unease, Peterson writes, is her belief that

the idea that the third wave has mastered inclusion problems is sadly mistaken, since many of us surfing this new wave still see the rehashing that happens time and time again of second wave and first wave problems. However, it is absolutely amazing how often we see the same problems repeat themselves time and time again – particularly in the blogosphere.³⁴⁹

As evidence, she cites the events and conversations I describe in Chapter 1 specifically, noting that,

[i]t really isn't fun to dredge up all the things that went on, particularly as I'd rather not think about it for too long, but it is necessarily to do so. Because people forget. Time went on, and this thing I remember so well as a pivotal turning point in the feminist blogosphere is history. Digital dust.³⁵⁰

I would qualify Peterson a bit here, insofar as what seems to have been forgotten is the particulars of the arguments that were had, the who said what and where. But the ideas over which the debate was had still linger in a more abstracted form - someone like Peterson still feels excluded by some aspects of third-wave sensibilities. It's that the forgetting of the particulars, or even just the avoidance of them out of fear of dredging up bad memories, makes parties on both sides feel dissatisfied, and stuck in a state of arrested development. It's not so much that

³⁴⁹ *Ibid.*

³⁵⁰ *Id.*

everyone forgets these conflicts to the same degree as it is that they are subsumed with varying degrees of success in the unconscious of the community, and there allowed to fester.

An awareness of this, of the fact that every conversation, for example, has roots and echoes of previous ones, is thus the first positive effect a critical democratic culture standard having on participants who internalized it. That while all of this may seem to have happened a long time ago, and about things which might seem less critically important in hindsight, leaving the discussion while the matter was unresolved guaranteed the perpetuation of bad feeling and distrust. The importance of keeping lines of communication open would be much more clear in that context. Without further talking things through, without realizing that some conversations are much more deeply felt than their initial instigating events would seem to merit, in other words, you risk never fully processing the roots of the problem. A critical democratic culture standard would posit that processing as crucial to the success of any deliberative process.

Second, having people imagine themselves as building a critical democratic culture would also open up discussion about the kinds of deliberative standards assumed to be the "right" ones for the group. The idea that civility resided only in some kind of idea of polite agreement, of "positive discourse," would be up for debate. It would be so particularly because everyone would come to the deliberative space understanding that even the manner in which the discussion was proceeded was subject to manipulation by the presence of social power - even if that manipulation was unconscious and thus wholly unintended. It would understand that the function of a "Fuck Seal Press"-type of statement in a debate could be gauged not simply by reference to the presence of an obscenity, but also by the quality of the avalanche of commentary it spurred. It could be understood as an attempt to break paradigms, or at least to resist the kinds of prejudices that could be hidden by the demands of "politeness." It would not descend immediately into a debate over which party had been the most rude and "unproductive." The

idea instead would be to excavate how and why these kinds of feelings have arisen in the discursive community at issue, and to understand that the “productivity” of a debate will sometimes involve overcoming certain instinctual emotional reactions. So when you are, for example, a Seal Press publicist who comes across a “FUCK SEAL PRESS” in a blog you’ve never seen before, one might, instead of leaping immediately into the fray on the defensive, want to take a moment to try and discover where the other party is coming from. In other words, the point of the debate, for you, is not to “win.” It is to try and reach a point of mutual understanding, even if that mutual understanding continues to have, as its subject, a strong disagreement about strategy and politics.

Finally, an internalized critical democratic culture standard would also force the feminist blogosphere into taking the problem of silencing extremely seriously. Perhaps most importantly, it would do this within the frame of it affecting the discussion itself, rather than some externalized value of equality. The notion that a debate is made epistemologically better by the inclusion of more voices would view the exclusion of voices as a serious impediment to the value of the space - not merely as an indicator that the space is "unequal" in the sense of a disproportionate number of those present with one particular colour of skin. The argument could advance far past the sort of tokenism that occasionally seems to tangle it, the idea that if one can dredge up a woman of colour who wasn't offended by the instigating events, then there is no further point in discussing racism within the discursive space. It would understand that concomitantly, the idea is not simply to have more bodies of some particularly under-represented kind in the room - the idea is to have them feel like they, as well as those they perceive as dominating or oppressing them, are mutually engaged with the project at hand.

That sense of mutual engagement, of working together in service of a goal, of participating in the creation and implementation of it, seems to me ultimately the key thing

anyone wants to get out of speech in a democratic polity writ large. And in that sense feminism is merely a crucible of a much larger problem. It is true that the "movement" has always had trouble with the implicit project of constructing an ideal sisterhood, even among those who are prepared to organize themselves under the banner of its label. Many of the concerns about the nature of the discussion in this space surfaced long before the internet ever came along. And the reason they have never been resolved, I think, is because women were too busy, for such a long time, rediscovering their own voices to have much time or energy to attend to the effect of their speech. It's perhaps easy to understand that. But much as the white property-owning men who designed the American Constitution imagined they implemented freedom when they gave themselves the exclusive right to vote, it is more than possible that by giving themselves unadulterated license to speak, the white feminist forebears of this movement nonetheless constructed a movement that served themselves more exclusively than they intended. Sisterhood must be earned, not assumed, as the popular observation goes. A critical democratic culture agrees, and simply posits that the wages of that work will have to be paid in talk, careful talk, and discussion motivated fundamentally by self-awareness.

As I have been working through these issues for this paper, I've of course been haunted by the question of what benefit the participants in the March-April 2008 discussions might have derived, in a more concrete sense than I have so far described, from an attitude that valorized the promotion of a critical democratic culture within the feminist blogosphere, rather than the incoherent, then-dominant ethos that everyone had a "right" to their own opinion. I'm reluctant to provide a full armchair adjudication of the issue since, as I mentioned in the introduction, I wasn't there at the time. And I am also conscious that, fruitful as I found their example to be as an aid to unpacking certain failures of free speech theory, this is a small community without a

formalized political structure that promoted a particular “regulatory” view of how discussions could proceed. Still, I have thought, often, about what exactly my opinion of all of the arguing is, and consequently have some ideas about the substantive merits of it, that I will offer in conclusion by way of showing that it’s possible this framework of mine can have a self-regulatory, informal political role.

Here, I think, are the easy truths you come to, refracting the conflict through the critical democratic culture lens: the role of social power is so ubiquitous, so inescapable, that even in a small, isolated corner of the internet, power disparities frustrate conversations in often devastating ways. It’s too easy to reduce this to calling the community at issue an overly specialized one, or one with limited influence, and leave the discussion of power there. Whatever else is true, the “professional feminists” of this world display a certain amount of homogeneity. To even aspire to be professional feminists, to put in the enormous amount of work in writing blog posts and doing the research, etc, all for free, that is required before the book deals and the magazine offers start coming through the door that can pay the rent, suggests a kind of privilege. It is the kind of privilege that attaches most often, in North American society at least, to being white, to having no children to care for, to achieving a certain kind of educational background regardless of class origin (i.e., you can have, like me, been born into a predominantly working class family, but you now have at least a bachelor’s, and probably a master’s or two). One understands, of course, that none of these factors make one feel particularly privileged in the culture writ large. (I have myself written enough feminist-inflected blog posts that provoked angry white male comments that suggested I was not, ahem, part of the mainstream.) But they do mean that when you turn around and go back to the community that you see yourself emerging from – i.e. “feminists,” which I again emphasize for me provisionally

includes any woman who sees herself as interested in “women,” whether she likes that label or not – you are not, in any real sense, returning home as an equal.

It is probably true that these disparities are inescapable. They may even be desirable, insofar as one wants, in the Mansbridgean sense, for people whose ideas developed in enclaves to go out there in the world and disseminate those ideas. You want, in your deliberative culture, for someone like an Amanda Marcotte to be able to act as bridges, translators, to others, to get the ideas out there. And again, to bring these ideas to the mainstream is not easy, and deserves respect for the effort. But that some benefit – even a benefit quite tangible to the community itself, say in the form of beneficial legislation whose origins come from feminist writing – is derived from that activity does not, however, mean that that the bridges and translators should escape accountability to the community that gave them their ideas in the first place. If the ideas are being improperly disseminated, either in content (through misunderstanding) or in form (by lack of citation and attribution), that needs to be called out, identified, discussed. In fact that’s precisely one of the best selling points of a critical democratic culture: that it is one where we question whether our speech acts are, in fact, achieving any of the good we intended them to do. That we do not presume the mere act of speaking is a good in and of itself.

The trick, in the feminist blogosphere as elsewhere, I think, is to understand that this whole question of how we talk about – and consequently, *do* – feminism, is not a question subject to one single answer. That it is rarely the case that the politics of disseminating the views to a larger audience will be pure, because there are compromises to be made when you are trying to get a larger audience. That it is equally rarely the case that the dissemination of those views will be an absolute, unqualified good for the community. So even though there are great things about knowing that writing hard and passionately and long enough as a feminist online might someday mean you get heard elsewhere, there are also risks to the activity. The point, I think, is

less that one should avoid the risks, and more, instead, in line with a critical democratic culture, that one should be aware of them, and always open to discussing them. We may never get this whole business of being a feminist “right.” We may never have a consensus on that for everyone to work from. The point, instead, in a critical democratic culture, is to be open to continual discussion, revision, and realignment, because it’s only in being so open that we really understand its importance to us. There is a sense, and a very real one, in which seeing yourself as a valued participant in the discussion, to feel a part of the conversation, is the only kind of real solidarity we can hope for. It is, in the end, a fitting irony that the only tie that might really bind, in a critical democratic culture is, precisely, the conflicted nature of speech itself.

Appendix A: List of URLs

This is a list of every URL of every blog post I consulted to construct the account of the feminist blogosphere that appears in Chapter One. The URLs have been listed in rough chronological order.

1. <http://guyaneseterror.blogspot.com/2008/03/notes-so-far-from-wam.html>
2. <http://www.rhrealitycheck.org/blog/2008/04/02/can-a-person-be-illegal>
3. <http://replay.waybackmachine.org/20080406123209/http://brownfemipower.com/?p=2531>
4. <http://web.archive.org/web/20080406123215/brownfemipower.com/?p=2540>
5. http://sealwomen.blogspot.com/2008/04/seal-and-women-of-color_03.php
6. <http://nocookiesforme.blogspot.com/2008/04/im-watching-and-cringing-and-thinking.html>
7. <http://guyaneseterror.blogspot.com/2008/04/i-am-firestarter.html>
8. <http://myecdysis.blogspot.com/2008/04/im-not-so-sure-anymore-feminism-and.html>
9. <http://myecdysis.blogspot.com/2008/04/feminists-too-steal.html>
10. <http://fetchmemyaxe.blogspot.com/2008/04/taking-credit-for-other-peoples-isnt.html>
11. <http://bitchmagazine.org/post/on-seal-press-and-the-fucking-of-same>
12. <http://problemchylde.wordpress.com/2008/04/08/dont-hate-appropriate/>
13. <http://theangryblackwoman.wordpress.com/2008/04/09/allies-talking/>
14. <http://hugoschwyzner.net/2008/04/09/if-its-stealing-you-d-better-prove-it-on-amanda-marcotte-bfp-and-alternet/>
15. http://daisysdeadair.blogspot.com/2008/04/borrowing-and-appropriating_09.html
16. <http://nataliaantonova.com/2008/04/09/dear-x-i-once-said-that-i-hope-you-never-change/>
17. <http://guyaneseterror.blogspot.com/2008/04/thats-all-she-wrote.html>
18. <http://pluckypunk.blogspot.com/2008/04/no-reconciliation-is-not-really-primary.html>
19. <http://sealwomen.blogspot.com/2008/04/response-in-aftermath-of-listening.php>
20. <http://www.feministe.us/blog/archives/2008/04/10/this-has-not-been-a-good-week-for-woman-of-color-blogging/>
21. <http://www.amptoons.com/blog/archives/2008/04/10/regarding-appropriation-brownfemipower-and-amanda-marcotte/>
22. <http://shakespearessister.blogspot.com/2008/04/we-write-letters.html>
23. <http://www.amptoons.com/blog/archives/2008/04/11/appropriation-made-of-suck/>

24. <http://whotookthebomp.blogspot.com/2008/04/invisible-white-privilege11-rears-its.html>
25. <http://angryblackbitch.blogspot.com/2008/04/untitled.html>
26. <http://deviousdiva.com/2008/04/11/another-voice-is-silenced/>
27. <http://sealwomen.blogspot.com/2008/04/response-in-aftermath-of-listening.php>
28. http://www.salon.com/life/broadsheet/2008/04/11/seal_press/index.html
29. <http://shewhostumbles.wordpress.com/2008/04/12/the-revolution-will-not-be-published/>
30. <http://guyaneseterror.blogspot.com/2008/04/soul-shaking-love-or.html>
31. <http://hugoschwyzer.net/2008/04/13/avoiding-the-zero-sum-game-on-feminist-publishing-citing-and-using-jessica-valenti-and-andrea-smith-together/>
32. <http://physioprof.wordpress.com/2008/04/13/intellectual-appropriation-attribution-of-credit-privilege/>
33. <http://sinverguenza.wordpress.com/2008/04/13/me-vale-madre-tu-porqueria-feminism-%c2%bfty-que/>
34. http://feministing.com/2008/04/14/on_feminist_blogging_community_1/
35. <http://rebelgrrrl.wordpress.com/2008/04/14/still-for-white-women-only/>
36. <http://www.deannazandt.com/2008/04/14/higher-learning-being-an-uncomfortable-feminist-in-2008/>
37. <http://theangryblackwoman.wordpress.com/2008/04/15/standing-is-solidarity-with-my-sisters/>
38. <http://naamenblog.wordpress.com/2008/04/15/feminism-whos-it-for/>
39. <http://bfpfinal.wordpress.com/2008/04/16/3/>
40. <http://web.archive.org/web/20080503094842/offourpedestals.wordpress.com/2008/04/28/unoriginal-thoughts-on-the-what-next-introduction-scope/>
41. <http://www.amptoons.com/blog/archives/2008/04/17/my-thoughts-on-bfps-summary-of-her-thoughts/>
42. <http://dearwhitefeminists.wordpress.com/2008/04/17/an-open-letter-to-the-white-feminist-community/>
43. <http://www.postbourgie.com/2008/04/17/the-amanda-marcotte-controversy-race-in-the-feminist-blogsphere/>
44. <http://fetchmemyaxe.blogspot.com/2008/04/okay-as-long-as-were-all-in-examination.html>
45. <http://guyaneseterror.blogspot.com/2008/04/five-for-one.html>
46. <http://cassandrasays.blogspot.com/2008/04/sometimes-jokes-just-write-themselves.html>
47. <http://www.feministe.us/blog/archives/2008/04/19/having-the-answers/>
48. <http://thecurvature.com/2008/04/19/on-being-an-ally/>

49. <http://www.feministe.us/blog/archives/2008/04/22/today-amanda-marcotte-at-kgb-bar-in-manhattan/>
50. <http://web.archive.org/web/20080427184407/offourpedestals.wordpress.com/2008/04/22/the-message-being-sent/>
51. <http://www.metafilter.com/71081/Feminist-bloggers-and-racism>
52. <http://blog.iblamethepatriarchy.com/2008/04/23/schooled/>
53. <http://lucikali.wordpress.com/2008/04/24/jotted-notes-on-appropriation-issues-of-privilege-and-potential-allies-in-positions-of-privilege/>
54. <http://danadocus.livejournal.com/59143.html>
55. <http://hugoschwyzner.net/2008/04/24/on-lorna-the-jungle-girl-and-the-dark-skinned-natives-a-reluctant-challenge-to-amanda-marcotte/>
56. <http://www.feministe.us/blog/archives/2008/04/25/i-guess-its-a-jungle-in-here-too-huh/>
57. <http://sadie-sabot.livejournal.com/149269.html>
58. <http://daisysdeadair.blogspot.com/2008/04/metafilter-and-amandagate.html>
59. <http://theangryblackwoman.wordpress.com/2008/04/25/seal-press-amanda-marcotteproof-that-feminism-and-racism-go-hand-in-hand/>
60. <http://sealwomen.blogspot.com/2008/04/public-apology.php>
61. <http://jezebel.com/384139/allegations-of-theft-racism-rock-the-feminist-blogsphere>
62. <http://nataliaantonova.com/2008/04/25/since-im-abroad-i-was-in-fact-thinking-about-ordering-its-a-jungle-out-there/>
63. http://feministing.com/2008/04/25/just_wow_1/
64. <http://shakespearessister.blogspot.com/2008/04/blindness-of-privilege.html>
65. <http://problemchylde.wordpress.com/2008/04/26/from-blackamazon/>
66. <http://florence-craye.livejournal.com/405967.html>
67. <http://www.racialicious.com/2008/04/29/on-facing-your-bias-owning-your-prejudice-and-allies-part-1/>
68. http://feministing.com/2008/04/29/some_feminist_selfreflection_1/