

Introduction

Cyberlaw, But Make It Feminist

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When I was a graduate student, a radio show on the Canadian Broadcast Corporation asked to interview me about the right to be forgotten, an idea gaining popularity and the subject of my dissertation. Flattered and excited, I enjoyed my conversation with the talented host and professional staff who asked about feminist themes like non-carceral interventions for content removal and rehabilitation through deletion. After the show aired, I received an email from a man who had taken the time to find my email address and draft a long message explaining that I probably said smart enough things but he couldn't determine one way or another because I sounded so stupid. My voice sounded silly and uneducated. He told me I should take voice lessons. Most of the authors in this volume regularly receive direct messages like this when they engage in public interviews on radio, podcasts, and television to discuss technology policy issues. Most of the messages are far more critical and inappropriate. The cyberspace phenomena of receiving unpleasant and unwelcome direct messages from strange men is a jarring and degrading experience but few of us have changed our tune.

Instead, these voices have grown louder and are collected here to launch a new field called Feminist Cyberlaw.¹ Feminist Cyberlaw represents a radical reimagining of technology law by articulating the way gender, race, sexuality, and disability shape cyberspace and the laws that govern it. Most of the voices, which include a mix of academics, practitioners, and clinicians, trained in a kind of traditional cyberlaw that include a canon of three white men: Barlow, Lessig, and Zittrain. Called the "single most influential essay in the history of Internet law,"² John Perry Barlow's 1996 "A Declaration of Independence of Cyberspace" instructed, "Governments of the Industrial World, you weary giants of flesh and steel, I come from

Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us.”³ A cattle rancher and lyricist for the Grateful Dead, Barlow also cofounded one of cyberlaw’s most important organizations: the Electronic Frontier Foundation. Lawrence Lessig’s book *Code: And Other Laws Of Cyberspace* came out in 1999 and popularized the idea that “code is law,”⁴ meaning code can constrain behavior the way architecture (i.e., a fence) can and as effectively as law can.⁵ The idea bolstered an entire line of study in technology law about design and governance that continues to thrive today. In *The Future of the Internet—And How To Stop It*, Jonathan Zittrain argued that the internet’s great value lay in its “openness,” and that in 2008, when the book was published, the internet operated as an exceptionally generative technology.⁶ Zittrain feared that attempts by companies to enclose the internet into proprietary, closed source places and services would end that generativity. All three wrote to ensure a future internet that maintained the aspects they valued and both fought change and called for change.

Voices in Feminist Cyberlaw do the same, but describe different scenes, focusing their lenses on alternative perspectives and values. The authors of this collection build on work that predated, coincided with, and responded to Barlow, Lessig, and Zittrain. In 2000, Jerry Kang asked whether cyberspace could “change the way that race functions in American society” and provided detailed design protocols to answer the question.⁷ That same year, Anita Allen revisited her seminal book *Uneasy Access: Privacy For Women in a Free Society*, noting that technology-inspired interest into privacy “had little to do with gender.”⁸ Intellectual property scholars like Sonia Katyal, Anupam Chander, Madhavi Sunder, and Rebecca Tushnet established critical feminist critique of copyright law through analysis of fair use interpretations.⁹ Danielle Citron and Mary Anne Franks centered the experience of marginalized people who endure bullying, threats, and harassment, revealing significant problems that derive from an emphasis on the virtual when seeking justice.¹⁰ And Julie Cohen has consistently demanded attention be paid to power dynamics and institutional structures that make and regulate technology since the 1990s.¹¹ Feminist Cyberlaw has gained momentum alongside our colleagues working in Information Science, Communications, Science and Technology Studies who established important networks to create change through concrete contributions like the Feminist Data Manifesto-No and Design Justice.¹² These interdisciplinary interventions lead to the same inescapable conclusion. As my coeditor Amanda Levendowski explains, “[Cyberlaw] has always been unified by its reactions to, and governance of, feminist issues—it simply hasn’t been understood that way.”¹³ The authors of this collection also build on the interdisciplinary cohort of scholars, of which they are a part, who have furthered works written over the turn of the millennium that complemented and challenged the cyberlaw canon.¹⁴ In this volume, cyberlaw’s focus on universality, virtuality, and novelty gives way to Feminist Cyberlaw’s attention to contexts, bodies, and legacies.

Barlow wrote his Declaration in the first person plural *we*. He articulated a universality built from the shared experiences of a particular idea of diversity. He declared, “We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth . . . Your legal concepts of property, expression, identity, movement, and context do not apply to us.” Barlow’s universality fades into the background in Feminist Cyberlaw, which instead highlights *context and locality*. The recognition of unique experiences and relationships to legal concepts in cyberspace is significant to Feminist Cyberlaw. Feminist Cyberlaw makes visible the local contexts in which we can see how cyberspace is part of specific communities, occupations, and relationships. When we hear the stories of those centered in Feminist Cyberlaw, the narratives change the way we see the world. In doing so, Feminist Cyberlaw scholars pursue an ever wider *we*.¹⁵

Barlow contends cyberspace “is a world that is both everywhere and nowhere, but it is not where bodies live.” Lessig further explored that nowhere/everywhere place, *comparing* the design elements of cyberspaces to the layouts of physical environments. Cyberspace is different, according to Lessig, where anonymity is the default. Relieving itself of these virtual versus meatspace analogies and placing anonymity on an ever-present spectrum, Feminist Cyberlaw emphasizes actual *materiality and bodies*. You will find an array of situated, lived bodies undertaking all kinds of activities, and those unique motivations are tied directly to the bodies of many forms, colors, and capabilities. Computers have bodies too and the physical components of the networked infrastructure run under and over different places with different ideas about engaging with the hard drives, servers, and pipes to enforce rules. Feminist Cyberlaw scholars account for the physicality of the network. They know where the bodies are.

Barlow sought to further “the dreams of Jefferson, Washington, Mill, Madison, DeToqueville, and Brandeis,” explaining, “These dreams must now be born anew in us.” Indeed, the canon utilizes the past in pursuit of the new and novel. Lessig puts novelty in the center of his readers’ attention in a way that connects to Zittrain’s generativity. They share a distaste for closed systems, those that keep out exciting and innovative new and renewed technologies. For Zittrain, this means that technologies should be built and governed to promote generativity: “a technology’s overall capacity to produce unprompted change driven by large, varied, and uncoordinated audiences.” The Feminist Cyberlaw authors do not discard novelty but reestablish a legacy of novel uses, hacks, and appropriations from communities overlooked, discarded, or misunderstood by Silicon Valley and its many imitators. Feminist Cyberlaw voices pull us back to note the *legacies of excellence and oppression* found in our most essential social institutions and invisible innovators.

We grouped Feminist Cyberlaw into three broad categories: ownership, access, and governance. Each section includes a set of chapters organized by legal subject and social value, notably not technology. Feminist Cyberlaw is values first,

recognizing the power dynamics and possibilities of technology as central to protecting and furthering those values. Values weaved throughout the chapters include accessibility, accountability, advocacy, attribution, autonomy, consent, creativity, dignity, participation, safety, and world building. Together, they are in conversation with those authors noted as canon, as well as the many scholars who, throughout the same period and within their intellectual domains and beyond, increasingly investigated the way oppression played out in cyberspace, its rhetoric, its logics, and its rules.¹⁶ You'll find a unique genealogy built through the feminist citation practices of the authors, acknowledging the "debt to those who came before; those who helped us find our way when the way was obscured because we deviated from the paths we were told to follow."¹⁷

The first group of Feminist Cyberlaw authors reveal and challenge patriarchal ownership structures in a number of different contexts from various angles. Amanda Levendowski surfaces the "FU" in fair use that degrades and exploits the bodies and labor of women and people of color and develops a new vocabulary for feminist use by delving into the historical context of libraries. Leah Grinvald and Ofer Tur-Sinai highlight the unrealized potential to repair, arguing that copyright furthers the oppressive and exploitative limitations on repair, but seen through a feminist lens, the law can carve out more expansive exemptions to create a bolder right to repair. Nina Srejovic investigates why women, the first computer programmers, don't hold more patents, and finds that it's all about stereotypes of which bodies innovate. Cynthia Conti-Cook uses spillers, fillers, and thrillers to arrange a better procurement process, across its many varieties, that would limit trade secrecy obstruction with the legal precedent of the public's right to know. Alexandra Roberts asks how women and marginalized people can better access and benefit from intellectual property rights instead of being exploited by them and answers by arguing that trademark law can, under the right circumstances, offer disenfranchised groups a means to controlling hashtags. Anjali Vats compares the racial geopolitics of cybercrime using Critical Race Intellectual Property to understand "good" versus "bad" intellectual property actors.

Another set of Feminist Cyberlaw writers investigate the way in which access makes different bodies vulnerable and empowered. Kendra Albert asks whether the law that originally prevented website operators from being held liable for the content posted by users to promote the growth of the web might be accidentally and even inspirationally work against the prison industrial complex. Blake Reid describes how the phenomenon of providing access to those bodies with disabilities consistently brings forth positive effects for those without, but warns that emphasizing this popular policy motive can lead to deprioritizing and erasing disabled users from design and policy processes. Esha Bhandari highlights how those seeking to assess the civil rights legality of algorithms that act on them must do so in an uncertain legal environment due to an outsized corporate influence over antiquated hacking laws. Two chapters describe new threats to bodies after

the US Supreme Court overturned its 1973 case *Roe v. Wade*, which established a constitutional right to an abortion, with its 2022 decision *Dobbs v. Jackson Women's Health*. Each tackles a unique facet of the amplified threats facing pregnant people. Michela Meister and Karen Levy describe how a post-*Roe* landscape is incredibly dangerous for a growing number of bodies, highlighting the physical threats of digital invasions and the vast fronts on which those violations may occur. Elizabeth Joh explains that the further limiting of access to safe abortions by *Dobbs* does not take us back to a time before *Roe*, but finds our intimacies brutally exposed in the present, most brutally by those least able to defend themselves, and requires structural changes for the future.

Finally, a collection of Feminist Cyberlaw authors write broadly about governance categories that get at different social values. Using sexual speech as her guide, Hannah Block-Wehba traces early victories for civil society that set the stage for a libertarianism emphasizing government threats to speech and privacy while leaving a conservative, market-minded set of private platforms to shape the moralistic terms of expression and asks whether information about abortions will give rise to an effective wave of civil libertarianism or further marginalize the subject. Gabrielle Rejouis describes the many vulnerabilities experienced by Black women online produced by a lack of intervention from dominant platforms and argues for wielding antitrust law to restructure social media, because these companies use their dominance as both insulation from pressure to protect their Black women users and as an excuse to inconsistently apply their own policies to the detriment of Black women. Jasmine McNealy challenges the viability of consent as a governance tool for data protection by complicating the politics and potential of control surrounding unsolicited dick pics. Iván Chaar López and Victoria Sánchez take an ethnographic dive into the racial politics of AI labor and digital infrastructure maintenance, arguing that current legislative efforts to continually classify and reclassify workers preserve a distinction about which bodies provide exploitable labor. Within the criminal justice context, Ngozi Okidegbe resists the way algorithms lock in existing inequalities by reminding us that algorithmic systems further the interests, attitudes, and values of those that design and employ them; she redirects them toward liberatory ideologies, calling for the meaningful shifts in power to our most oppressed and subjugated people. Kate Darling wraps up this volume by reflecting on how voices from breast pump innovators expressing concerns over historical erasure have shaped her work on the future of robotics policy and invites us all to find those a-ha moments.

These alternative voices provide alternative perspectives, but Feminist Cyberlaw is for everyone.¹⁸ We are overwhelmingly grateful to our authors for giving us so much to introduce, and to you, reader, for joining us in this reunification and reorientation. We organized the collection from a broad, intersectional feminist perspective, utilizing the “prism” to bring to light the dynamics otherwise underappreciated in the analysis of subordination.¹⁹ However, you won't find a unified

theory of Feminist Cyberlaw, nor a volume steeped in feminist theory, in the following pages. You also won't find degradations of bro-cyberlaw or attacks on existing cyberlaw scholarship. We hope our volume will supplement the canon and current course materials in cyberlaw, information and communication policy, and computer ethics. Through a tweak to the senses, we hope to expand possibilities. We hope this encouragement leads to further development of Feminist Cyberlaw, for this volume, edited by two white women and largely limited to the United States, is just the beginning. We know there are more perspectives and voices to hear and support. We look forward to doing so.

NOTES

1. We first gathered under this name at the 2020 Privacy Law Scholars Conference.
2. James Grimmelman, *INTERNET LAW: CASES & PROBLEMS* (12th ed., 2022).
3. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, EFF (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.
4. Lessig followed Joel Reidenberg's 1998 article *Lex Informatica*, which argued that technology delivers a distinct regulatory force. Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules through Technology*, 76 *TEX. L. REV.* 533 (1998).
5. Lawrence Lessig, *CODE: AND OTHER LAWS OF CYBERSPACE* (1999).
6. Jonathan Zittrain, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008).
7. Jerry Kang, *Cyber-Race*, 113 *HARV. L. REV.* 1130 (2000).
8. Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 *STAN. L. REV.* 1175 (2000).
9. Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 *AM. U. J. GENDER SO. POL'Y & L.* 463 (2006); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 *AM. U. J. GENDER, SOC. POL'Y & L.* 273 (2007); Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 *CAL. L. REV.* 1 (2007).
10. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 *COLUM. J. GENDER & L.* 224 (2011); Danielle Citron, *HATE CRIMES IN CYBERSPACE* (2014).
11. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373 (2000); Julie E. Cohen, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012); Julie E. Cohen, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTION OF INFORMATIONAL CAPITALISM* (2019).
12. Marika Cifor, Patricia Garcia, T.L. Cowan, Jasmine Rault, Tonia Sutherland, Anita Say Chan, Jennifer Rode, Anna Lauren Hoffmann, Niloufar Salehi, and Lisa Nakamura, *Feminist Data Manifest-No* (2019), <https://www.manifestno.com/>; Design Justice Network, *Design Justice Network Principles* (last updated summer 2018), <https://designjustice.org/read-the-principles>.
13. Amanda Levendowski, *Defragging Feminist Cyberlaw*, 37 *BERKELEY TECH. L.J.* 1 (forthcoming 2023).
14. Lilly Irani, *The Cultural Work of Microwork*, 17(5) *NEW MEDIA AND SOCIETY*, 720 (2013); Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 357 (2013); danah boyd. *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* (2014); Karen Levy, *Intimate Surveillance*, 51 *IDAHO L. REV.* 3 (2015); Dan Bouk, *HOW OUR DAYS BECAME NUMBERED: RISK AND THE RISE OF THE STATISTICAL INDIVIDUAL* (2015); Meg Leta Jones, *CTRL+Z: THE RIGHT TO BE FORGOTTEN* (2016); Kate Klonick, *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, 75 *MARYLAND L. REV.* 1029 (2016); Solon Barocas and Andrew Selbst, *Big Data's Disparate Impact*, 104 *CALI. L. REV.* 671 (2016); Khiara M. Bridges, *THE POVERTY OF PRIVACY* (2017);

Mar Hicks, PROGRAMMED INEQUALITY: HOW BRITAIN DISCARDED WOMEN TECHNOLOGISTS AND LOST ITS EDGE IN COMPUTING (2017); Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018); Safiya Umoja Noble, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); Ruha Benjamin, RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE (2019); Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 L. & SOC. INQ. 4 (2019); Sarah T. Roberts, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA (2019); Scott Skinner-Thompson, PRIVACY AT THE MARGINS (2020); Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT'L L.J. 41 (2020); Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671 (2020); Charleton D. McIlwain, BLACK SOFTWARE: THE INTERNET & RACIAL JUSTICE, FROM THE AFRONET TO BLACK LIVES MATTER (2021); Vincent Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021); Kendra Albert, *Five Reflections from Four Years of FOSTA/SESTA*, CARDOZO ARTS & ENTMT L.J. (forthcoming 2022).

15. Pope Francis, "Towards an Ever Wider 'We,'" *Message for the 107th World Day of Migrants and Refugees*, SUMMARY OF BULLETIN VATICAN PRESS (June 5, 2021).

16. Some writers at the time went largely overlooked. Two notable examples are Paulina Borsook, CYBERSELFISH: A CRITICAL ROMP THROUGH THE TERRIBLY LIBERTARIAN CULTURE OF HIGH TECH (2001); and Jane Bailey and Adrienne Telford, *What's So Cyber about It: Reflections on Cyberfeminism Contribution to Legal Studies* CAN. J. WOMEN & L. 19 (2007): 243.

17. Sarah Ahmed, LIVING A FEMINIST LIFE (2017).

18. Catherine Knight Steele explains that like bell hooks's feminism, digital Black feminism is not about division, but adds that it is "the lived experience, writing, and thought work of Black women that make Black feminism accessible to multiple races and genders." Catherine Knight Steele, DIGITAL BLACK FEMINISM (2021); bell hooks, FEMINISM IS FOR EVERYBODY (2000).

19. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 140 UNI. OF CHI. LEGAL FORUM, 139 (1989); Katy Steinmetz, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What it Means to Her Today*, TIME (May 10, 2018), <https://time.com/5786710/kimberle-crenshaw-intersectionality/>.