



DURKHEIM'S INTERNET: SOCIAL AND POLITICAL THEORY IN ONLINE SOCIETY

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ABSTRACT: While the Internet has changed dramatically since the early 1990s, the legal regime governing the right to privacy online and Internet speech is still steeped in a myth of the Internet user, completely hidden from others, in total control of his online experience, and free to come and go as he pleases. This false image of the "virtual self" has also contributed to an ethos of lawlessness, irresponsibility, and radical individuation online, allowing the evisceration of online privacy and the proliferation of hate and harassment.

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I argue that the myth of the online anonym is not only false as a matter of technology, but also inaccurate – it does not reflect the sociology of the Internet: who we are online, what we want, and how we engage in Internet society. I argue that decreasing online anonymity, the mediation of our online experiences through intermediaries, and the involuntary nature of much of our online presence require us to reorient the way we think about the right to privacy and freedom of speech online.

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INTRODUCTION

There is a pervasive impression that the online world offers its users unregulated and rapid communication among end users, uninterrupted connections to distant audiences, and direct access to a wealth of information with minimal transaction costs. It does this, the story continues, for anonymous users with an almost mystical or magical purity – *a* sends a photo directly to *b* titled *x.jpg* by clicking “send;” *x* writes a blog post immediately accessible to all users by clicking “publish” on TypePad;¹ and *p* updates *q*’s Wikipedia

¹ TypePad is blogging software that allows bloggers to write and maintain their blogs.

page to say that q is gay by logging in as “mrqISgay” and clicking “edit.”²

Yet this image of a free and anonymous online world (Figure 1) is simply false. The Internet may put rapid communication and access to a worldwide mass audience at the fingertips of anyone with a cell phone, but it does so through private intermediaries who filter for us, highlight relevant search results, and provide the platform for every online interaction (Figure 2). Our online selves are also traceable and increasingly identifiable as extensions of our physical selves.

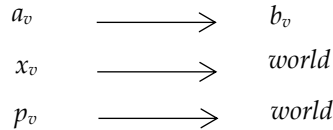


Figure 1

Consider, for example, the process by which an email goes from one computer to another. Most people think it looks like the simple, binodal relationship pictured in the first part of Figure 1. One person, designated a_v , where v refers to the “virtual” or digital nature of the users and process, sends an email to his recipient b_v . But in

² Anyone can create a Wikipedia account and edit most posts. Providing an email is optional. See *Create an Account*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Special:UserLogin&type=signup&returnto=Main_Page (last visited Mar. 3, 2013 4:15PM).

reality, emails wind their way through a complex series of processes and servers, touching on mechanisms given to us for a price by private companies. Figure 2 shows an already oversimplified journey: *a* logs on to the Internet via an Internet Service Provider, or ISP, like TimeWarner Cable or AT&T, and uses an email client, like Microsoft Outlook or Google's Gmail, to write an email. Upon clicking "send," that email is processed through the server associated with *a*'s email client and finds the nearest host in cyberspace. The email travels through a series of hosts, each of which ask a Domain Name System (DNS) Server to find out where to route the email next. Perhaps after passing through a virus or spam filter, the email is processed by the recipient email server, down to the email client, where the email can be viewed once *b* logs on to his Internet via his ISP. At each stage of this process, intermediaries learn more about users, making complete anonymity a fantasy.

The myth of the anonymous Internet user is not only pervasive – even among politicians who should know better³ – but this mistaken image of the Internet user governing his virtual experience pervades the law of the Internet. It is part of the zeitgeist of the medium itself: the online world is somehow different, separate, apart, ephemeral or just plain fake. This perception has caused us to perceive volitional actions where participation in online life is anything but voluntary. It has also encouraged us to elevate the importance of online speech while devaluing the effect of online harassment.

³ See, e.g., *Anthony Weiner Twitter Scandal: New Photos Emerge*, HUFFINGTON POST (June 6, 2011), http://www.huffingtonpost.com/2011/06/06/anthony-weiner-twitter-new-photos_n_871817.html; Matthew Jaffe, *Congressman Chris Lee Resigns After Shirtless Photo Posted on Internet*, ABC NEWS (Feb. 9, 2011), <http://abcnews.go.com/Politics/congressman-chris-lee-resigns-shirtless-photo-posted-internet/story?id=12878937>.

There are “Kill a Jew Day” groups⁴ and entire websites dedicated to ranking classmates by attractiveness and asking the question, “Who would you do?”⁵ It has allowed devastating cyberharassment of gay and lesbian youth to push victims to suicide,⁶ targeted women with threats and hate and left us incapable of conceiving of the harm wrought by online defamation against a victim and his community. Online harassment and violence is very real, yet for some reason we tend think of it as less serious than anything that happens in the physical world.⁷

⁴ Yaakov Lappin, ‘Kill a Jew’ Page on Facebook Sparks Furor, JERUSALEM POST (July 5, 2010), <http://www.jpost.com/JewishWorld/JewishNews/Article.aspx?id=180456>.

⁵ NJ College Aims To Get ‘Cyber-Bullying’ Anonymous Website Shut Down, CBSNEWYORK.COM (Apr. 8, 2011), <http://newyork.cbslocal.com/2011/04/08/nj-college-aims-to-get-cyber-bullying-anonymous-website-shut-down/>.

⁶ E.g., Emily Bazelon, *Bullies Beware*, SLATE (Apr. 30, 2010), <http://www.slate.com/id/2252543/>; Emily Friedman, *Victim of Secret Dorm Sex Tape Posts Facebook Goodbye, Jumps to His Death*, ABC NEWS (Sept. 29, 2010), <http://abcnews.go.com/US/victim-secret-dorm-sex-tape-commits-suicide/story?id=11758716>. And that was not the first time. Tyler had complained to university officials that his roommate was videotaping him, but nothing was done. Jonathan Lemire et al., *Rutgers' Tyler Clementi Complained of Video Voyeur Before Fatal Fall*, DAILY NEWS (Oct. 1, 2010), http://www.nydailynews.com/ny_local/2010/10/01/2010-10-01_he_wanted_roomie_out_rutgers_suicide_complained_of_video_voyeur_before_fatal_fal.html.

⁷ This is the phenomenon that Mary Anne Franks calls “cyberspace idealism.” See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 226 (2011) (“[H]arms committed in cyberspace are often dismissed as ‘not really real,’ as they are by their nature not physical, bodily harms.”).

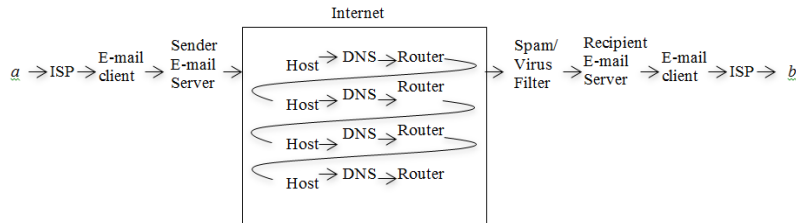


Figure 2

I argue that Internet users are not free and autonomous agents of pure choice, but rather situated social selves limited by intermediaries and the needs of the modern social world. They are Durkheimian agents, not Rawlsian ones. They are, as Durkheim argued, automatic participants in a social order that existed before them, tailoring their behavior and reflecting the interdependence of all things. They are not, as Internet users are roughly described in several areas of Internet law today, kings of everything, yet masters of nothing, bumping heads with other virtual selves like hydrogen atoms randomly hoping for fusion.

There are wide-reaching implications of this reorientation of perspective, from online privacy and the consequences of partial disclosures to the applicability of the third party doctrine to the protections afforded Internet speech. For example, if Internet users are truly voluntary agents of free choice, giving up their personal data when they choose, it makes sense that those who assume the risks of disclosure should lose the privacy interest in the matters disclosed. However, if participation in online life is constructively involuntary, then the disclosures necessary to that life should not extinguish users' privacy rights. Similarly, if users are social actors in an interdependent social world online, then libertarian free speech law is a bad fit for the virtual world.

In this Article, I introduce a sociological description of today's Internet user. I first show how the inaccurate assumption of the un-

fettered online anonymity has created a doctrine of near-boundless Internet free speech and has done damage to online privacy. I then challenge the assumption, replace it with a more accurate description, indebted to sociological theory, of the modern Internet user and construct an alternative way of analyzing free speech and privacy online. I argue that decreasing online anonymity, the mediation of our online experiences through intermediaries, and the involuntary nature of much of our online presence underscore the need for a sociology-driven Internet speech and privacy jurisprudence, or one that reflects empirically observed behavior and effects.

In Part I, I describe the myth of the virtual self as a completely autonomous anonymity roaming through cyberspace. The Supreme Court's Internet speech cases, several online privacy and disclosure decisions, and the language of online libertarians⁸ make this vision clear. Relying on philosophical and legal scholars of liberalism, classical Republicanism, and American constitutionalism, I argue in Part II that the conception of the virtual self, which that jurisprudence reflects is remarkably similar to Immanuel Kant's autonomous self⁹ and John Rawls's political conception of the person¹⁰ in

⁸ I use the term "online libertarian" to refer to those scholars, advocates, and activists who believe that the best Internet is the least regulated Internet, and should be the home to as much unregulated speech as possible.

⁹ Kant's autonomous self is the foundation of his understanding of human behavior and the core of his political theory. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Lara Denis ed., Thomas Kingsmill Abbott trans., 2005) (eBook for iPad version) [hereinafter KANT, *GROUNDWORK*]; IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Thomas Kingsmill Abbott ed., 2009).

¹⁰ While Rawls's *A Theory of Justice* based its political principles on the Kantian conception of the person, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *JUSTICE*], Rawls responded to criticism of that position by divorcing his theo-

that all are separate from their physical or embodied selves and autonomous agents of free choice. I also describe the implications of this vision for two areas of law – online speech and privacy – arguing that the myth of the autonomous agent underlies most of our modern First Amendment law and is doing violence to user privacy online.¹¹

Given these difficulties, I use Part III to propose a more robust and more accurate vision of the virtual self that is based on the sociological theories of Emile Durkheim¹² and four descriptive sociological claims of online life: (1) that most, if not all, of us have some kind of virtual presence; (2) that our virtual selves are increasingly public, i.e., not anonymous, selves; (3) that our virtual interactions are mediated by private Internet intermediaries; and (4) that many of us are online involuntarily to some extent. While most of these statements are no longer controversial, I show how these elements are absent from online free speech and privacy jurisprudence even though they constitute the best description of our virtual presence going forward. In Part IV, I show how a reorientation of the virtual

ries from its Kantian roots. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993); Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765 (1994) (book review).

¹¹ We have created near-absolute free speech jurisprudence in both the physical and virtual worlds, putting teenagers at risk and forcing those of us who wish to address cyberharassment to rely on arguments for a school's disciplinary authority of cyberbullies. This was my argument in *Hostile Educational Environments*. Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705 (2012) (arguing that the difference between single-incident cyberaggression and repeated cyberbullying means that, under current law, the respective cyberattacker's free speech defenses to a school's authority to punish them should be treated differently).

¹² See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 20 (W.D. Halls trans., 1997) [hereinafter DURKHEIM, *DOL*]. See also DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Carol Cosman trans., 2001) [hereinafter DURKHEIM, *ELEMENTARY FORMS*].

self would foster robust protection for online privacy and safety.¹³ This model would protect everyone, including at-risk youth, women and other minorities from harassment, and protect the privacy of all Internet users. In the end, I create a vision of the virtual self and a proposal for an open, participatory online world that reflects social norms, virtue and community responsibility in a society that is not separate from our physical world, but rather bound up with who we are offline.¹⁴

I. THE MYTH OF THE INTERNET USER: ANONYMITY AND FREE CHOICE

Sitting in an Internet cafe, you could be an overweight and lonely middle-aged man; but, once you access your online avatar, you could be a svelte, popular young woman. You could be brave where your physical self was meek or proud of your sexuality where your physical self had to hide in the closet. When considering the problem of minors accessing lewd or sexual content online, the Supreme Court took this potential for anonymity to heart, noting that there is “no effective way” to determine a user’s age.¹⁵ Nor, for that matter, could strangers accessing dating sites assure them-

¹³ Some scholars refer to “digital citizenship,” or the ability to participate actively and effectively in online life. See, e.g., Danielle Keats Citron and Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. Rev. 1435 (2011) (discussing how certain policy considerations make sense not merely for their positive consequences, but as an expression of our digital identity); KAREN MOSSBERGER ET AL., *DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY AND PARTICIPATION* (2008).

¹⁴ Many of the theories and claims in this paper are the subjects of more in-depth qualitative and quantitative studies for my doctoral dissertation. Those results will be published in article form along the way or upon publication of the dissertation.

¹⁵ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 876 (1997).

selves that their friendly digital interlocutors are really the young men or women in the pictures just exchanged via email. The Internet was supposed to be liberating, a technology that allowed you to be whomever you desired, at any time.

Anonymity was only one part of this liberty. The Internet was supposed to free the online self from the constraints of its physical cousin not only by allowing a user to create a whole new person, but also by eliminating the external constraints on the physical self's access to content, i.e., publishers who censor speech and intermediaries whose control of the media makes it expensive to join in. John Perry Barlow¹⁶ called it "a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."¹⁷

This rhetoric found its way into early legal scholarship about speech on the Internet. Lauding the democratizing potential of what was then called the "information superhighway," Eugene Volokh believed that the Internet would empower end users since what they read, said, and heard in the physical world was controlled by intermediaries, like Bertelsmann, Rupert Murdoch, and the publisher of the New York Times.¹⁸ On the Internet, content would go "straight from the speaker to the listener,"¹⁹ and since financial and

¹⁶ Mr. Barlow, an essayist and former lyricist for the Grateful Dead, has been called a "cyberlibertarian." See JACK GOLDSMITH AND TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 17 (2006).

¹⁷ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), <https://projects.eff.org/~barlow/Declaration-Final.html>. See also Franks, *supra* note 7, at 235-36 (citing additional similar statements from Mr. Barlow and arguing that Mr. Barlow's view is the foundation for "cyberspace idealism," a utopian vision of the online world).

¹⁸ Eugene Volokh, *Cheap Speech and What it Will Do*, 104 YALE L.J. 1805, 1834 (1995).

¹⁹ *Id.* at 1836.

opportunistic barriers to entry into the online speech market would be close to zero, anyone who wanted "a variety of topics or views will easily be able to get them."²⁰ Kathleen Sullivan agreed. Since the Internet was available at home to anyone who could afford a computer and a connection, or to anyone who could rent a few minutes of connectivity at a cybercafé or drive to the public library to use it for free, there would be more speakers and more listeners, and more things said and heard.²¹

Internet users were also supposed to be autonomous. Unlike a radio station, a newspaper, or a cable station, each of which provides specific content at a specific hour to users who happen to be listening, reading,²² or watching at the time, the Internet would not "push" content. Rather, "Internet consumers pull information from the net at their own volition."²³ And given the economic and technical factors that make Internet speech cheap and, therefore, abundant, being able to choose content from an enormous and limitless cache was to be a true consumer in the ideal marketplace of ideas.²⁴ As we shall see, this ability to choose among possibilities is not only central to the myth of the online end user, but also a foundational element of online speech and privacy jurisprudence.

²⁰ *Id.* at 1834.

²¹ Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 *UCLA L. REV.* 1653, 1670 (1998).

²² Even newspapers provide content at specific times. In addition to those local papers that used to print morning and evening issues, newspapers generally provide content once per day, each morning.

²³ Sullivan, *supra* note 21, at 1668.

²⁴ *Id.* at 1669-70 (citing Volokh, *supra* note 18).

The unique features of the Internet – instant communication, abundance of content, and the autonomy of the user²⁵ – inspired its early enthusiasts to see the online world as a realization of a long-sought goal of free speech law – the “marketplace of ideas.”²⁶ That “idealism,”²⁷ to use Mary Ann Franks’s word, has been reaffirmed by the Supreme Court’s online speech jurisprudence. In *Ashcroft v. American Civil Liberties Union*,²⁸ the Court hailed the Internet as a “forum for a true diversity of political discourse.”²⁹ In *Reno v. American Civil Liberties Union*,³⁰ the Court marveled that the Internet enabled “any person with a phone line” to become a “pamphleteer” or a “town crier with a voice that resonates farther than it could from any soapbox.”³¹ At any given time, the Court said, Internet users could freely access content on their own, without being forced to consume any of it.³² Internet communications, the Court noted, “do

²⁵ *Id.* at 1667–69. Professor Sullivan also refers to the “unboundedness” of the Internet. While this has come to refer to the incorrect view that the cross-boundary nature of data means that content regulation is not possible for individual nations – consider the examples of Chinese censorship and Egypt shutting down the Internet during the 2011 Arab Spring – Professor Sullivan was simply referring to the ability of Internet users to reach international audiences, sometimes involuntarily.

²⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

²⁷ Franks, *Unwilling Avatars*, *supra* note 7, at 226, 235–36. This “idealism” did not go unopposed. See, e.g., Jerry Berman and Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *YALE L.J.* 1619, 1628–29, 1636–37 (1995).

²⁸ 535 U.S. 564 (2002).

²⁹ *Id.* at 566.

³⁰ 521 U.S. 844 (1997).

³¹ *Id.* at 870.

³² *Id.* at 852 (citing *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)) (“content on the Internet . . . as diverse as human thought”).

not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"³³ This distinguished the Internet from, say, a radio station or a television broadcast, which could use its scheduled content to penetrate the home with images unsuitable for children. An online user would have to click on a sex-themed webpage and pass through its pop-up warning for images to come up, but if a prime time cable host used a curse word or if an evening drama showed its star in some state of undress, that content was pushed onto consumers involuntarily.

In the privacy context, the ideal of the freely choosing self manifests itself when the assumption of risk doctrine justifies the extinguishment of a continued privacy interest after an initial disclosure. A telephone user, for example, "voluntarily convey[s] numerical information to the telephone company . . . [and] assume[s] the risk" that the telephone company would subsequently reveal that information.³⁴ A bank depositor has no legitimate expectation of privacy in the financial information "voluntarily conveyed to . . . banks" because the depositor "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."³⁵ This doctrine has been extended to the Internet. Several federal courts have held that since any information conveyed to an online service provider in order to access the Internet is "knowingly revealed," there could be no invasion of privacy when an Internet service provider ("ISP") gives that information to some-

³³ *Id.* at 869 (citing *Reno*, 929 F. Supp. at 844).

³⁴ *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

³⁵ *United States v. Miller*, 425 U.S. 435, 443 (1976).

one else.³⁶ Similarly, in *United States v. Forrester*,³⁷ the Ninth Circuit refused to recognize any legitimate expectation of privacy in the to/from addresses of email messages or the Internet Protocol (IP) addresses of the websites we visit because “this information is “voluntarily” turned over to ISPs.³⁸ As Justice Marshall noted in his dissent in *Smith v. Maryland*,³⁹ the foundation of the assumption of risk doctrine is the online anonym’s power of free choice, where he exercises some volition or “discretion” in deciding on a course of action.⁴⁰

Putting this together, the early image of the Internet user was as an anonymous and autonomous self, one who was free from the constraints imposed by his own body, media intermediaries and censors, and one who freely and voluntarily governed his own user experience. And he was both the same as every other Internet user – everyone was supposedly anonymous and free and could access the same content if he so chose – and different: since the Internet could be accessed in Springfield, Paris and Ulan Batur, it necessarily constituted a pluralistic society of users. This online anonym was a free figure, hidden from everyone else, learning from and contributing to a pluralistic community of man.

I argue that the so-called myth of the virtual self – detached from, blind to, and unconstrained by his physical self and the phys-

³⁶ *United States v. Hambrick*, 55 F. Supp. 2d 504, 508 (W.D. Va. 1999). *See also* *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (“When defendant entered into an agreement with Road Runner for Internet service, he knowingly revealed all information connected to [his] IP address . . . He cannot now claim to have a Fourth Amendment privacy interest in his subscriber information.”).

³⁷ 512 F.3d 500th (9th Cir. 2008).

³⁸ *Id.* at 510.

³⁹ 442 U.S. 735 (1979).

⁴⁰ *Id.* at 749 (Marshall, J., dissenting).

ical world in which he lives – is at the heart of our current Internet speech and privacy jurisprudence even though the image was never accurate, internally inconsistent, and, in any event, outdated. It has contributed to an online speech doctrine that endangers gay and lesbian teenagers, women,⁴¹ and other victimized minorities, and stacks the deck against the protection of user privacy online.

The American philosopher John Rawls created a strikingly similar ideal self, indebted to Immanuel Kant, and a political conception of the self, to defend the modern liberal state and its organizing principles of liberty, tolerance, and pluralism. His ideal self, anonymous to everyone else behind the “veil of ignorance” and an autonomous agent of choice, was not weighed down by prejudice, limitations, and other encumbrances. It was the self we should be when we craft organizing principles for society. Rawls could not have known it, but the early image of the Internet user captured Rawls’s vision,⁴² and, to some extent, Internet society mirrors the world according to Rawls’s self.

⁴¹ Danielle Citron’s work focuses on the victimization of women online. See, e.g., Danielle Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

⁴² Others have compared the mythological virtual self to the writings on freedom and liberty of John Locke. See Franks, *supra* note 7, at 234–37. Professor Franks compares the “rhetoric of cyberspace idealism,” i.e., the unfettered freedom of the Internet user, to Locke’s ideal of freedom in the state of nature. *Id.* at 234. That argument is persuasive, and consistent with my own. I compare the so-called ideal virtual self, the anonym taking advantage of the freedom Professor Franks discusses, to the autonomous self of the Kantian/Rawlsian tradition. All liberals in the classical sense, Locke, Kant and Rawls were part of the same project to elevate the individual over its ends. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (1690).

I. KANT, RAWLS AND IMPLICATIONS FOR FREE SPEECH AND PRIVACY JURISPRUDENCE

Immanuel Kant and neo-Kantians⁴³ like John Rawls are not the only philosophers of liberalism whose ideas have shaped American law,⁴⁴ but their theories have become the core of a modern state that prioritizes individual rights and sees its members as free agents of choice. They have also become the basis for modern free speech and privacy jurisprudence, both in the physical world and online: they envision a duality of the self where autonomy and choice are central to the democratic idea.

A. THE LIBERAL SELF AND THE MYTH OF THE ONLINE ANONYM

The Kantian scholar Christine Korsgaard reminds us that Kant constructs two separate worlds, one in which man is free, one in which he is not.⁴⁵ In the real world we are not free. We, like animals, are governed by external forces; we can neither completely control our need to eat nor master our desire to have sex.⁴⁶ This is what Kant calls our "heteronomous actions," our actions in the physical

⁴³ Notably, Durkheim should also be considered a neo-Kantian. *See, e.g.,* ANTHONY GIDDENS, EMILE DURKHEIM 91 (1979) (referring to certain of Durkheim's writings as "sociological Kantianism").

⁴⁴ Rogers Smith and many others would point to Locke as the primary liberal voice that influenced the Framers. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 1, 18-29 (1990).

⁴⁵ KANT, CRITIQUE OF PRACTICAL REASON, *supra* note 9, at 190; KANT, GROUNDWORK, *supra* note 9, at 27-28. For my analysis of Kant's view of the self, I rely primarily on the work of Christine Korsgaard, Thomas Scanlon, John Rawls and Michael Sandel.

⁴⁶ Christine Korsgaard, *Fellow Creatures: Kantian Ethics and Our Duties to Animals*, The Tanner Lecture on Human Values, 5, 12 (Feb. 6, 2004), available at <http://www.people.fas.harvard.edu/~korsgaard/CMK.FellowCreatures.pdf>.

world.⁴⁷ Every step we take in the physical world is based on the desire to achieve something that we want or need. Freedom, therefore, is contingent upon deposing our wants and desires from their mastery over us. To do this, we must detach ourselves from the physical world. Here we can begin to see a parallel to the myth of the virtual self. In Kant's morality, only when we step away into a purely intelligible world can we be free.⁴⁸ Autonomy, in contrast to heteronomy, is independence from "the determining causes of the world of sense."⁴⁹ But since our actions in the real world are governed entirely by wants and desires, our autonomous selves only exist in the intelligible world, prior to those inclinations taking hold over us. "If we think of ourselves as free," Kant writes, "we transport ourselves" outside of the real world and recognize "the autonomy of the will."⁵⁰ This detachment is necessary to freely choose among ends because any choice we make in the physical world is governed by wants and desires and, thus, never truly free.

For Kant, then, autonomy and choice are salient. In Kant's world, the free individual is primary and controls his destiny. Freedom derives from stepping outside the physical world, breaking loose from the constraints imposed by our bodies, our wants and our needs, and entering a world governed by pure reason, where we can decide what we want on our own terms. This vision of the rational self sounds strikingly similar to the myth of the virtual self described by Eugene Volokh, John Perry Barlow and the courts in *Reno*, *Zeran*, and *Forrester*, among others. Both the rational self and the early image of the virtual self find liberation in shedding physi-

⁴⁷ KANT, GROUNDWORK, *supra* note 10, at 51.

⁴⁸ *Id.* at 71.

⁴⁹ *Id.*

⁵⁰ *Id.* at 72.

cal constraints, both are free agents of choice in control of their destiny, and both inhabit an ideal world.

Rawls's conception of the self is also free and independent, not limited by the physical, emotional and moral constraints of his physical life, and exercising his freedom by choosing his goals from among a myriad of possibilities. In *Political Liberalism*, Rawls argued that neo-Kantian detachment is necessary only for political purposes, not as any universal source of just behavior. He felt that we need to detach ourselves from our wants, desires, and prejudices in order to think about questions of political justice. Should picketing be banned near a school?⁵¹ Should we force people to take loyalty oaths before they can get a benefit from the state?⁵² Privately, there may be commitments so important that there would be no way that we "could or should . . . stand apart from [them] and evaluate objectively. . . . It [would be] simply unthinkable to view [our]selves apart from certain religious, philosophical, and moral convictions."⁵³ But when we turn from our private lives to the public sphere, those ties, however strong, have to be left at home, lest we use our antecedent moral prejudices to infringe on the rights of others. For example, when deciding if all types of picketing except school-related labor picketing should be banned near a school, we should bracket our personal opinions concerning unpopular views and ask ourselves if it is appropriate for the state to accept some types of

⁵¹ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

⁵² *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that withholding tax exemptions because of failure to take a loyalty oath violated the First Amendment).

⁵³ RAWLS, *POLITICAL LIBERALISM*, *supra* note 11, at 31.

protest, but not others.⁵⁴ And when determining the constitutionality of conditioning rights on taking a loyalty oath, we should bracket our love of country and consider whether we want our rights conditioned on the State forcing us to speak against our better judgment.⁵⁵

The Rawlsian self exists in a society assumed to be plural, or constitutive of different people. Otherwise, there would be no need for principles of justice, which “deal with conflicting claims upon the advantages won by social co-operation; they apply to the relations among several persons or groups.”⁵⁶ Conflicts arise because we are different; we each possess a unique cacophony of wants, desires, hopes and dreams. This leads to a host of political and legal implications for the modern liberal state – most notably, neutrality among the diverse interests of its citizens.

Rawls's political conception of the person, therefore, still constructs a duality in the self: we are private selves and public selves. In private, the self is properly encumbered and influenced by those people and commitments around him; but when considering political questions in public, he should leave his prejudices behind. So,

⁵⁴ In *Mosley*, the Court wrote that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Mosley*, 408 U.S. at 95-96.

⁵⁵ In his concurring opinion in *Speiser's* companion case, Justice Black stated that “[l]oyalty oaths, as well as other contemporary ‘security measures,’ tend to stifle all forms of unorthodox or unpopular thinking or expression – the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be.” *First Unitarian Church of L.A. v. Cnty. of L.A.*, 357 U.S. 513, 532 (Black, J., concurring).

⁵⁶ RAWLS, JUSTICE, *supra* note 10, at 16.

the Kantian self – autonomous from and unconstrained by his ends – lives on the liberal public sphere Rawls creates.

This vision is just as liberating as – and strikingly similar to – the myth of online anonymity and the so-called “ideal” virtual world he inhabits. In the modern liberal state, Rawls wants us to exist as two people: one is complete with all the good and bad personality traits that come with wanting things, loving things, and hating things; the other is free from the constraints of the physical world, free to choose his way in life, and free to remain neutral to the choices of others. Similarly, the image of the online anonymity envisions two selves: one is limited by his body and identity in the real world; the other is unconstrained by physical, geographic and identifying limitations in the virtual world. Both the political sphere and the virtual world were supposed to be bastions of freedom, where we could shed whatever held us back and freely exercise our autonomy.

The Rawlsian self, defined by his autonomy and ability to choose, also describes much about modern free speech and privacy law, both in the physical world and online. Unfortunately, the primacy of the autonomous choosing self unencumbered by society has contributed to a First Amendment lawlessness and the evisceration of privacy rights.

B. IMPLICATIONS FOR SPEECH AND PRIVACY: FREE CHOICE AND NEUTRALITY

There are two salient and related implications of this vision of the person. First, his power to choose is central to who he is, an argument made persuasively by Professor Korsgaard: “when Kant

says rational nature or humanity is an end in itself, it is the power of rational choice that he is referring to, and in particular, the power to set an end . . . and pursue it by rational means."⁵⁷ What defines us, then, is our capacity to choose: "a moral person is a subject with ends *he has chosen*, and his fundamental preference is for conditions that enable him to frame a mode of life that expresses his nature as a free and equal rational being as fully as circumstances permit."⁵⁸ In Professor Sandel's words, the Kantian (and neo-Kantian) self is "a sovereign agent of choice."⁵⁹

If the power to choose is central to the self, then any society that he would create in the original position would respect his right to make his own choices, whatever they might be. Rawls was not alone in coming to this neo-Kantian conclusion. Thomas Scanlon would later describe a society based on the Kantian self in a similar way:

The "basic structure" of society is its legal, political, and economic framework If a basic structure does this in an acceptable way - if citizens have no reasonable complaint about their access to various positions within this framework or to the package of rights, liberties, and opportunities for economic reward that particular positions present them with - then that structure is just. It is up to individuals, operating within this framework, to choose their own ends and make use of the given opportunities and resources to pursue those ends as best they can. How success-

⁵⁷ CHRISTINE KORSGAARD, *CREATING THE KINGDOM OF ENDS* 124 (1996) [hereinafter KORSGAARD, *ENDS*].

⁵⁸ RAWLS, *JUSTICE*, *supra* note 10, at 561 (emphasis added).

⁵⁹ MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 22 (1998).

ful or unsuccessful, happy or unhappy they are as a result is their own responsibility.⁶⁰

By extension, then, it is also up to the individual to live with the consequences of the choices he makes. As we shall see, much modern privacy law assumes that the individual is a free and voluntary agent of choice, despite the fact that in many cases of partial disclosures he is nothing of the sort.

The next important implication of the individuated, autonomous self choosing his ends is, as Professor Scanlon notes, that the state must be neutral in the moral controversies of its members. In other words, if the most important thing about us is our ability and right to choose our own path, the state should not step in to tell us that one goal is better than the other, that this job is better for us than any other, or that this speech is worth more than any other speech. This implication of the Kantian and Rawlsian selves defines the character of online speech jurisprudence. It is "precisely because we are freely choosing, independent selves," Rawls states, "that we need a neutral framework, a framework of rights that refuses to choose among competing values and ends,"⁶¹ or, more specifically, refuses to choose *for us* among the myriad of possibilities from which we are supposed to choose. After all, what matters in the Rawlsian ethic is not what ends we choose, but our ability to choose our ends independent of some exogenous, comprehensive dogma.

Neutrality, therefore, means that the government should not affirm any particular vision of the good life, or, to use the common parlance, stay out of the moral debates of its citizens. Thus, the state

⁶⁰ THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER 244 (1998).

⁶¹ MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICAN IN SEARCH OF A PUBLIC PHILOSOPHY 12 (1996) [hereinafter SANDEL, DISCONTENT].

should not establish an official religion.⁶² Nor should the state criminalize abortion⁶³ or the possession or distribution of sex toys⁶⁴ simply because church teachings forbid it. When thinking about these questions in the liberal state, we must bracket away the parts of our lives mediated by tradition, social networks, and social norms. If these implications of the vision of the individuated, autonomous self extend to the virtual world, we must come to the same conclusion – namely, that the restrictions of the physical world are meaningless online. The state should foster free choice and remain neutral toward our online journey.

⁶² See *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 347 U.S. 203, 243 (1963) (“[I]n order to give effect to the First Amendment’s purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions [regarding theological disputes]. These principles were first expounded in the case of *Watson v. Jones*, which declared that judicial intervention in such a controversy would open up ‘the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination.’ Courts above all must be neutral, for ‘(t)he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.’” (internal citations omitted) (emphasis added)).

⁶³ See *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”).

⁶⁴ See *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (“The State’s primary justifications for the statute are ‘morality based.’ The asserted interests include ‘discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex.’ These interests in ‘public morality’ cannot constitutionally sustain the statute after *Lawrence*.”).

C. CHOICE AND NEUTRALITY IN MODERN FREE SPEECH AND
PRIVACY JURISPRUDENCE

I have argued that the liberal self – as described by Kant’s metaphysics and Rawls’s political conception of the person – is strikingly similar to the myth of the online anonym, who apparently enjoys unlimited freedom in the virtual world. The similarity is important because the assumption of free choice and the requirement of state neutrality are necessary implications of both the Kantian and Rawlsian conceptions of the self and the online anonym. In this section, I will use certain areas of speech and privacy law as case studies to prove how far the liberal selves and myth of the online anonym have penetrated modern law.

In the speech context, we have come to assume that the Constitution sets up a roughly neutral framework of rights that frowns on viewpoint- or content-based restrictions on speech. But our respect for neutrality has turned the Internet into a place of lawlessness, where the dangers of unbridled speech rights are ignored. In the privacy context, the third party doctrine and the common law principle of assumption of risk ignore both logic and the sociology of Internet users, and thereby limit privacy rights on the assumption that those users are free and voluntary agents of choice.

1. *Neutrality in Offline and Online Free Speech Law*

If he were alive today, Rawls would see much of his work reflected in the modern Supreme Court’s free speech precedents. The Court has gone out of its way to divorce the First Amendment from

any particular conception of the good, and instead sees the ban on laws abridging the freedom of speech⁶⁵ as setting up a neutral framework where most people can speak freely, subject to relatively few restrictions and exceptions.⁶⁶

⁶⁵ "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST., amend. I.

⁶⁶ See RAWLS, JUSTICE, *supra* note 10, at 203. It was not always that way. The Framers never conceived of the First Amendment as a unique expression of individual rights, but rather merely as a check on federal power and a guarantor of citizen participation. Thomas Jefferson would have been fine with the Sedition Act of 1798, for example, if it had come from the States; the authority to address an "overwhelming torrent of slander which is confounding all vice and virtue," he wrote to Abigail Adams, "is fully possessed by the several state legislatures While we deny that Congress have a right to controul the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so." LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 307 (1985) (quoting Jefferson to Abigail Adams, Sept. 4, 1804). And most legal historians believe that the Framers took a decidedly republican perspective on the First Amendment, focused mainly on the *telos* of free expression to an effective democracy. See, e.g., *id.* Justice Brandeis made this point in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927), where a unanimous Court upheld the conviction of a man who tried to establish a communist party, stating that "that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government." *Id.* at 375. Notably, Justice Brandeis may have been more influenced by classical philosophy than the words of the Framers. See Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 461-64 (1988). For Brandeis, the purpose of the First Amendment was to ensure that the citizenry could fulfill its responsibility to engage in active public discussion about political matters, a view the Framers embraced. Justice John Marshall agreed, believing that the danger to the public peace of "calumnious" speech was reason enough to suppress it because defamation that would "at length sully the fairest reputation, and will throw suspicion on the purest conduct," would cause wrought destruction of the public sphere or cause citizens to shy away from it. John Marshall, *Address of the Minority* 11-14 (1839) (quoted in ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 88, n. 61 (1968)). Rogers Smith reminds us that James Madison and Thomas Jefferson saw individual liberties in context, there for the purpose of promoting "'moderation and harmony' and hence 'the preservation of free government.'" SMITH, *supra* note 44, at 94. And Alexander Hamilton, in arguing for ratifica-

Content-neutrality refers to the doctrine that when a law restricts some element of speech, the Court's role is not to get involved in the particular moral dispute over the speech being restricted, but to simply decide whether the state actor treated everyone the same. It is a necessary implication of the Kantian and Rawlsian selves: To protect the individual's right as an autonomous agent of choice, the state must respect those choices. Otherwise, if the government commanded that labor protests are permissible, but denied citizens a right to protest a woman's right to choose to have an abortion, for example, it would be enforcing one particular vision of the good, while restricting individual autonomy.

Content-neutrality may owe its longevity to Rawls, but it owes its birth to Oliver Wendell Holmes. In *Otis v. Parker*,⁶⁷ a non-speech case, Justice Holmes spoke eloquently about the Constitution's neutrality, noting that "[c]onsiderable latitude must be allowed for differences of view. . . . Otherwise a constitution, instead of embodying only relatively fundamental rules of right . . . would become the partisan of a particular set of ethical or economical opinions."⁶⁸ Both the Constitution and the judge interpreting it were neutral among ends: "it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disa-

tion of the Constitution in *The Federalist No. 1*, cautioned about too much concern about the individual, for zeal for individual rights is "a much more certain road to the introduction of despotism" than a "zeal for the firmness and efficiency of government." THE FEDERALIST NO. 1, at 4 (Alexander Hamilton) (Gary Wills ed., 1982). For these early American leaders, the *right* to speak freely did not reside in the self *qua* self, but rather in the ends of society, fostering civic goals of participation, education and order.

⁶⁷ 187 U.S. 606 (1903).

⁶⁸ *Id.* at 609.

gree.”⁶⁹ And in *Lochner v. New York*,⁷⁰ Holmes stated that he would uphold the maximum hour law for bakers regardless of his personal views because they had nothing “to do with the right of a majority to embody their opinions in law”⁷¹ and because the Constitution does not impose any particular economic truth on society.⁷² With that, Holmes typified what Rawls meant by his “political conception of the person” or the self in the original position. When considering questions of politics and justice, Holmes requires that we bracket away our private morality. Holmes saw that detachment as both a good idea and required by the neutrality embodied in the Constitution.

With respect to free speech, this neutrality means that the First Amendment requires government to act as a neutral arbitrator in the marketplace of ideas, neither distorting the citizenry’s discussion of important issues nor favoring certain viewpoints or forms of expression.⁷³ In *Police Dep’t of Chicago v. Mosley*⁷⁴ and *Carey v.*

⁶⁹ *Id.* at 608.

⁷⁰ 198 U.S. 45 (1905).

⁷¹ *Id.* at 75 (Holmes, J., dissenting).

⁷² *Id.* at 76 (Holmes, J., dissenting).

⁷³ This view is widely held. See, e.g., Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 932–33, 939, 945 (1993) (arguing that the First Amendment’s core is that the government should not make policy based on the effects of speech); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives.”); Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 769 (2000) (arguing that free speech cases ask one thing: whether the government acted with an impermissible anti-speech motive); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197–233 (1983) (suggesting, in part, that the content neutrality principle is based on the desire for equality among speakers).

⁷⁴ 408 U.S. 92 (1972).

Brown,⁷⁵ for example, the Court invalidated laws that banned picketing near a school and home, respectively, but exempted labor protests. The Court held that the “central problem” with the bans was “that it describe[d] the permissible picketing in terms of its subject matter.” After all, “the essence of . . . forbidden censorship is content control.”⁷⁶ The bans “accord[ed] preferential treatment to the expression of views on one particular subject,” as if the government was deciding for its citizens what kind of protest speech was better than others. The statutes endorsed particular concepts of the good – labor protests are “better” than any other protests – and ignored the individual’s fundamental right to discern for himself what kind of protests to join.

It should be evident that the neo-Kantian vision of the self as an autonomous agent of choice has informed our First Amendment jurisprudence in its rhetorical and substantive respect for the autonomy of the speaker above all else and in its requirement of content-neutral laws. Those principles also form the foundation of our current laws governing Internet intermediary liability for third party speech and the Supreme Court’s Internet speech jurisprudence, suggesting that the same vision of the autonomous self also influences the Court’s treatment of speech in the virtual world.

Section 230(c)(1)⁷⁷ of the Communications Decency Act (“CDA”)⁷⁸ is probably the starkest example of free speech neutrality

⁷⁵ 447 U.S. 455 (1980).

⁷⁶ *Mosley*, 408 U.S. at 96.

⁷⁷ Section 230(c)(1) states 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.” 47 U.S.C. § 230(c)(1) (2006). The term “interactive computer service” means “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet

online. The legislative history of the provision, which immunizes from suit certain service providers for the acts of third parties online, suggests that it was included to promote online libertarian purposes. Section 230 was first offered as an amendment by Representatives Christopher Cox of California and now-Senator Ron Wyden of Oregon⁷⁹ to make sure that Internet providers were not treated "like other information providers such as newspapers, magazines, or television and radio stations," who, at common law and by statute, "may be held liable for publishing or distributing obscene or defamatory material written or prepared by others."⁸⁰ Therefore, the section's goal was to override traditional liability rules applicable to nearly every other information service provider, leaving the Internet a unique locus of unfettered speech. Indeed, Congress explicitly stated that it made this policy choice to preserve the Internet as "a forum for a true diversity" of views "with a min-

and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2) (2006). "Most courts have held that through these provisions, Congress granted interactive services of all types, including blogs, forums, and listservs, immunity from tort liability so long as the information is provided by a third party." Citizen Media Law Project, *Immunity for Online Publishers Under the Communications Decency Act*, <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act>.

⁷⁸ The CDA is Title V of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified as amended in various sections of 47 U.S.C.).

⁷⁹ See 141 CONG. REC. H8460-01 (Aug. 4, 1995).

⁸⁰ *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D. D.C. 1998). Some commentators have suggested that Congress intended for § 230(c) to override only publisher, not distributor, liability. See, e.g., Susan Friewald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 637-42 (2001) (courts should leave distributor liability intact when applying § 230); David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 167-72 (1997) ("[W]hen Congress said 'publisher,' it meant 'publisher,' and not 'distributor.'").

imum of government regulation,” and to maintain “the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”⁸¹ That means that Congress thought the Internet was different than traditional media, and that the Internet user was somehow unique or different from users of traditional media. What made the virtual world a bastion of libertarian free speech philosophy, then, was the conception of the virtual self as anonymous, autonomous, and distinct from his physical self.

Congress’s other reason for enacting § 230(c) was to encourage Internet intermediaries, users and parents to self-police the Internet for obscene conduct.⁸² But in interpreting the clause, courts have tended to minimize Congress’s hope for digital virtue. In *Zeran v. America Online, Inc.*,⁸³ for example, the Fourth Circuit focused almost exclusively on § 230’s concern that lawsuits against providers for third party content would risk “freedom of speech in the new and burgeoning Internet medium.”⁸⁴ Concluding that AOL was immune from suit for offensive messages about the Oklahoma City bombing on an AOL bulletin board,⁸⁵ the court stated that “Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum.”⁸⁶ While the court gave lip service to Congress’s hope that the provision would encourage self-help, it

⁸¹ 47 U.S.C. §§ 230(a)(3)-(4), (b)(2).

⁸² See § 230(b)(4); 141 Cong. Rec. H8469-70 (Statements of Representative Cox, Wyden and Barton); Blumenthal, 992 F. Supp. at 52.

⁸³ 129 F.3d 327 (4th Cir. 1997).

⁸⁴ *Id.* at 330.

⁸⁵ *Id.* at 328.

⁸⁶ *Id.* at 330. See also *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000).

never entered into the Fourth Circuit's broad reading of the clause.⁸⁷

Implicit in § 230 and its legislative history is a respect for autonomy and neutrality. By distinguishing online providers from offline providers, which have been subject to limitations because of the scarcity of radio signals⁸⁸ and the invasiveness of and easy ac-

⁸⁷ It makes sense that the online libertarian purpose would be given primacy over any other stated purpose because regardless of the legislative history of the entire CDA and any congressman's statement otherwise, Congress made clear that it included § 230 to overrule *Stratton Oakmont v. Prodigy Services*. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In that case, a user of Prodigy's "Money Talk" bulletin board posted that Stratton Oakmont, an investment bank, committed fraud and other criminal acts before its initial public offering. *Id.* at *1. Stratton sued Prodigy, arguing that by running the bulletin board and holding itself out as a service that monitored and removed such content, Prodigy should be liable for the defamation. *Id.* at *1-*2. The court agreed. Because Prodigy took an active role in monitoring its bulletin boards, it was a publisher for the purposes of state libel laws and could be held liable for defamatory posts. *Id.* at *4. When it took up § 230, Congress made clear that it wanted to use the section to overrule *Stratton Oakmont*. See S. REP. NO. 104-230, at 194 (1996) ("One of the specific purposes of [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions . . ."); H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("The conferees believe that [decisions such as *Stratton Oakmont*] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."); 141 Cong. Rec. at H8461-70 (statement of Rep. Cox) (referring to disincents created by the *Stratton Oakmont* decision). See also Zeran, 129 F.3d at 331 (emphasizing that § 230 was adopted to overrule *Stratton Oakmont*); HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATION LAW 615 (1999) (observing that it is "crystal clear that [Section 230] was designed to change the result in future cases like *Stratton Oakmont*"). As a defamation case unrelated to obscenity or minors, *Stratton Oakmont* played a defining role in the creation and passage of § 230, suggesting that Congress's chief concern was maintaining an Internet free speech regime that was as unfettered as possible.

⁸⁸ *NBC, Inc. v. United States*, 319 U.S. 190, 213 (1943) ("[Radio] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limi-

cess to television,⁸⁹ Congress absolved itself and the judiciary from having to determine the role of the provider in the virtual world and presumed that the online self autonomously chooses content and is never confronted with speech that he did not select on his own. In other words, it does not matter what role TimeWarner Cable, Google, Facebook, or YouTube play in providing and organizing content because, under § 230, they are treated like faceless virtual persons roaming the Internet's Wild West alongside the autonomous virtual self.

These same presumptions about the virtual self were also present in the Supreme Court's major Internet speech cases. In *Reno v. ACLU*,⁹⁰ the Court struck down the other part of the CDA, which prohibited the online transmission and display of indecent speech directed at minors. The CDA, which at least some members of Congress seemed to think was unconstitutional when they voted for it,⁹¹ was vague and overbroad.⁹² Beyond that specific holding, the Court's vision of the virtual self reflected the influence of Kant and Rawls. For the *Reno* Court, the virtual self was an active agent of

tation upon the number of stations that can operate without interfering with one another."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396-401 (1969).

⁸⁹ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (stating first that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" with the ability to "confront[] the citizen" at home, and second, that "broadcasting is uniquely accessible to children, even those too young to read").

⁹⁰ 521 U.S. 844 (1997).

⁹¹ See 141 CONG. REC. H8470 (the Cox-Wyden amendment sought to provide aid during the "flood of legal challenges" likely to prevent the rest of the Act from having any effect). See also LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 174 (1999) (referring to the CDA as a whole as "[a] law of extraordinary stupidity [that] practically impaled itself on the First Amendment").

⁹² *Reno*, 521 U.S. at 870-73, 877.

choice⁹³ – he had to verify his age with a credit card number or an adult password, suggesting that he was hardly a passive person with content thrust upon him. “[U]sers seldom encounter[ed] such content by accident,” the Court reasoned, noting that an Internet user would receive detailed information about a site’s content before taking the next step and accessing the file. And indecent content was hidden by warnings as to the sexual content, making “the odds . . . slim” that someone would access explicit sites by accident.⁹⁴ This description presumes a virtual self in complete command of his online activity; it ignores pop-up windows, sexually explicit sites with strange names and teaser content before requiring payment, and search engines that aggregate and arrange content without the user’s input. But while this vision of the virtual self is, at best, incomplete – and not entirely unsurprising coming from a group of relatively elderly judges who received one Internet tutorial during *Reno*’s pendency⁹⁵ – it pervades the Court’s decision. If the virtual self were not an agent of choice who controls his online conduct, the Internet could be accurately compared to television broadcasters who “push” their content into the home. Yet the myth of the autonomous online self gave the Court a way to distinguish its previous media intermediary jurisprudence.

As is evident from the foregoing discussion, the legal framework expressed by § 230, *Zeran*, and *Reno* is influenced by the per-

⁹³ *Id.* at 864, 870.

⁹⁴ *Id.* at 854.

⁹⁵ Tony Mauro, *The Hidden Power Behind the Supreme Court: Justices Give Pivotal Role to Novice Lawyers*, USA TODAY (Mar. 13, 1998), 1A (“The court’s library arranged for a demonstration of the Internet, and several clerks gave their justices short tutorials on how to navigate.”) (quoted in Mark S. Kende, *Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle’s Eye*, 2007 B.Y.U. L. REV. 1623, 1631 n.54 (2007)).

ception of the autonomous self and its attendant corollary of neutrality. This is the myth of the virtual self: like the Kantian and Rawlsian selves, he is a free agent of choice, freely and voluntarily online and able to find content that he likes and absorb as much virtual speech as he can handle from an almost endless storehouse of possibilities. Like the Rawlsian self veiled from his private life, the online anonym is unencumbered by his offline self because he can surf the Internet anonymously. He can be a dog, a brave soul, or a proud gay woman. This is the image of the virtual self described by John Perry Barlow, early scholars of the Internet, and by Congress and the Court in § 230 and *Reno*, respectively.

2. *Assumption of Free, Voluntary Choice in Privacy Law*

The notion of the online anonym as a free agent of choice has penetrated online privacy law as well, most notably through the related doctrines of assumption of risk and third-party disclosures. The assumption of risk doctrine is a creature of tort law, holding that a plaintiff cannot recover for injury from a risk created by another if the plaintiff (1) possessed knowledge of the risk and (2) had the free choice to avoid or encounter that risk. When someone exercises his own volition and chooses to encounter the risk, he assumes the risk that his behavior could lead to injury and, therefore, cannot recover.⁹⁶ Justice Cardozo explained it best in *Murphy v. Steeplechase Amusement*:⁹⁷ “One who takes part in [a potentially dangerous activity] accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his an-

⁹⁶ Restatement (Second) of Torts, § 496A (1965).

⁹⁷ 166 N.E. 173 (N.Y. 1929).

tagonist or a spectator at a ball game the chance of contact with the ball."⁹⁸ Free choice, therefore, is an essential element of the assumption of risk logic: If the risk is mandatory or unavoidable, the risk is forced, not voluntarily assumed.

The assumption of risk doctrine, and its requirement of free choice, bleeds from tort law into privacy law, where the risk involved is not physical injury, but the voluntary disclosure of secrets or personal information to one person or a small group, with the attendant risk of further public disclosure. Several courts have held that information "publicly and openly" disclosed to a small group of friends or co-workers could extinguish any lingering privacy interest in that information.⁹⁹ Those disclosures "were freely offered to the persons around her without concern of the impact it might have on her character,"¹⁰⁰ without concern that the information disclosed might in turn be transferred from the few to the many, from friends to strangers, or from a private third party to the government. Personal data "voluntarily" given to a credit card company can be rented or purchased by third parties for the same reason: there is no continued privacy interest in material you part with of your own accord.¹⁰¹

This neo-Kantian notion of the free and voluntary actor choosing to disclose despite these risks is the basis for the third party doc-

⁹⁸ *Id.* at 174.

⁹⁹ *Fisher v. Ohio Dep't of Rehabilitation and Correction*, 578 N.E.2d 901, 903 (Ohio Ct. Cl. 1988).

¹⁰⁰ *Id.* See also, e.g., *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291, 1295 (Ohio Ct. App. 1985) ("There is no liability when the defendant merely gives further publicity to information about the plaintiff that . . . the plaintiff leaves open to the public eye.").

¹⁰¹ *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995).

trine announced in *Smith v. Maryland*.¹⁰² In that case, the Court approved the warrantless use of a pen register to record the numbers dialed from a telephone at person's home because there could be no reasonable expectation of privacy in information – like the phone numbers you dial – voluntarily turned over to the phone company in the normal course of business.¹⁰³ The same is true for bank records¹⁰⁴ and it is applicable online. In *United States v. Hambrick*,¹⁰⁵ for example, a court found no legitimate expectation of privacy in ISP records – including a user's name, address, credit card number, email address, home and work telephone numbers, fax number, and the user's associated IP address – because users entering into agreements with their ISP “knowingly reveal[]” all that information as a condition of Internet access.¹⁰⁶ And in *United States v. Forrester*,¹⁰⁷ the Ninth Circuit held that using a mirror port on an individual's account with his ISP did not constitute a Fourth Amendment search.¹⁰⁸ A mirror port is akin to a pen register: where the latter records the phone numbers a person dials, the former records the to/from addresses of all incoming and outgoing email addresses and the IP addresses of websites visited. True to the neo-Kantian notion of free choice, the court concluded that there could be no legitimate expectation of privacy in that information since it was “voluntarily turned over” to the ISP.¹⁰⁹ In these decisions permitting further disclosure, the courts assumed that an internet user is a free

¹⁰² 442 U.S. 735 (1979).

¹⁰³ *Id.* at 742.

¹⁰⁴ See *United States v. Miller*, 425 U.S. 435 (1976).

¹⁰⁵ 55 F. Supp. 2d 504 (W.D. Va. 1999).

¹⁰⁶ *Id.* at 508.

¹⁰⁷ 512 F.3d 500 (9th Cir. 2008).

¹⁰⁸ *Id.* at 509.

¹⁰⁹ *Id.* at 510.

agent of choice who already voluntarily disclosed the information at issue.

3. *Effects of the Myth of the Online Self on Internet Society and Online Privacy*

Other scholars, like Danielle Keats Citron,¹¹⁰ Azy Barak¹¹¹ and Mary Anne Franks,¹¹² have discussed the ways in which the apparent lawlessness of the virtual world has wreaked havoc on women, endangering their lives, threatening their personal and professional success, and silencing their speech. Repeating their persuasive work would be redundant and beyond the scope of this paper. Instead, I would like to supplement their analyses and touch on two additional implications of the myth of the online anonymity: a lack of responsibility and an inability to address group defamation and hate.

First, the myth has emptied the Internet of responsibility by fostering the perception that the virtual world is somehow ephemeral and less real. As Mary Anne Franks has argued, this "idealism" in the virtual world has minimized the "realness" of cyberharassment while elevating the "realness" of cyberspeech, valuing the latter above the former.¹¹³ To idealists who see the virtual world as a space of true freedom, cyberspace is "more real than real life." Yet, at the same time, harms inflicted on others in the virtual world are dismissed as "'not really real,' as they are by their nature not physi-

¹¹⁰ See, e.g., Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

¹¹¹ See Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77 (2005), available at <http://construct.haifa.ac.il/~azy/SexualHarassmentBarak.pdf>.

¹¹² E.g., Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012).

¹¹³ Franks, *Unwilling Avatars*, *supra* note 7, at 226.

cal, bodily harms.”¹¹⁴ This means that virtual speech is real and demands the utmost protection, while cyberharassment is not real aggression and need not be taken seriously. As a result, Professor Franks argues, we see cases where sex-based harassment is ignored simply because it happens online.¹¹⁵ This confusion of “realness” derives from Kant and Rawls and the mistaken idea that the virtual world is like the autonomous realms where everyone is free and unencumbered. Those philosophical constructs were meant to be ideals, but the inviolability of the individual implied by them and their very nature as separate and apart from the physical world simultaneously elevates the person and diminishes the space. The erosion of privacy buttresses this perception. The ease with which mandatorily disclosed information can be turned over to the government or third parties fosters the erroneous idea that privacy cannot exist online and contributes to a sense of lawlessness in the virtual space.

Second, strict enforcement of neutrality strips the law of tools necessary to combat identity-based hate and harassment. Digitized harassment can take many forms, from posting a doctored photograph on Flickr of a victim with the words “sucks dick” scrawled across his face to posting a video on YouTube and using words like “whore,” “dyke,” “a dirty Jew” or “all faggots must die” in reference to a particular target or targets. It is not clear that a liberal free speech jurisprudence can adequately address this kind of personal and group defamation in the physical world, let alone online.¹¹⁶ Identity-based aggressors highlight a quality intrinsic to someone’s

¹¹⁴ *Id.*

¹¹⁵ Franks, *Sexual Harassment*, *supra* note 112, at 663-69.

¹¹⁶ See Ari Ezra Waldman, *All Those Like You: Identity Aggression and Student Speech*, 77 MO. L. REV. 1 (2012).

personhood and demean it, deprive it of value, and use it as a weapon. They attack women,¹¹⁷ racial minorities,¹¹⁸ religious minorities,¹¹⁹ and other traditionally victimized groups. And, as such, they attack not only their particular victims but also their victims' communities. Identity-based aggressors interfere with victims' access to education, their liberty to express who they are, their right to participate in the body politic, and perpetuate the legitimacy of a social stigma attached to any given minority.¹²⁰ But Rawls's *Political Liberalism* strips the law of the tools necessary to address this problem for two reasons. First, victims of identity-based harassment have to leave their social identities at the political door, making it difficult for a liberal regime to conceive of group harm. Second, strict neutrality denies the difference between attacks on identity and identity-affirming speech. If the state is truly to remain neutral in the debates of its citizens, there could be no legal distinction between wearing a t-shirt to school that makes fun of same-sex attraction¹²¹ and one that says, "Jesus was not a homophobe."¹²² The liberal would say that both forms of expression deserve to be heard

¹¹⁷ See Citron, *Cyber Civil Rights*, *supra* note 41, at 63–67.

¹¹⁸ See, e.g., *Scott v. Sch. Bd. of Alachua Cnty.*, 324 F.3d 1246 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. of Volusia Cnty. Fla.*, 218 F.3d 1267 (11th Cir. 2000).

¹¹⁹ Corilyn Shropshire, *Deniers of Holocaust Tap Facebook to Spread Message: Facebook Wrestles with Anti-Semitism*, HOUSTON CHRONICLE (May 15, 2009) <http://www.chron.com/life/houston-belief/article/Deniers-of-Holocaust-tap-Facebook-to-spread-1749168.php>.

¹²⁰ See Waldman, *All Those Like You*, *supra* note 116.

¹²¹ Jim Lopata, *ACLU Defends Anti-Gay T-Shirt*, BOSTON SPIRIT (Mar. 2, 2013), http://www.boston.com/lifestyle/blogs/bostonspirit/2013/03/aclu_defends_anti-gay_t-shirt.html.

¹²² James Eng, *Teen Wins Right to Wear "Jesus Is Not a Homophobe" T-Shirt to School*, NBC NEWS (May 29, 2012), http://usnews.nbcnews.com/_news/2012/05/29/11939795-teen-wins-right-to-wear-jesus-is-not-a-homophobe-t-shirt-to-school?lite.

and cannot be restricted. And yet, we know that harassing words can have particularly devastating effects that identity-affirming speech does not. Therefore, the supposed neutrality of the state when it comes to speech is not neutrality at all, but rather a value judgment that words either cannot cause harm or that the harm they do cause is not a social ill for the state or society to solve.

II. WHO IS THE REAL VIRTUAL SELF?

I have argued that a false conception of the virtual self – one who freely, autonomously, and anonymously governs his own online experience – has been the foundation of online speech and privacy jurisprudence. To illustrate how, I have compared the myth of the online anonym to the Kantian self in the intelligible realm and Rawls’s political conception of the person who brackets away his private life when considering matters of public concern. I then showed how these conceptions of the self, and their correlative principles of neutrality and choice, pervade modern First Amendment and privacy jurisprudence. Finally, I argued that this vision has had serious negative effects on online society. In this section, I would like to replace the Internet myth with a more accurate description of the virtual self, one that reflects the sociology of the Internet: who we are, why we are online, and what kind of Internet society we want.

Like the Kantian and Rawlsian selves, which ignore important constituent elements of our identity and decision-making processes, the myth of the online anonym is wrong because it inaccurately describes who we are online. We are not anonymous, we are not autonomous, and we are not voluntary agents of choice. We are, at a minimum, traceable, with online anonymity, if it ever existed, quickly becoming a thing of the past. Our online interactions are entirely dependent upon intermediaries who “push” content on us,

minimizing our mastery of our online experience. And many of us are online involuntarily, placed there by others – maliciously or not – and forced into a public virtual world to participate in modern society. These observable, sociological claims, together with the recognition that most, if not all, of us have or will soon have a virtual presence, represent the fully constituted virtual self. He is bound up with his physical identity, dependent on others for information, and an often-unwilling participant in online society. His vision of the virtual world should, therefore, look quite different from that of the online anonym. Unlike the myth of the online anonym who, like Kant's and Rawls's vision of the self, informs speech and privacy doctrines that focus on neutrality and choice, the fully constituted virtual self should reorient of our speech and privacy regimes to reflect Emile Durkheim's thesis on the interconnectedness of all things.

A. A SOCIOLOGICAL CRITIQUE OF THE RAWLSIAN SELF

Kant and Rawls may have created a liberating vision of the self as an unfettered agent of free choice, free from the nasty prejudices of everyday life, but they have left our physical and virtual societies bereft of meaning greater than ourselves. Both worlds are devoid of the ideals to which many of us strive: we are uncivil to each other,¹²³ we have little need for social norms,¹²⁴ and we make life unsafe for others.¹²⁵

¹²³ Our society needed an unspeakable tragedy, like the 2011 shooting of Representative Gabrielle Giffords, to start encouraging us to act more civilly to one another in our public discourse. A civil discourse institute was created. *See, e.g.*, Ewan

For the remainder of this Article, I will show how the radical, detached individual of Kant and Rawls is not who we are online and, therefore, should not be the basis of our Internet speech and privacy jurisprudence. I replace the liberal self with a sociological theory of the Internet based on empirical observation of online social life and the theories of Emile Durkheim. Though heavily influenced by Kantian conceptions of the individual,¹²⁶ Durkheim saw humanity as diverse, social, and interdependent. It is our membership in a society that defines who we are, not our capacity to separate ourselves from the formal and informal regulatory boundaries of modern social life. Becoming radically independent, would create *anomie*, or a sense of dissonance, emptiness, and lack of belonging.¹²⁷ Durkheim has, therefore, done more than accurately describe the observables of online life as one of interconnectedness and remix. He has also diagnosed the Internet's cancer: the *anomie* reflected in the law of online speech and privacy.

Durkheim observed a modern world defined by the interconnectedness and interdependence of all things. The project of his career was to explain how society functioned and how its individual

MacAskill, *Bill Clinton and George Bush Sr. Open US Centre for Political Civility in Arizona*, THE GUARDIAN (Feb. 21, 2011), <http://www.guardian.co.uk/world/2011/feb/21/us-centre-political-civility-arizona>. But our political and online discourse is as uncivil as ever.

¹²⁴ Citron, *Cyber Civil Rights*, *supra* note 41, at 62-63 (citing ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 18 (1942)). In person, we exert pressure on one another to maintain civil society and avoid anti-social behavior; those pressures are less powerful online today.

¹²⁵ Danielle Citron illustrated how dangerous life can be for women and minorities online. *See id.* at 69-80, 85-86.

¹²⁶ *See, e.g.*, EMILE DURKHEIM, *Individuals and the Intellectuals*, in EMILE DURKHEIM: ON MORALITY AND SOCIETY, 44-49 (Robert N. Bellah ed., 1973).

¹²⁷ DURKHEIM, *DOL*, *supra* note 12, at 304.

constitutive members could exist independently and as part of a collective social unit.¹²⁸ For Durkheim, “[s]ociety is a reality *sui generis*,” with its own characteristics not found in its individual members or elsewhere, and, therefore, prior to the individual.¹²⁹ It is a thing, a “social fact” into which we are born that mediates and obligates us in various ways.¹³⁰ This makes intuitive sense: we are all born into families with collective histories and are all subject to the same norms of social interaction. These histories and norms exist before us and mediate our lives and interactions from the start. But for Durkheim, social norms are more than just mediators and regulators of behavior; they are, in fact, what bind diverse and distinctive individuals together. Everything, therefore, is social: we conceive of religion,¹³¹ family,¹³² law,¹³³ and even time,¹³⁴ space,¹³⁵ and logical thought¹³⁶ through the tinted lenses of our social network. So, too, is man. Whereas Kant saw a duality between man’s purely rational, human self and his determined, animal self, subject to inclinations, Durkheim sees man as both individual and social. The individual side originates within us, but our social side “represents within us the higher reality of the intellectual and moral order,” i.e., society.¹³⁷ In an obvious departure from Kant, Durkheim says that

¹²⁸ For scholarly analyses of Durkheim’s life’s work, see, e.g., ANTHONY GIDDENS, CAPITALISM AND MODERN SOCIAL THEORY 65–118, 185–242 (1971).

¹²⁹ DURKHEIM, ELEMENTARY FORMS, *supra* note 12, at 17–18.

¹³⁰ EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 50–51 (Steven Lukes ed., W.D. Halls trans., 1982) [hereafter DURKHEIM, RULES].

¹³¹ DURKHEIM, ELEMENTARY FORMS, *supra* note 12, at 11, 42.

¹³² DURKHEIM, DOL, *supra* note 12, at 20–21.

¹³³ *Id.* at 24–26. Law, in fact, is a model for that which reflects solidarity in society.

¹³⁴ ELEMENTARY FORMS, *supra* note 12, at 12.

¹³⁵ *Id.* at 13.

¹³⁶ *Id.* at 331.

¹³⁷ *Id.* at 18.

society exists before the individual, and because man is at once an individual and a social being, "it is impossible to reduce reason to [just] individual experience."¹³⁸

But society does not erase the individual. In fact, the social forces binding individuals together are founded upon the interdependence created by social diversity and complementarity. Individualism and increased specialization in all areas of life create a society based on a "system of different and special functions united by definite relationships"¹³⁹ where we depend on one another rather than resemble one another. The more labor is divided, the more personalized our work becomes, and the greater the importance of the individual in society. But, at the same time, our interdependence increases.¹⁴⁰ In this regard, no man is ever an island unto himself; individual persons "always lack something, and the best among us feel our own inadequacy."¹⁴¹ And so we seek out that which we lack, bringing in friends, companions, and co-workers to complement and complete us. As members of society, individuals are interdependent, bound together, and mediated by strong social solidarity with others; they are not radically individuated atoms with total control over their paths and destinies. Therefore, there can be no radically individuated anonymity.

Such separation from society into a world of unfettered autonomy, or the virtual world of the liberal self and online anonymity, is an aberration away from solidarity to what Durkheim calls *anomie*, or a feeling of the absence of belonging, a listless dissonance in times of social crisis caused by radical individuation and the ab-

¹³⁸ *Id.*

¹³⁹ DURKHEIM, *DOL*, *supra* note 12, at 83.

¹⁴⁰ *Id.* at 85.

¹⁴¹ *Id.* at 17.

sence of sufficient law and regulation binding the individual to society.¹⁴² Normally, increased interdependence allows for the natural emergence of sufficient rules and norms to govern interaction.¹⁴³ *Anomie* is an “abnormal” social state that arises from a situation with too little social regulation of the individual,¹⁴⁴ thus allowing the individual to wander away from the meaning and values that social solidarity impresses upon him.

It stands to reason, then, that separation from society into an “ideal” purely autonomous realm would strip the individual of his humanity, placing him and his autonomous realm into a constant state of anomie. “It is not true . . . that humanity can be released from all restraint,”¹⁴⁵ Durkheim writes in his seminal work on the sociology of suicide. No such thing is really possible because “[a]ll existence being a part of the universe is relative to the remainder; its nature and method of manifestation accordingly depend not only on itself but on other beings, who consequently restrain and regulate it.”¹⁴⁶ The world according to Durkheim, therefore, is characterized by an individual and social identity entirely bound up with one another and by individuals who find harmony only through interdependence and social integration. The analogy to online life should be apparent: Unlike the liberal self who separates himself from the limitations of the physical world and exists online as an autonomous agent of free choice, the Durkheimian self is a social

¹⁴² *Id.* at 304.

¹⁴³ *Id.* at 302.

¹⁴⁴ EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 258 (John A. Spaulding and George Simpson trans., 1997) [hereafter DURKHEIM, SUICIDE]; DURKHEIM, *DOL*, *supra* note 12, at 304.

¹⁴⁵ DURKHEIM, SUICIDE, *supra* note 144, at 252.

¹⁴⁶ *Id.*

self, automatically joining a virtual community that integrates, regulates, and educates.

The clearest explanation of this thesis appears in Durkheim's discussion of religion. In *The Elementary Forms of Religious Life*, Durkheim used his own and others' observation of primitive peoples and their religious rites to conclude that the origins of religion are social and, specifically, the regular group-based rituals that imbue the individual with collective meaning and renew the sanctity of the group's religious objects.¹⁴⁷ Even in this arena of social life, where an ideal world of sacred objects and ideal values can exist separate from the profane existence of everyday life,¹⁴⁸ no real separation is possible because meaning in one is impossible without the other. That is, if an ideal world based on sacred objects, ritual, and social unity can exist, the "ideal society is not outside the real society; it is part of it. Far from being torn between them . . . we cannot insist on one without insisting on the other. For a society is not simply constituted by the mass of individuals who compose it . . . but above all by the idea that it fashions itself."¹⁴⁹ No one individual or idea can separate itself from society and retain its humanity or meaning, respectively. In Durkheim's world, there is no Kantian intelligible realm where man can remove the bonds of the body and social life and act autonomously and freely. For Durkheim, any

¹⁴⁷ GIDDENS, *supra* note 128, at 105-18.

¹⁴⁸ Durkheim uses the terms "sacred" and "profane" to distinguish between religious objects in which the social collective has effervesced meaning (sacred) and the everyday things (profane). In many religions, he observed, there is a strict rule of separation between the two, lest the profane strip the sacred of its special meaning. DURKHEIM, *ELEMENTARY FORMS*, *supra* note 12, at 36-41. Durkheim, the scion of a religious Jewish family and the son of a rabbi, was familiar with this separation of sacred and profane from childhood.

¹⁴⁹ DURKHEIM, *ELEMENTARY FORMS*, *supra* note 12, at 317-18.

such removal from society is not only empirically impossible, but also a bad idea. After all, individualism is anomic without society.

B. THE REAL VIRTUAL SELF

Durkheim's conception of the social self – interdependent, defined, and mediated by society rather than anonymous – tells a more accurate story about who we are in an online world that, like society in general, is a Durkheimian social fact that existed before us, mediates us, and will continue to exist after us. First, the virtual self is a *public* self, never truly anonymous or detached. Like Durkheim's man, his identity is an integral part of online society, a role he is increasingly embracing as the Internet matures. Even beyond the technological lack of anonymity, the virtual self reflects the wants and desires of his physical brother, seeking out content and aligning preferences that make sense only in the context of who he is offline. Second, like the Durkheimian man born into and mediated by social norms, the virtual self is a *mediated* self, never truly autonomous. He has only second-hand control over the content he sees, as all content and all online interactions occur over platforms run, organized, and censored by private companies like Facebook, Google, and Yahoo. Like a man situated within society, where social norms govern and mediate his experiences, the virtual self's online experience depends upon his relationship with Internet intermediaries and the bilateral obligations between them. Third, the virtual self is often an *involuntary* self, entering a Durkheimian society that predated him. He often has no choice but to join the online world. And, fourth, the virtual self is *universal*; in some form, we are all part of the online world. This idea is at the foundation of Durkheim's sociology: all men are social, part of networks larger than and prior to themselves. Like Durkheim's vision that society is the

source of all things, connecting individuals to one another in mechanical and organic ways, the virtual self is bound up with both the physical and online worlds in a way that John Perry Barlow never understood. The virtual self is nothing without a robust Internet community that is more than just the sum of independent agents.

1. *A Public Self*

The virtual self is a public self in two distinct ways: first, anonymity *per se* does not exist on the Internet, and even perceived anonymity, where the user believes his identity is hidden, is on the decline; second, his experience is inexorably tied to the wants, desires and preferences of his physical counterpart, making it difficult to hide who he really is.

Daniel Solove notes that what exists on the Internet today is a balance between anonymity and accountability, or “traceable anonymity.” On this theory, we allow virtual selves to speak anonymously online, but preserve trails of breadcrumbs to identify online speakers when they cause others harm.¹⁵⁰ It is easy, Solove suggests, to blog anonymously about Article III judges¹⁵¹ or about politics in Pittsburgh,¹⁵² but it is almost impossible to be untraceable because

¹⁵⁰ DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 146 (2007) (citing Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1028, 1032, 1044 (2004)).

¹⁵¹ David Lat, who now runs the blog Above the Law, blogged anonymously under the pseudonym “Article III Groupie” at the blog “Underneath Their Robes,” before outing himself in *The New Yorker*. SOLOVE, *infra* note 263, at 136-139.

¹⁵² “PittGirl” blogged about politics in Pittsburgh, Pennsylvania before outing herself in 2009. John D. Sutter, *The Coming-Out Stories of Anonymous Bloggers*,

the user's IP address is logged with each Internet interaction. That IP address does not simply exist on the Internet in some ethereal form; the IP address of the user's computer, the ISP that provided the address, and even the geographic location of the ISP are all available. If an anonymous blogger posts from his work computer, his employer will know; if he posts from home, his ISP will know.¹⁵³

All that sounds very technical and difficult,¹⁵⁴ but even if these coded breadcrumbs were inaccessible to an Internet user with only an average understanding of computers, much of our online behavior leaves traces that can lead to our physical selves. Zip codes, gender, and dates of birth, all identifying data that we key in to online dialog boxes on a regular basis, can be used to "re-identif[y]" a "large portion" of the United States population.¹⁵⁵ Even simple searches on Google, Yahoo, or Bing can be used to identify a particular user.¹⁵⁶

CNN.COM (Aug. 21, 2009), http://articles.cnn.com/2009-08-21/tech/outing.anonymous.bloggers_1_bloggers-online-anonymity-persona?_s=PM:TECH.

¹⁵³ SOLOVE, *infra* note 263, at 147.

¹⁵⁴ It isn't. In some cases, that information is hand-delivered to users. At the blog Concurring Opinions (www.concurringopinions.com), for example, where I am a frequent contributor, whenever a user posts a comment to post I have written, an email report is delivered to my email inbox identifying the IP address of the commenter and a link to the American Registry of Internet Numbers (ARIN) to determine the commenter's ISP and the ISP's geographic location. In any event, what is difficult is making yourself untraceable. SOLOVE, *supra* note 150, at 147 (citing Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)*, Apr. 6, 2005, at <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php>).

¹⁵⁵ SOLOVE, *infra* note 263, at 147 (citing Ralph Gross & Alessandro Acquisti, *Information Revelation and Privacy in Online Social Networks (The Facebook Case)*, ACM Workshop on Privacy in the Electronic Society, Nov. 7, 2005, at § 4.2).

¹⁵⁶ SOLOVE, *infra* note 263, at 147 (citing Michael Barbaro & Tom Zeller, Jr., *A Face Is Exposed for AOL Searcher No. 4417749*, N.Y. TIMES, Aug. 9, 2006, at A1). Professor Solove argues that this "traceable anonymity" is a good balance: it allows online

This kind of traceability seems to be the baseline of anonymity in today's Internet. As Professor Solove has discussed at length, governments and businesses are collecting dossiers of information about people, threatening privacy.¹⁵⁷ Yet even on a less sinister level, our online interactions are increasingly dependent on providing identification. Facebook, whose Statement of Rights and Responsibilities requires real names and emails to register,¹⁵⁸ has more than one billion active users every month.¹⁵⁹ Facebook also maintains close relationships with law enforcement, pursuant to which, the company not only complies with all subpoenas for information about potential illegal activity, but also offers that information when it has "a good faith belief it is necessary to prevent fraud or other illegal activity, to prevent imminent bodily harm, or to protect" users from those who violate the Facebook terms of service.¹⁶⁰ The company also uses facial recognition software to identify users

users to benefit from a cloak of anonymity, but provides adequate protection for those harmed by anonymous harassment. It is not clear, however, that traceable anonymity adequately protects the harassed victim, who must spend the time, money and energy uncovering the identity of his attacker or defamer, a process that Professor Solove admits can be cumbersome. See SOLOVE, *infra* note 263, at 142-46 (discussing the case of John Seigenthaler, a journalist, who was defamed on Wikipedia as being involved in the Kennedy assassination, and his and the Wikipedia critic David Bradt's lumbering journey to find the user who edited Mr. Seigenthaler's Wikipedia page).

¹⁵⁷ See *id.* at vii. See also SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* (2004).

¹⁵⁸ *Disabled - Inauthentic Account*, FACEBOOK <https://www.facebook.com/help/?page=1132> (last visited March 14, 2013).

¹⁵⁹ Mark Zuckerberg, *One Billion People on Facebook*, FACEBOOK NEWSROOM (Oct. 4, 2012), <http://newsroom.fb.com/News/457/One-Billion-People-on-Facebook>.

¹⁶⁰ *How does Facebook work with law enforcement?*, FACEBOOK, <https://www.facebook.com/help/131535283590645/> (last visited Feb. 22, 2013).

in friends' photographs.¹⁶¹ More websites are requiring users to register with a recognized and functioning email address or Facebook account before they can comment on news stories¹⁶² or blog posts.¹⁶³ And anonymity is on the decline everywhere. A New York City woman who recently tangled with a train conductor by telling him, "Do you know what schools I've been to and how well-educated I am?" was identified when a fellow rider posted a video on YouTube;¹⁶⁴ after Vancouver lost the Stanley Cup, looters were identified when friends tagged their pictures online;¹⁶⁵ and a 40-year-old British man could not keep his deceitful "Gay Girl in Damascus" blog alive when his identity was so readily available.¹⁶⁶

Anonymity is on the decline. Increasingly, anonymous web interactions will be the bastions of the shameful: "Anonymity online will gradually become a lot like anonymity in the real world. When we encounter it, we'll take a firm grip on our wallet and leave the neighborhood as soon as possible—unless we're doing something we're ashamed of."¹⁶⁷ Web 2.0's interactivity is giving way to "Web

¹⁶¹ Bloomberg News, *Facebook 'Face Recognition' Feature Draws Privacy Scrutiny*, NEW YORK TIMES (June 8, 2011), http://www.nytimes.com/2011/06/09/technology/09facebook.html?_r=0.

¹⁶² See, e.g., SAN DIEGO GAY AND LESBIAN NEWS, www.sdgl.n.com (last visited March 13, 2013).

¹⁶³ See, e.g., CONCURRING OPINIONS, www.concurringopinions.com (last visited March 13, 2013).

¹⁶⁴ Brian Stelter, *Upending Anonymity, These Days the Web Unmasks Everyone*, NEW YORK TIMES (June 21, 2011), <http://www.nytimes.com/2011/06/21/us/21anonymity.html>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Janna Anderson and Lee Rainie, *The Future of the Internet*, PEW INTERNET, 40–41 (2010), <http://www.pewinternet.org/Reports/2010/Future-of-the-Internet-IV.aspx> (follow "Download" hyperlink) (quoting Stewart Baker, Internet legal expert at Step-toe & Johnson LLP).

3.0,” or a completely integrated virtual world that can track our locations and tailor content to our longitude and latitude. It is changing the way we conceive of our place in the world since:

[t]he seamless integration of these technologies into the spaces and places of our everyday lives . . . compromises physical and social boundaries in private and public spheres. This potential to be caught within a web of constant accessibility, visibility, and exposure challenges our fundamental ideas about personal space and boundaries, and the privacy expectations that accompany them.¹⁶⁸

The virtual world is leaving a deeper digital footprint in our lives, leading to a world where there is “no place left to hide.”¹⁶⁹ Many scholars agree.¹⁷⁰

But even if these portends of the future do not come true, online users are still tied to their physical selves in more subtle, yet profound, ways. In our desire to connect – something Durkheim sug-

¹⁶⁸ Anne Uteck, *Ubiquitous Computing and Spatial Privacy*, in *LESSONS FROM THE IDENTITY TRAIL, ANONYMITY, PRIVACY AND IDENTITY IN A NETWORKED SOCIETY* 83 (Ian Kerr et al. eds., 2009) available at http://www.idtrail.org/files/ID%20Trail%20Book/9780195372472_kerr_05.pdf.

¹⁶⁹ *No Anonymity on Future Web Says Google CEO*, ITPROPORTAL (Aug. 5, 2010), <http://www.itproportal.com/2010/08/05/no-anonymity-future-web-says-google-ceo/>. See also John Markoff, *Taking the Mystery Out of Web Anonymity*, N.Y. TIMES (July 3, 2010), http://www.nytimes.com/2010/07/04/weekinreview/04markoff.html?_r=2.

¹⁷⁰ Anderson and Rainie, *supra* note 167 at 40-41 (gathering comments from Internet experts, including Susan Crawford – “We’re moving into an increasingly authenticated and permission-based world. We’ll be known to others as a condition of doing what we want to do. That may not be all bad news – we’ll get loyalty points, after all . . . When it comes to commerce, anonymity is over.” – Oscar Gandy – “Anonymity will increasingly be associated with ‘antisocial’ behavior, and it will be moved to the boundaries or fringes of the net.” – and others).

gests is natural for all humans¹⁷¹ – we go online for a reason, leaving clues as to who we are and tying our virtual selves to our physical selves in very real ways. This is not about anonymity *per se*; we do not always go online with nametags brandishing our IP addresses, email accounts, and dates of birth for everyone to see all the time. Rather, our online activities link our virtual and physical identities in ways that make one meaningless without the other. And, increasingly, many of us want it that way.

Google, Apple, Amazon, and Facebook do this most efficiently. If you have a Gmail account, Google tailors your experience to what it learns about you from your emails and previous searches. Advertisements and search terms are geared toward topics that you discuss on email or have searched before based on a complicated keyword algorithm.¹⁷² You can be directed toward *The Nation's* website if you seem to discuss liberal politics, or *NewsMax* magazine if you admire Paul Ryan. You are even prompted to add friends to your network and to email compositions based on previous groups of mail recipients in previous emails.¹⁷³ Apple's iTunes program recommends music and iPhone apps that you might like based on

¹⁷¹ DURKHEIM, DOL *supra* note 12, at 17 (“However richly endowed we may be, we always lack something, and the best among us feel our own inadequacy. This is why we seek in our friends those qualities we lack, because in uniting with them we share in some way their nature, feeling ourselves then less incomplete. . . . [The] true function [of the division of labor] is to create between two or more people a feeling of solidarity.”).

¹⁷² *Autocomplete*, GOOGLE, <http://support.google.com/websearch/bin/answer.py?hl=en&answer=106230> (last visited Feb. 22, 2013); *Ads in Gmail and Your Personal Data*, GOOGLE, <http://support.google.com/mail/answer/6603?hl=en> (last visited Feb. 22, 2013).

¹⁷³ Maayan Roth et al., *Suggesting (More) Friends Using the Implicit Social Graph*, RESEARCH AT GOOGLE, <http://research.google.com/pubs/pub37120.html> (follow “View the PDF” hyperlink).

your previous purchases or indicated preferences.¹⁷⁴ Amazon recommends books for purchase based on the accumulated image of the reader you have become over your entire history of buying books on Amazon.¹⁷⁵ And LinkedIn tells you whom you might know and recommends friends and pages that comport with the narrative of your LinkedIn experiences to date.¹⁷⁶ These programs are adaptive as well. If you like Jason Mraz, but not Justin Bieber, iTunes knows to focus more on alternative rock than teen pop, and Facebook might suggest that you “Like” Sara Bareillis or Colby Caillat rather than Miley Cyrus or Selena Gomez. Once you make those selections, the programs know not to bother you with teen pop again. Without intermediaries that channel content based on who we are and what we want, our Internet experience would be completely dull, flat, and unfulfilling.

Internet users are voluntarily going further than passively allowing Gmail, Apple, Amazon, and Facebook to suggest things for them. Increasingly, we shun anonymity’s liberating potential for the global community that the Internet provides. Facebook is the paradigmatic example among the general population, but all social networking and dating sites foster voluntary rejection of anonymity every time they ask users identifying questions – What is your fa-

¹⁷⁴ Christopher Mims, *How iTunes Genius Really Works*, MIT TECHNOLOGY REVIEW (June 2, 2010), <http://www.technologyreview.com/view/419198/how-itunes-genius-really-works/>.

¹⁷⁵ Greg Linden et al., *Amazon.com Recommendations: Item-to-Item Collaborative Filtering*, IEEE INTERNET COMPUTING (2003), at <http://www.cs.umd.edu/~samir/498/Amazon-Recommendations.pdf>.

¹⁷⁶ Janet Ryu, *People You May Know: Helping You Discover Those Important Professional Relationships*, LINKEDIN BLOG (May 12, 2010), <http://blog.linkedin.com/2010/05/12/linkedin-pymk/>; LinkedIn, *Discover People You May Know on LinkedIn*, YOUTUBE http://www.youtube.com/watch?feature=player_embedded&v=JmvumZbpaNI.

favorite movie? What is your work history? In what town did you grow up? – and provide 500 characters for an answer. Whether through traceability, adaptive learning of our preferences, or the use of your real identity to let the Internet supplement and facilitate physical community, the virtual world knows who we are. And many of us increasingly want it that way, as evidenced by the exploding popularity of real-name social networking sites, location “check ins” that allow your online followers to know where you are in the physical world, the voluntary reporting of personal information, the rise of online photo sharing, and the myriad examples in which users are willing to give up personal information for gifts, bonuses, and just the chance to win a prize.¹⁷⁷ The list of examples of our embrace of open identity online goes on.¹⁷⁸ We want to participate in the online community, not as free floating anonyms isolated from those around us, but as members of a society – of liberals, of gays, of lovers of World of Warcraft – because social interaction and interdependence create harmony and solidarity. In this sense, the public nature of our virtual selves is rooted in Durkheim’s sociological conception of man: he is gregarious, social, and defined by the communities of which he is naturally a part.¹⁷⁹ The virtual world was supposed to allow us to bracket away our real lives in the name of a freely autonomous and anonymous existence.

¹⁷⁷ Alessandro Acquisti has done groundbreaking work in this area, proving that individuals in the physical world and Internet consumers are willing to give up personal information for tiny benefits and better tailored experiences. See Somini Sengupta, *Letting Down Our Guard With Web Privacy*, NEW YORK TIMES (Mar. 30, 2013), <http://www.nytimes.com/2013/03/31/technology/web-privacy-and-how-consumers-let-down-their-guard.html?pagewanted=all>.

¹⁷⁸ Of course, the next step is to empirically test this theory, which is the core of my doctoral dissertation.

¹⁷⁹ See *supra* notes 129–149 and accompanying text.

But, as we have seen, that is not the case. Internet users do not want to bracket their real lives; instead, they tend to act like Durkheimian social creatures, seeking out online content that supplements their physical selves, not supplants them.

2. *A Mediated Self*

In addition to seeing the individual as a member of a *sui generis* society that gives him meaning, ethics, and purpose, Durkheim reminds us that society plays a mediating and coercive role vis-à-vis the individual.¹⁸⁰ At times, social norms are reflected in law by the criminalization of behavior that offends the deeply held beliefs of the collective.¹⁸¹ At other times, social solidarity governs individual behavior in more subtle ways, by providing a background of trust for interpersonal relationships and the soft power of social norms.¹⁸² This mediation is not purely negative; individuals derive positive benefits from their relationship to others in society.¹⁸³

Similarly, the virtual self is never really a free and autonomous agent of choice; rather, he lacks control over the content and speech he sees online in two related ways. First, every online interaction is governed by an intermediary – from websites like Facebook to search engines like Google – that help determine what content is available. Second, by identifying preferences and interests, the virtual self allows intermediaries to “push” tailored content toward him, further limiting the orbit of speech at his disposal toward that

¹⁸⁰ DURKHEIM, RULES, *supra* note 130, at 50–51.

¹⁸¹ DURKHEIM, DOL *supra* note 12, at 39–40, 50, 92–93, 97–98. Durkheim calls this “mechanical solidarity.”

¹⁸² *Id.* at 101–78.

¹⁸³ *Id.* at 77–86.

which he has previously expressed a related interest. In both of these ways, the online experiences of the virtual self differ greatly from the vision of the online anonym and mirror the individual cabined by society in Durkheim's sociology.

An online intermediary "facilitates" interactions among third parties on the Internet and, therefore, the definition encompasses a host of online entities. They can be Internet service providers (ISPs), like Comcast, Earthlink, or Netzero; web hosting providers, like Go Daddy; search engines, like Google or the erstwhile AltaVista; e-commerce platforms, like eBay; Internet payment systems, like PayPal; and participative networking platforms, like blogs and wikis.¹⁸⁴ Intermediaries include websites that we use to interact with one another (Facebook), platforms that allow us to videoconference, chat, or phone someone across the globe (Skype), and the companies that allow the websites we use every day to run.

Every online interaction is filtered through some intermediary. David Ardia of the Berkman Center for Internet & Society at Harvard Law School explains the pervasiveness and essential role of online intermediaries through a seemingly simple example: uploading a video on to YouTube.¹⁸⁵ First, the user goes to www.youtube.com using, say, Internet Explorer, Firefox, or the new Google Chrome. That process already involved numerous intermediaries:

¹⁸⁴ *The Economic and Social Role of Internet Intermediaries*, OECD.ORG, 9-14 (2010), <http://www.oecd.org/dataoecd/49/4/44949023.pdf>.

¹⁸⁵ See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 385-86 (2010).

All Internet communication is accomplished by splitting the communication into data packets that are directed by specialized hardware known as routers, which are operated by intermediaries throughout the network. These routers identify computers on the Internet by their Internet Protocol (IP) addresses, which typically look something like 192.0.1.123. Because human beings cannot easily remember this string of numbers, the domain name system (DNS) allows mnemonic names to be associated with IP addresses. When an Internet user enters one of these domain names into her web browser, for example YouTube.com, her computer sends a request to a DNS server, typically operated by her Internet Service Provider (ISP) or another intermediary that maintains a lookup table associating the name with a specific IP address.¹⁸⁶

Once at the YouTube website, the user signs on and uploads the video. But the video does not go directly to YouTube; rather, the video goes from the user's computer onto a network run by an ISP, which in turn sends the data - packets of 1's and 0's that constitute the video - via "multiple intermediaries that provide 'peering connections,' to the network owned by the ISP that services YouTube."¹⁸⁷ In other words, the user's ISP sends data through fellow, or "peer," ISPs to the provider that runs YouTube. From there, the data go to YouTube's servers, which will host the video. And when someone else wants to view this video, the sequence is re-

¹⁸⁶ *Id.* (citing Lawrence B. Solum and Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 847 (2004)); see also Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974, 1980 (2006).

¹⁸⁷ Ardia, *supra* note 185, at 386.

versed: data travel from YouTube's servers through to YouTube's ISP and through peers until it reaches the viewer's ISP and, ultimately, the viewer's desktop, laptop or mobile device.¹⁸⁸

This happens in an instant, suggesting to the untrained eye that the original user and the subsequent viewer had total control over the process.¹⁸⁹ In fact, these intermediaries provide important functions for the virtual self's online experiences. Without them, the Internet would be an inhospitable place, difficult for users to sift through the noise until they find the content they want. This works in two ways. First, intermediaries control unwanted content, such as spam and malware, and unwanted attacks, such as viruses and Trojan horses.¹⁹⁰ While this used to be done through firewalls and filtering software installed in the end user's computer, most of these functions are now integrated into the network itself. Network providers include proprietary antivirus and firewall protections as part of accessing their system, assuming the protection function as an intermediary.¹⁹¹ Second, intermediaries not only block bad content, but they also help users identify the content they want. Since the creation of the Internet and the proliferation of user-generated content through Web 2.0, the amount of content available online has grown. It would be impossible for the average user to sift through an unorganized multitude of data to find the particular information he needs, so he depends on a variety of "content aggregators," such

¹⁸⁸ *Id.*

¹⁸⁹ Recall the discrepancy between how many Internet users think email works (See Figure 1, *supra*) and how email actually gets from sender to recipient (See Figure 2, *supra*).

¹⁹⁰ Christopher Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 703-4 (2010).

¹⁹¹ *Id.* at 705.

as bloggers, search engines, and bulletins to identify and retrieve content.¹⁹² The most effective aggregators are adaptive; they learn from their users' habits, preferences and previous searches to help them find future content that would likely want.¹⁹³ This is why Google has generally supplanted every search engine competitor: its search algorithms are the best at identifying the content its users prefer.

But Google's algorithms are not the only means by which our online experiences are not entirely our own. The free speech regime created by § 230 immunity and *Reno v. ACLU* allows harassing and threatening conduct to pop up and remain on websites not otherwise devoted to such material, thus, as Danielle Citron has noted, "increas[ing] the likelihood that children and unwilling adults will encounter it."¹⁹⁴ This material becomes difficult to avoid not only because it can show up anywhere – and websites and ISPs are not liable when it does – but also because individual users do not have the power to avoid it even if they knew about it. Fans of former Republican Senator Rick Santorum have this problem. When you type in "rick santorum" into a Google search, two of the first four results include a graphic definition for a sexual neologism.¹⁹⁵ In response to offensive comments then-Senator Santorum made about gays and homosexuality in general,¹⁹⁶ sex columnist Dan Savage created the

¹⁹² *Id.* at 707.

¹⁹³ *Id.* at 707 (citing Greg Lastowska, *Google's Law*, 73 BROOK. L. REV. 1327, 1334–37 (2008)).

¹⁹⁴ Citron, *supra* note 41, at 85.

¹⁹⁵ Steve Peoples, *Santorum Talks About Longtime Google Problem*, ROLL CALL (Feb. 16, 2011), http://www.rollcall.com/issues/56_84/-203455-1.html.

¹⁹⁶ *Id.* Santorum told the Associated Press that gay sex could "undermine the fabric of our society" and compared gay sex with "man on child, man on dog" relationships. *Id.* ("And if the Supreme Court says that you have the right to consensual sex

website www.spreadingsantorum.com and tied it to a contest in which he asked readers to submit definitions for the term "santorum." Using extensive links to other sites, Savage made sure that the winning definition would be among the top search results in any search.¹⁹⁷ This may have been the first "Google bomb" in the political arena, but cases like this have plagued and harassed ordinary individuals long before Mr. Santorum found himself a victim of his own bigotry and Mr. Savage's revenge.¹⁹⁸

Whatever the advantages and disadvantages of intermedia-
tion,¹⁹⁹ it is clear that we are not free and autonomous agents of
choice online. Our experiences are often dictated or, at a minimum,
influenced by intermediaries that help us block unwanted content
and help us find the content we seek. The real virtual self is, like the
individual in Durkheim's sociology, mediated and influenced by
the institutions of society into which he is born. Durkheim calls
these social institutions, "social facts," or the things of life that are

within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything. Does that undermine the fabric of our society? I would argue yes, it does.").

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., Citron, *supra* note 41, at 71-74 (discussing the pattern of attacks on female law students that occurred on the site AutoAdmit in 2007, where one participant in the "Google bombing" campaign stated explicitly that he was "not going to let that bitch have her own blog be the first result from googling her name!").

¹⁹⁹ It is beyond the scope of this paper to enter this debate. See generally, e.g., Oren Bracha and Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1161-79 (2008); Jennifer A Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095 (2007); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105 (2010). For the purposes of identifying the real virtual self, it is enough to note that his online experiences are mediated.

external and coerce us.²⁰⁰ Belief is a social fact, as is marriage, sisterhood, religion, customary practices, and even lasting phenomena like traffic jams: we did not create them, but rather entered into a world in which they exist. We do not control them; rather, they mediate our experiences and make us act in a certain way. They are “the beliefs, tendencies, and practices of the group taken collectively.”²⁰¹ Consider the example of marriage:²⁰² it existed before us and it uses the social norms with which it has been imbued over the years to coerce social behavior both outside its bonds – social norms encourage people to marry and to hold the institution in some degree of esteem – and inside its limits – norms within marriage define anything from the impropriety of adultery to the importance of showing love and affection to the need to live together. Internet intermediation is similarly a social fact. The problem, as discussed above, is that the online speech law has stripped it of social responsibility and online privacy law has ignored intermediation to the detriment of privacy rights.

The reality of Internet intermediation has other implications, most notably by leveling a likely fatal attack on part of the Court’s reasoning *Reno v. ACLU*. *Reno* involved a constitutional challenge to the Communications Decency Act (CDA), most of which the Supreme Court struck down.²⁰³ The CDA’s restrictions on indecent material would have passed constitutional muster, the Court said, had Internet intermediaries been more like broadcasters, who force

²⁰⁰ DURKHEIM, RULES, *supra* note 130, at 50-51.

²⁰¹ *Id.* at 54.

²⁰² I discuss this example at length in Waldman, *Marriage Rights and the Good Life: A Sociological Theory of Marriage and Constitutional Law*, 64 HASTINGS L.J. __ (2013) (on record with the Journal of Law & Liberty).

²⁰³ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-73, 877.

their content into people's homes. Internet communications, the Court believed, "do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"²⁰⁴ That, however, is not the case. Passwords, age verification, and warning pages may exist to block some indecent content from users, but even the *Reno* Court admitted that those technologies are unreliable.²⁰⁵ Unpleasant content, indecent pictures, and threatening speech are constantly "pushed" on the Internet user by Google bombings and other manipulations and by the pervasive proliferation of harassing and sexually suggestive content on sites not otherwise focused on such material.²⁰⁶ Intermediation, and the lack of autonomy that comes with it, make avoiding bad content more difficult than Internet libertarians would have us believe.

3. *An Involuntary Self*

As an individual who enters society and social institutions that are external and prior to himself, Durkheim's conception of man must join society. He neither wants to avoid it,²⁰⁷ lest he be thrust

²⁰⁴ *Id.* at 869 (citing *Reno*, 929 F. Supp. at 844).

²⁰⁵ *Id.* at 856.

²⁰⁶ Citron, *Cyber Civil Rights*, *supra* note 41, at 85. See also Mark S. Kende, *Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle's Eye*, 2007 B.Y.U. L. REV. 1623, 1630-31 (2007). Professor Kende correctly notes that the Internet "is more dangerous and print or broadcast" because interactivity and anonymity allow pedophiles to prey on children. *Id.* at 1630. Only when anonymity evolves into real traceability and the ethos of lawlessness created by Section 230 and *Reno* is lifted will the Internet become a safer place for children.

²⁰⁷ See *supra* notes 139-141 and accompanying text.

into a state of *anomie*,²⁰⁸ nor can he, because it is impossible to ignore the empirical social fact of social institutions around him.²⁰⁹ Similarly, many of us find that we must join the virtual world, lest we be left behind in social, professional, and political circles. And yet the concept of the free and autonomous online anonymity is anathema to involuntariness. There are voluntary, involuntary, and constructively involuntary Internet users, whose fate cannot be understood by reference to the online anonymity.

By using this range of voluntariness, I refer to a standard legal definition running through terms such as “gift,”²¹⁰ “voluntary statement,”²¹¹ or “voluntary confession,”²¹² all of which imply some level of freedom on the part of the actor. John Locke explained the

²⁰⁸ See *supra* notes 1422–144 and accompanying text.

²⁰⁹ See *supra* notes 129–138 and accompanying text.

²¹⁰ Black’s Law Dictionary defines gift as “the voluntary transfer of property to another without compensation.” BLACK’S LAW DICTIONARY 757 (9th ed. 2009).

²¹¹ Black’s Law Dictionary defines a voluntary statement as a “statement made without the influence of duress, coercion, or inducement.” *Id.* at 1539.

²¹² *Schneckloth v. Bustamonte*, 412 U.S. 218, 223–28 (1973) (discussing the definition of “voluntariness” when it comes to a confession). “The notion of ‘voluntariness,’ Mr. Justice Frankfurter once wrote, ‘is itself an amphibian.’ It cannot be taken literally to mean a ‘knowing’ choice. ‘Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements – even those made under brutal treatment – are ‘voluntary’ in the sense of representing a choice of alternatives. On the other hand, if ‘voluntariness’ incorporates notions of ‘but for’ cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.’ . . . ‘The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.’” *Id.* at 224–35 (internal citations omitted).

differences between voluntary, involuntary, and constructively involuntary actions in his *Essay Concerning Human Understanding*. For Locke, voluntariness contrasted with lack of control, not necessity or duress. After all, "a waking man . . . necess[arily has] some ideas constantly in his mind," and can move from one thought to another of his own volition.²¹³ Volition, in turn, "is an act of the mind knowingly exerting that dominion it takes itself to have over any part of the man,"²¹⁴ which can be done in a state of pure freedom, but also out of necessity or "compulsion."²¹⁵ So, if you stand at a cliff and an assailant holds a gun to your child's head, threatening to shoot him unless you jump, your act of taking control of your legs and jumping off the cliff to save your child is a volitional act, even though you acted under duress. Volition is not the enemy of necessity, freedom is: "the act of volition, or preferring one of . . . two [options], being that which he cannot avoid, a man, in respect of that act of willing, is under a necessity, and so cannot be free."²¹⁶ You can stand at a cliff and be completely free to leap to your death because you have the "power to leap or not to leap." But if some greater force prevents you from jumping or pushes you off, you are no longer free "because the doing or forbearance of that particular action is no longer in" your power.²¹⁷ There are, therefore, voluntary actions – those that are free; involuntary actions – those that are unfree; and, constructively involuntary actions – those that are voli-

²¹³ JOHN LOCKE, *ESSAY ON HUMAN UNDERSTANDING* 318 (Alexander Campbell ed., 1894), available at <http://callisto10.ggimg.com/doc/LTNK/LTNK-19001397601-i251-500.pdf>.

²¹⁴ *Id.* at 320.

²¹⁵ *Id.* at 319.

²¹⁶ *Id.* at 326.

²¹⁷ *Id.* at 329.

tional, but done out of necessity. This triad offers a generalized means of describing most Internet users, which contradicts the image of the free online anonym yet again.

Those of us who voluntarily create an Internet presence are likely the most wired. We use Facebook because it is fun and a great way to stay in touch with friends old and new. We use Twitter.²¹⁸ And we pay all our bills online even though we could easily write checks. We go online freely, hoping to reap efficiency, connectivity, and economic rewards in the process, but not because we must go online for any particular reason. In contrast to these users are those who are online involuntarily. They are probably a shrinking breed,²¹⁹ but they still represent a significant portion of the online world. They want little to do with the Internet, never use email and, if they own mobile phones, use them strictly for cellular calls. An Internet presence is created for them, say, by employers who upload pictures of their employees onto their company websites or by friends who posts pictures of them on Facebook even though they are not members. In this way, their names and pictures are out there, available online for others to see, even though they had no control over the situation.

Between these two extremes likely fall most Internet users, many of whom are constructively involuntary virtual selves. For Locke, like in other legal contexts, constructively involuntary ac-

²¹⁸ A next step in the empirical research of my dissertation will analyze the social network overlap of Facebook and Twitter users, in addition to other online social networks.

²¹⁹ More than 81 percent of adults had some Internet presence as of December 2010, and that number has been increasingly dramatically over the past five years. Demographics of Internet Users, PEW INTERNET & AMERICAN LIFE PROJECT, [http://pewinternet.org/Trend-Data-\(Adults\)/Whos-Online.aspx](http://pewinternet.org/Trend-Data-(Adults)/Whos-Online.aspx) (last visited Mar. 3, 2013 5:06PM).

tions are those that involve human volition, like jumping off a cliff,²²⁰ or resigning from a job out of necessity, for example, in response to a threat against your child or an intolerably hostile working environment.²²¹ These are the users who must join the online world lest they be left behind their peers and the rest of the world. Online banking may be essential for productivity; an Internet connection may be essential to do research for a school project; all your friends may be online, pressuring you to join as well. If everyone joined Facebook or Google+ and you remained offline, you would miss essential social interaction with your peers.²²² In fact, even those of us who are online completely voluntarily – if that is even possible – have little control over how our online presence is used. Examples of that lack of control can vary from the innocuous – a friend forwarding a digital picture and an email address to a potential paramour – to the harassing – a peer doctoring a photograph of

²²⁰ LOCKE, *supra* note 213, at 329.

²²¹ In the Title VII context, for example, an employee can be “constructively discharged,” or forced to resign because of intolerable or illegal hostile working conditions. In *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140 (5th Cir. 1975), the court laid out the original definition of constructive discharge—namely, that “if the employer deliberately makes an employee’s working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge.” *Id.* at 144. In *Yates v. Avco*, 819 F.2d 630 (6th Cir. 1987), the court defined constructive discharge as occurring when “working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.” *Id.* at 637. Constructivity in this context is similar to Locke’s volition-with-necessity conception of a man’s power to act: the employee makes her own decision to resign, but she does so out of necessity, making her act unfree.

²²² I am currently analyzing survey data from approximately 2100 high school and college students in the New York City area that should prove the necessity of a digital social networking presence and, perhaps, a mobile digital social networking presence. The results will be published in my doctoral dissertation.

you and sending it to every Facebook member, making threats on your blog or publishing your address on a public board and inviting readers to find you and rape you.²²³

This involuntary and constructively involuntary nature of many of our Internet selves not only damages the myth of the online anonym as a free agent of choice, but also implies that the kind of Internet regulatory regime we would want should differ from the online libertarian model that, among other things, eviscerates our privacy rights upon constructively involuntary disclosures to banks, ISPs, and other online intermediaries. Recall that free choice is the shibboleth of assumption of risk and the third party doctrine.²²⁴ But personal data disclosures to ISPs are mandatory conditions of Internet access and Internet access is a mandatory condition of modern life. In this context, free choice is a fantasy.

4. *A Universal Self*

As digital interaction becomes more important in our daily lives, there are fewer Americans without a virtual presence than ever before. This fact mirrors Durkheim's model of society as essential to an individual's meaning and happiness in life.²²⁵ The same is true of the virtual world. Given the pervasiveness of the Internet today and the essential function it plays in modern social interaction, it is becoming increasingly impossible for any of us to deny the need for a virtual presence. Social networking technologies are re-

²²³ Citron, *Cyber Civil Rights*, *supra* note 41, at 64-65 (telling the story of Kathy Sierra and other women attacked by online mobs).

²²⁴ *See supra* II.C.2.

²²⁵ *See supra* notes 128-1 and accompanying text.

placing bars as “places” of social interaction²²⁶ and blogs and news-feeds are replacing newspapers.²²⁷ According to one estimate, 1 in 5 romantic relationships already begin online.²²⁸ Approximately 9 in 10 Americans ages 18-29 already see the Internet as an essential daily tool.²²⁹ Nearly 54 percent of Americans over the age of 65 are online, joining almost everyone (98 percent) making more than \$75,000 in annual income.²³⁰ And nearly half of adults (47 percent), or 59 percent of Internet users, say they use at least one social networking tool.²³¹ This is nearly double the 26 percent of adults who used a social networking site in 2008. According to the Pew Internet & American Life Project of the Pew Research Center, “this means the average age of adult-[social networking site] users has shifted from 33 in 2008 to 38 in 2010. Over half of all adult . . . users are now

²²⁶ See, e.g., June Thomas, *The Gay Bar: Can It Survive*, SLATE (July 1, 2011) <http://www.slate.com/id/2297609>.

²²⁷ Joseph Plambeck, *Newspaper Circulation Falls Nearly 9%*, N.Y. TIMES (Apr. 26, 2010), <http://www.nytimes.com/2010/04/27/business/media/27audit.html>; John A. Byrne, *The Changing Truths of Journalism*, NIEMAN WATCHDOG (Dec. 21, 2008), <http://www.niemanwatchdog.org/index.cfm?fuseaction=showcase.view&showcaseid=100>.

²²⁸ Match.com and Chadwick Martin Bailey 2009-2010 Studies: Recent Trends: Online Dating, http://cp.match.com/cppp/media/CMB_Study.pdf (last visited Apr. 16, 2013 12:33PM).

²²⁹ Demographics of Internet Users, PEW INTERNET & AMERICAN LIFE PROJECT, [http://pewinternet.org/Trend-Data-\(Adults\)/Whos-Online.aspx](http://pewinternet.org/Trend-Data-(Adults)/Whos-Online.aspx) (last visited Mar. 3, 2013 5:06PM).

²³⁰ *Id.*

²³¹ Trend Data (Adults), PEW INTERNET & AMERICAN LIFE PROJECT, [http://pewinternet.org/Trend-Data-\(Adults\)/Online-Activites-Total.aspx](http://pewinternet.org/Trend-Data-(Adults)/Online-Activites-Total.aspx) (last visited Mar. 3, 2013 5:13PM).

over the age of 35. Some 56 percent of [social networking site] users now are female."²³²

This trend toward universality has been accompanied by integration of the virtual world into our identities. Like Durkheim's society, which provided an essential space for community and mediating our experiences, the modern Internet is a place for social interaction, community, and political engagement. Pew found that social networking site users get more emotional support and companionship than those not using Facebook, Google+, or other similar sites.²³³ They are more politically engaged, using their social networks for political causes, to galvanize allies, and to discuss current political affairs.²³⁴ In a sense, then, social networking sites have become outgrowths of our physical social spaces, channeling our social needs and linking us with those around us, not simply because Facebook seems like the fun thing to do, but because it provides an essential function in our social, professional and political lives.

III. WHAT KIND OF INTERNET SOCIETY DO WE WANT?

The goal of this Article is to not only argue that the law's conception of the virtual self is wrong - it ignores the essential link between our physical and online lives, our desire for community, and the salience of virtual social interaction in obtaining that community - but also to show how the myth of online anonym has contributed to a lawless ethos on the Internet. But if I am correct that the

²³² Keith N. Hampton et al., *Social Networking Sites and Our Lives*, PEWINTERNET.ORG 3 (2011), <http://www.pewinternet.org/~media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf>.

²³³ *Id.* at 4, 5.

²³⁴ *Id.* at 4-5.

virtual self is public, mediated, involuntary, and universal, like Durkheim's sociological conception of the individual, then Internet society and the legal regimes that frame it should look quite different than they do today. In short, if the virtual self is bound up with and dependent on the online community for essential social, professional, and political purposes, then the ethos and goal of Internet social norms and regulatory law should be to effectuate "digital citizenship," not personal autonomy. Durkheim would expect social norms to exert pressure on bad actors by having websites limit anonymity and require users to invest in their online reputations. He would want our social networks to be integrated places of safety, where everyone can participate in the network and both users and website operators are working toward the common good. In a sense, then, the Internet is a modern realization of Durkheim's society, essential for human interaction and capable of playing a salient role in forming good digital – and, for that matter, physical – citizens. Where Durkheim's individual acted responsibly because of the solidarity he felt with others in society,²³⁵ law, intermediaries, and individuals should work together to realize our need for community.

The legal case studies discussed in this Article, including identity-based online harassment and the lack of recognition of online privacy interests, are anathema to this robust concept of digital citizenship. Harassment conveys the message that the victims are members of a "group in the community [that are] not worthy of equal citizenship," thus depriving them of "civic dignity."²³⁶ It in-

²³⁵ DURKHEIM, *Individuals and the Intellectuals*, in EMILE DURKHEIM: ON MORALITY AND SOCIETY, SELECTED WRITINGS, *supra* note 173, at 55–56.

²³⁶ Citron and Norton, *supra* note 13, at 1450 (quoting Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1601, 1607 (2010)).

flicts serious psychological injury on the victim.²³⁷ It skews public discourse by misrepresenting gay people to the society at large.²³⁸ And it causes discrimination.²³⁹ A failure to respect online privacy rights by seeing free choice where none really exists turns the necessities of online life into burdens, making the Internet an inhospitable place for the wide swaths of users who express “concern” or “worry” about the availability of their personal data online.²⁴⁰ Weak privacy protections, therefore, disincentivize participation in online social, professional, and consumer life. Together, these problems foster the perception of online lawlessness and sense of hopelessness about it. Fostering community online by reorienting speech and privacy jurisprudence can go a long way toward ameliorating the concerns engendered by a lawless Internet ethos.

A. THE ROLE OF THE LAW IN FOSTERING DIGITAL CITIZENSHIP

1. *Recommendations for Online Speech Jurisprudence*

Durkheim believed that law was both reflective and generative, expressing social norms as well as pushing society to develop new ones.²⁴¹ The same can be said of the laws that govern cyberspace. As argued above, the ethos of lawlessness created by § 230 immunity and cases like *Reno v. ACLU* teaches digital users that the only path

²³⁷ See Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 387 (2012).

²³⁸ Citron and Norton, *supra* note 13, at 1451 (citing Charles Lawrence, *If He Holes, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468 (1990)).

²³⁹ *Id.* (citing Richard Delgado and David Yun, *The Neoconservative Case Against Hate Speech Regulation – Lively, D’Souza, Gates, Carter, and the Toughlove Crowd*, 47 VAND. L. REV. 1807, 1812 (1994)).

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²⁴¹ DURKHEIM, *DOL*, *supra* note 12, at 83-84.

to decent conduct online our hope Internet intermediaries will choose to self-regulate rather than be subject to tort suits. Instead, changes to the law of speech can shape virtue and citizenship values online in at least three ways.

We can reject the autonomy-obsessed rhetoric of *Reno* and *Zeran*.²⁴² In striking down the CDA in *Reno* and finding AOL immune from suit for the offensive messages on its bulletin board in *Zeran*, the federal judiciary based its holdings on an inaccurate conception of the virtual self as alone, anonymous, free of encumbrances, and wanting it that way. In *Reno*, the Internet user was an active agent of choice whose control over his Internet experience allowed him to block indecent content on his own, without need for government interference.²⁴³ “[U]sers seldom encounter[ed] such content accidentally,” the Court believed, and noted that “the odds [were] slim” that someone would access explicit sites by accident.²⁴⁴ And in *Zeran*, the court immunized AOL because of the judiciary’s singular focus on online autonomy: the court stated that “Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum,”²⁴⁵ ignoring § 230’s other purpose to encourage users and intermediaries to work together to prevent indecent content from reaching minors.

A conception of the virtual self that understands the salience of online participation and the role social networking plays in community-building correlates with more republican free speech values

²⁴² See *supra* part II.C.

²⁴³ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 864, 870 (1997).

²⁴⁴ *Id.* at 854.

²⁴⁵ *Zeran v. America*, 129 F.3d 327, 330 (4th Cir. 1997).

that are absent in *Reno* and other Internet speech cases.²⁴⁶ These are the values expressed by Justice Brandeis in his concurring opinion in *Whitney v. California*:²⁴⁷

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.²⁴⁸

Justice Brandeis's vision of free speech channeled Durkheim's sociology and his respect for the salient relationship between man and society. Speaking freely was not meant to be a right of autonomy alone, a Kantian end in itself. Rather, it was meant to allow citizens to "develop their faculties" by participating in and "deliberat[ing]" about politics. Free speech, press, and association were meant to

²⁴⁶ Danielle Citron has argued that restraining cyberharassment comports with the First Amendment value of autonomy. See Citron, *Cyber Civil Rights*, *supra* note 41, at 97-98.

²⁴⁷ 274 U.S. 357 (1927).

²⁴⁸ *Id.* at 375.

protect the vitality of the state, not provide cover for licentiousness. In Brandeis's view, like Durkheim's, public discussion and political involvement are important to a functioning democracy and essential jobs of a citizen.

Cass Sunstein may be the most prominent scholar and advocate for this vision of the First Amendment, and it is one that comports with my vision for Durkheimian digital citizenship. Sunstein sees Brandeis's view of the First Amendment through Madisonian eyes, focused on the "right of freely examining public characters and measures, and of free communication among the people."²⁴⁹ Madison "place[d] a high premium on political (not economic) equality and on the deliberative functions of politics,"²⁵⁰ so free expression was meant to foster democratic governance, participation, and cooperation. For Sunstein, then, free speech is the means through which we express "a certain conception of democratic government, one that promotes political discussion."²⁵¹ Its "overriding goal" is not an expression of individual autonomy detached from his political context; rather, it "is to allow judgments to emerge through general discussion and debate."²⁵² On this view, deliberative politics is prior to the individual right to free speech in that the right to speak serves a uniquely salient purpose in government. As a corollary, Sunstein would argue that current free speech jurisprudence and its Kantian and Rawlsian foundations are doing damage to the First

²⁴⁹ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvii (1993) [hereinafter *SUNSTEIN, DEMOCRACY*]. See also James Madison, Report of 1800, (Jan. 7, 1800), in *Papers of James Madison* 341 (David Matern et al., eds. 1991). For a broader discussion of Professor Sunstein's Madisonian First Amendment vision, see *SUNSTEIN, DEMOCRACY* at 93-121.

²⁵⁰ *SUNSTEIN, DEMOCRACY* at xvii.

²⁵¹ *Id.* at 27-28 (discussing Justice Brandeis' civic conception of speech).

²⁵² Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 314 (1992).

Amendment by flattening it, depriving it of meaning, and equating obscene²⁵³ and hateful²⁵⁴ speech with deliberative political discussion.

Applying this vision of the First Amendment to *Reno* may not have changed the result; the Court held that the CDA was vague and overbroad²⁵⁵ regardless of the conception of the virtual self implicit in its decision. But, had these values been as prominent in free speech discourse as individual autonomy, the court in *Zeran* may not have been so quick to dismiss Congress's hope that § 230 would encourage online cooperation to shield children from indecent conduct.

In addition to elevating republican free speech values into First Amendment discourse, two concrete reforms would move us toward creating an Internet legal regime that fosters digital citizenship by restricting online hate and harassment and sends a message that such speech is no longer part of the ethos of the virtual world. Danielle Citron has argued online hate and harassment on women, minorities, and other vulnerable groups should be seen as civil rights violations because of their devastating effects and attendant community and societal harms and also because of the expressive power of civil rights suits in condemning deviant online behavior.²⁵⁶ A civil rights agenda for cyberhate would foster digital citizenship because it would highlight communal harms and dangers to Internet society as a whole rather than focusing exclusively on the pain of an individual victim.²⁵⁷ It would also empower the vir-

²⁵³ See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

²⁵⁴ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²⁵⁵ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870-73, 877 (1997).

²⁵⁶ See generally Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

²⁵⁷ *Id.* at 85-95.

tual selves of previously victimized groups, allowing them access to the online world and letting them actively participate in essential social, professional, and political communities online.²⁵⁸ And a civil rights agenda would help end an ethos of lawlessness on the Internet by reminding harassers that § 230 immunity would not be absolute and that there can be little safety behind a cloak of anonymity.

We can also expand our vision of harassment to encompass the virtual world. As I have argued in the public school context,²⁵⁹ and as Mary Anne Franks has argued in the workplace context,²⁶⁰ harassment in the physical world can extend to harassment in the virtual world, and vice versa, forcing victims into hostile environments wherever they go. Therefore, when determining the extent of a hostile environment caused by harassment, courts should consider peer-to-peer cyberharassment as an extension of harassment between the same parties in the physical world. By clinging to the opposite view, that a school's authority to discipline harassers extends only as far as the schoolyard and a workplace's hostile sexual environment extends only as far as the four walls of the office, we not only ignore the reality of how our virtual selves are inexorably bound up with our physical selves, but also send the message that what happens online is somehow less important, someone else's problem or, worse yet, not even real. Like a civil rights agenda for online hate, recognizing that online hostile environments caused by cyberharassment can have deleterious effects on victims' participation, sense of self-worth, and dignity will allow the law to foster digital citizenship online.

²⁵⁸ *Id.* at 101-106.

²⁵⁹ See Waldman, *Hostile Educational Environments*, *supra* note 11.

²⁶⁰ See Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. (2012).

2. *Recommendations for Online Privacy Jurisprudence*

The perceived lack of privacy online redoubles the image of online lawlessness. Therefore, getting rid of the third party doctrine – admittedly, just one weed in an overgrown field – is a necessary first step toward bringing the law of the Internet in line with Durkheimian social space it occupies. The third party doctrine makes little sense in the offline world. As Susan Brenner and Leo Clarke argue, it assumes that a “disclosure to a trusted, reputable [third party] is the same as indiscriminate disclosure to the public,” where, in fact, the two disclosures are not fungible. Sharing information with certain small groups or third parties are “controlled disclosures,” or limited sharing for a particular purpose.²⁶¹ To assume that those disclosures are based on the same decision-making processes as public disclosures on Facebook or YouTube is absurd. The increasing role played by Internet and digital technologies makes this problem worse. As Dan Solove has noted, the third party doctrine will eviscerate all Fourth Amendment protections as online intermediaries hold more personal information.²⁶²

This Article shows that the Durkheimian nature of the Internet makes the foundations of the third party doctrine – free choice and assumption of risk – mere fantasies. Personal data disclosures to ISPs, online banking platforms, social networks, and other private online intermediaries are mandatory conditions of participation in online life; the notion of free choice in this context is absurd as well.

²⁶¹ Susan W. Brenner and Leo L. Clarke, *Fourth Amendment Protection for Shared Privacy Rights in Stored Transactional Data*, 14 J.L. & Pol’y 211, 258 (2006).

²⁶² DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 13 (2011).

Therefore, the third party doctrine threatens privacy on the basis of a liberal ideal of free and voluntary choice in a world where that kind of choice often does not exist.

B. THE ROLE OF INTERMEDIARIES

Durkheim believed that society makes us better. The same can be true of the virtual self, who can learn to be a good digital citizen by learning from social norms on the Internet. Danielle Citron and Helen Norton propose a host of steps for private intermediaries to take to help foster digital citizenship.²⁶³ Rather than repeating many of those helpful strategies here, I would like to critique or supplement some of them and show how certain strategies comport with the more robust vision of the virtual self.

Removing hateful content is one thing, but countering it with responsive speech and user education may be more effective. Professors Citron and Norton tell the story of Google's response to a 2004 incident where the first result on a Google search for "jew" was the rabidly anti-Semitic website jewwatch.com.²⁶⁴ While Google did not change its algorithm to remove the site from its search results, it added its own link to the page where jewwatch.com appeared, explaining that the site might be offensive, that Google did not endorse the view and that users could click a hyperlink to visit the homepage of the Anti-Defamation League.²⁶⁵ This strategy does not so much as enforce positive social norms as remind users that there is other content out there. It also permits the hateful speech to remain at the top of Google's search results, thus contributing to the

²⁶³ Citron and Norton, *supra* note 13, at 1468–84.

²⁶⁴ *Id.* at 1471–84.

²⁶⁵ *Id.* at 1472–73.

permanence of online defamation. It also accepts that the best response to bad speech is more speech, which is decidedly libertarian in perspective and does little to ameliorate the harm. It creates a shouting match between hateful and tolerant speech, which is essentially no different than what exists online today.²⁶⁶

Simply adding more speech does less to instill social norms in users than Professors Citron's and Norton's transparency principle.²⁶⁷ They argue that intermediaries should be clear about the harms that their policies against hate speech seek to address and, by explaining why hate speech is anathematic to their corner of the online world, they can "make behavioral expectations more understandable."²⁶⁸ Websites should not just state that they do not tolerate hate or harassment, but explicitly define those terms in their Terms of Service (TOS).²⁶⁹ To do this, Professors Citron and Norton provide a basis for intermediaries to define cyberhate – namely, as that which threatens or incites violence, intentionally inflicts severe emotional distress, harasses, silences speech, and exacerbates hatred or prejudice by denigrating an entire group.²⁷⁰ The principles of safety described in the TOS should also be highlighted, not discarded after the user's first visit, by repeated reminders and intermediary requests that users join them in identifying hateful content. This kind of education teaches users what behavior is acceptable in this

²⁶⁶ Nancy Kim gives a thorough explanation of the weakness of the "more speech" response. See Nancy Kim, *Website Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1052-54 (2009).

²⁶⁷ Citron and Norton, *supra* note 13, at 1457-59.

²⁶⁸ *Id.* at 1457.

²⁶⁹ *Id.* at 1458.

²⁷⁰ *Id.* at 1438-39.

online community, thus allowing them to learn by doing in the Aristotelian sense.

To a similar end, intermediaries should discourage anonymity and encourage users to invest in their online reputations. The strongest antidote to deviant behavior in this area is the requirement to use real names, as is the case on Facebook. In order to sign up for Facebook, you have to provide your full name and email address and your full name follows you wherever you go. Unlike other social networking sites like MySpace, Facebook has no screen names; your online identity is your physical identity.²⁷¹ Real name registration and the display of your real name links your online experience to your physical identity by putting your physical reputation at risk from online misbehavior. To be sure, Facebook users could still concoct fake names and sign in with one of any number of email accounts that hide their true identities,²⁷² but Facebook has created its own social norms that make doing so difficult. Facebook users have grown to expect that those they meet online will have posted on their walls and on their friends' walls, have several if not hundreds of pictures of them with their friends, have hundreds if not thousands of friends and, with any likelihood, have mutual

²⁷¹ On Facebook, there is "no pseudonymous role-playing, as in so many other online social networks." Richard A. Posner, *Just Friends*, NEW REPUBLIC (July 21, 2010), <http://www.newrepublic.com/article/books-and-arts/magazine/76433/facebook-privacy-mark-zuckerberg#> (reviewing DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDER STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* (2010)).

²⁷² For example, my email address includes my name, Ari Waldman, but Google does not prevent me from creating an email address like asdfghjkl@gmail.com that hides my identity. Still, when you create additional email accounts, you are asked to input another email address in case you lose your password or forget your user name. Maintaining anonymity in this context becomes a full-time affair, almost as complicated as creating shell corporations to launder money.

friendships that link them to strangers. It would take considerable effort for a fake profile of a fake identity to exist in this environment, especially when users are suspicious of others who do not conform to Facebook's norm of sociability. Facebook's real name requirement and its attendant social norms inhibit hateful and deviant behavior by creating unavoidable accountability – we are linked to our physical identities, so any misbehavior leaves a deep footprint on our online and physical identities. For example, if I wanted to post the remark, "All Faggots Must Die," on a colleague's or classmate's wall or as my updated status, that statement goes directly into the site's "mini-feed" that can be seen by my friends, the recipient's friends, and, depending upon our privacy settings, anyone in our networks. Not only will my target know who attacked him, but thousands of others will as well. It is akin to committing a crime in broad daylight.

Real names are not the only means to enforce the norms that go along with being a public, non-anonymous self. Intermediaries can require additional disclosures as part of a sign-in page before a user is able to access an online community, thus encouraging voluntary surrender of anonymity. Facebook requires a real name, an email address, gender identification, and a birthday.²⁷³ Yelp requires the same information in addition to a zip code, presumably so it can tailor your experience to your geographic location.²⁷⁴ And eBay re-

²⁷³ See Welcome to Facebook – Log In, Sign Up or Learn More, FACEBOOK, <https://www.facebook.com/index.php?lh=fe006e54543718d427e630f76abee890&eu=Bo4JjxP8sjKOWyCx-qE4A> (last visited Mar. 3, 2013 4:48PM).

²⁷⁴ See *Sign Up*, YELP, <https://www.yelp.com/signup> (last visited Apr. 9, 2013 7:24PM).

quires a full mailing address, as well.²⁷⁵ These additional pieces of information add additional checks on online misbehavior.

Underlying the effectiveness of real-name use and registration and other opt-in disclosures is the effect such requirements have on the user's online and physical reputations. That is, we create and foster good behavior by putting users' skin in the game, by putting our reputations out there for people to see and by allowing other users to measure our virtuousness. Facebook does this implicitly – by creating a world in which you are supposed to use your real name, use a clear face picture, have large circles of friends, post pictures, and regularly interact with your online acquaintances, anyone who deviates from the norm is considered suspect. Sites like eBay and Wikipedia do this explicitly, creating reputation systems among users that encourage them to take care of their online identities. On eBay, users are encouraged to rate each other after each transaction by selecting a rating (Positive, Neutral or Negative) and leaving comments (“Prompt shipment, item as advertised. I recommend this seller. A+”).²⁷⁶ The rating then follows the user wherever he goes, displayed next to the user's screen name in bold, hyperlinked numbers to allow any other user to review previous ratings and comments. In an online community that permits pseudonyms, eBay has nevertheless created and enforced social norms. Negative reviews are a form of social control, warning others to stay away, and comments are accessible to anyone, allowing them to understand the reasons for the reviews and creating a sense of trustworthiness among users. Wikipedia also has a form of reputa-

²⁷⁵ See Hi! Ready to register with eBay?, EBAY, <https://scgi.ebay.com/ws/eBayISAPI.dll?RegisterEnterInfo> (last visited Mar. 3, 2013 4:50 PM).

²⁷⁶ Actual review taken from an eBay's user's review of me.

tion ranking, though far more subtle. Users can acquire administrative privileges in Wikipedia, which allows them to lock entries to prevent misbehavior and stop vandalism, by proving their worth: only when a user makes “lots of edits” can he “apply[] for an administratorship.”²⁷⁷ He has to show the Wikipedia authorities that he will use his newfound authority for good, in consort with the common ethos of Wikipedia’s original editors.²⁷⁸

Such rating systems are not without problems. They can create barriers to entry for new users who, by definition, have no ratings, and have the potential to be misused out of spite. But neither drawback has materialized in any significant way on eBay or Wikipedia. Instead, the social norms created by these systems have turned eBay and Facebook into villages, where people know quite a bit about each other. That accountability should keep misbehavior in check and reinforce the norms of conduct expected in those communities.

And it reflects precisely the kind of society that would be associated with the robust conception of the virtual self. If the virtual self is public, or not anonymous; mediated, or subject to intermediaries; and often involuntary, or required to be a part of the online world, then he would want a society focused on allowing him to realize his digital personhood in that community. He would not be obsessed with individual autonomy. After all, true user autonomy cannot exist online. Rather, the virtual self’s need to participate online would suggest that the focus of Internet speech law and Internet social norms should be on fostering user participation and access rather than autonomy. And creating a place where everyone

²⁷⁷ JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET* 134 (2008) (quoted in Citron and Norton, *supra* note 14, at 1479).

²⁷⁸ Citron and Norton, *supra* note 13, at 1479.

feels safe and capable of participating means cooperating to create good digital citizens and to stamp out online hate and harassment. These are classic Durkheimian values, updated to reflect our digital world.

CONCLUSION

Who we are online – or, what I have called the “virtual self” – is quite different from who our laws and Internet intermediaries think we are. Much of our online speech and privacy jurisprudence presume a conception of the self that is Kantian or Rawlsian: he is the myth of the online anonym, a completely autonomous agent of free choice. What is more, our error is not esoteric; our belief in the myth is at the foundation of a neutrality-obsessed Internet speech regime and a series of cases that eviscerate privacy interests on the basis of the fantastic assumption of pure free choice. And by absolving everyone of responsibility, our laws have created an online ethos that anything goes and that there is nothing protecting us when we, as we must, venture online.

This Article proposes a new way of thinking about the virtual world, one that reflects a more accurate vision of the virtual self as public, mediated, and often involuntary. He is a modern Durkheimian man, defined by his membership in digital society and imbued with meaning as a member of that social space. To create this society, we need a legal regime that balances free speech rights with other values, such as access, safety, and participation, and that recognizes that privacy protections foster greater social interaction.