WHY IS IT SO HARD TO REIN IN SEXUALLY VIOLENT SPEECH?

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I'm honored to be part of this Symposium on Danielle Citron's incisive and powerful *Hate Crimes in Cyberspace*. My comments focus on some free speech issues that persist despite Danielle's determination to fit her proposals into existing First Amendment doctrine.

The speech at issue is largely aimed at individuals rather than taking the form of noxious group disparagement (racist or sexist rants about groups of people), but it is often based at least in part on gender, race or sexual orientation. Citron shows how the personal nature of the postings (often including the target's real name and identifying information) can lead to the denial of job offers, loss of work for those who are employed, withdrawal from social media that are essential to success in many endeavors in the modern world, and loss of identity—as in the case of a woman who had to abandon a successful blogging career, a feminist speaker who could no longer use her real name when travelling or publicize her talks, and several women who felt they had to masquerade as men in order to participate safely in online forums. Citron persuasively demonstrates that online speech starting with one speaker too often transmutes into mob speech in cyberspace and may be linked to tangible intimidation, harassment and violence in the physical world.

Citron underscores the gender patterns and implications of cyberspace hate: studies in the U.S., the U.K., and other countries show that women are disproportionately the subjects of cyber-harassment. Contemporary speech in cyberspace is full of " 'sexual attacks on women' " (107), as Citron's book demonstrates in disturbing detail. She calls on us to treat cyberspace as "the civil rights movement's new frontier," which yields "the legal agenda at the heart" of Citron's project (23, 224). Citron presses this theme by comparing the current disinclination to take seriously the claims made by victims of cyber-attacks to the struggle to convince lawmakers, law enforcement officials and judges that domestic violence was real violence and that sexual harassment should not be treated as business as usual.

Citron provides the best existing analysis of the current state of the civil and criminal law that can be used to hold speakers accountable and analyzes the shortcomings of the existing legal framework for responding to the challenges

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she has identified. But she is also a model of the citizen/scholar/activist: she proposes specific legal reforms, emphasizes the role private parties can play, and responds to free speech concerns.

Citron anticipates assorted free speech arguments against government regulation (in the forms of new statutes and enforcement efforts) of the cyber-hate crimes that are her focus. She positions herself carefully, respecting free speech dictates, and seeking to push hate speech outside the elusive boundary that marks expression to which the First Amendment offers no safe haven. Citron admirably seeks to preserve and promote the positive use of the Internet for the public dialogue essential to active citizenship and self-governance while reining in cyber harassment and cyber stalking.

She distances herself from speech extremists on both ends of the spectrum. On the one hand, she stands up against the so-called First Amendment absolutists within the online community who oppose *any* regulation. On the other, she makes clear that she has set out to "work within the framework of existing First Amendment doctrine," using recognized categories of unprotected speech like defamation, true threats and intentional infliction of emotional distress (190-191). Citron resists all temptations to ally with those who would expand the categorical exceptions to freedom of speech, or preclude or limit protected speech in new platforms (such as the Internet generally or videogames)—invitations the Supreme Court has repeatedly declined.[1]

Despite the care with which Citron has crafted her proffered solutions to the hazards that flow from hate-filled cyberspeech, Citron may underestimate the obstacles the First Amendment poses to her reform agenda.

She is right that the "cruel harassment of private individuals does not advance public discussion," that it is what courts call "low value" speech, and that it may drive its victims out of the public discourse (195). But much hate speech has a political component, and in the U.S. constitutional scheme, hate speech may not permissibly be banned based on its content and viewpoint. Other countries take a different view, and political theorists like Jeremy Waldron have argued that their approach is the wiser course.[2] But, as Justice Kagan pointed out when she was still a law professor, while hate speech codes at universities might satisfy what she called "a reasonable system of First Amendment law," they cannot survive constitutional analysis in the United States.[3] Citron may be too quick to assert that it is okay as a matter of First Amendment jurisprudence to silence low

[1] For history see Catherine J. Ross, Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech, 53 VAND. L. REV. 427, 436-46 (2000). Recent cases include Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011); and United States v. Stevens, 559 U.S. 460 (2010).

[2] JEREMY WALDRON, THE HARM IN HATE SPEECH (Harvard University Press 2012).

[3] CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 164-65 (2015). To be sure, Citron cites some leading constitutional scholars including Jack Balkin, Stephen Heymann, and Cass Sunstein, for the proposition that speech that denies the full expression or participation of others should amenable to being silenced (196), but that is not the current state of the law.

value speakers in order to protect the "expressive autonomy" of their victims (197), or even the victim's sense of personal security.

In its most recent consideration of what was certainly low value speech, the Supreme Court in *Elonis v. United States* (decided after Citron's book was published) reiterated classic doctrine: if hateful or threatening speech does not rise to the level of a "true threat," a category of speech which lies outside the First Amendment's protection, the speaker cannot be held criminally accountable.[4] Ruling on statutory rather than constitutional grounds, the Court held that Anthony Elonis could not be convicted of issuing true threats through Internet postings that appeared to threaten his ex-wife based on a showing of negligence that would be sufficient in a civil case. More was required: proof of *mens rea.* The Court reserved the more precise question whether the mental state requirement could be satisfied by a showing of recklessness or whether something more (such as intent) would be required—a question no court of appeals has yet addressed. Similar constitutional and statutory constraints are likely to apply to prosecutions based on the online abuses at which Citron takes aim.

To be sure, the facts in *Elonis* were egregious. Some of the content Elonis posted indisputably chills the blood of reasonable observers, and is comparable to many of the examples Citron presents. Like many others, I find the following particularly disturbing:

> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife . . . .
>
> . . . it's very illegal to say I really, really, think someone out there should kill my wife . . .
>
> But it's not illegal to say with a mortar launcher.
>
> Because that's its own sentence.[5]

Elonis went on to explain how illegal it would be to tell his Facebook audience the best vantage point for firing a mortar launcher at his wife's house, which he sets out in accurate detail, along with a diagram of the property. It would not surprise me at all if a jury considering similar facts were to conclude that the speaker was at least reckless, or even that he intended for his ex-wife and others to feel threatened and, after applying the corrected legal standard, to convict him of issuing a true threat.

Follow-through is not the key to true threat doctrine. Instead, as the Court explained in *Virginia v. Black*,[6] the doctrine centers on the intent to intimidate those exposed to the communication. If the speaker takes steps to carry out a threat (whether or not it falls within the narrow definition of a true threat) free

[4] Elonis v. United States, 135 S.Ct. 2001 (2015).

[5] *Id.* at 2005.

[6] 538 U.S. 343 (2003).

speech ceases to offer a potential defense and *conduct* becomes the basis for criminal charges. Conduct in the real world also exposes the speakers whose vitriol is Citron's focus to prosecution, if only the victims can convince authorities to take the threats and conduct seriously.

But unlike most of the incidents Citron recounts, Elonis never communicated directly with his ex-wife. He ranted on Facebook, where the two of them were not friends. Elonis's ex-wife searched the Internet for Anthony's postings, which she later testified made her feel "extremely afraid for [her] life."[7] She received a three-year restraining order against him. Elonis mocked the order on another post, one that offered a link to Wikipedia's entry on Freedom of Speech:

> Fold up your [order] and put it in your pocket
>
> Is it thick enough to stop a bullet?[8]

The Court correctly resisted any temptation to premise legal doctrine on the extremely unattractive facts presented in *Elonis*, including multiple threats to a variety of potential victims, tracked by an FBI agent who took the threats very seriously. Instead, the Court served the goals of the Speech Clause by focusing on risks to the person the Chief Justice frames as the "innocent actor." The innocent actor is the one who really was joking (with friends he thought understood his innocent state of mind) but whom the state nonetheless punishes for making true threats. Any efforts to rein in cyber hate will also need to protect this innocent actor. A serious risk exists that once law enforcement officials and prosecutors become educated about the harms caused by cyber hate, they will wrongfully conflate true threats and protected speech—bringing jurors in criminal trials along with them.

Elonis will make it even more difficult to convict speakers accused of making true threats than it was when *Hates Crimes in Cyberspace* went to press. As a matter of constitutional law, that is as it should be. Like the speakers in many of the iconic First Amendment cases, Anthony Elonis presents as an angry, vicious man. When such people—cross-burners and other racists, Nazis, anti-abortion zealots, misogynists and, yes, cyber-haters too—fight for their personal freedom to express constitutionally protected thought we hate, everyone's freedom of expression rides on the correct legal resolution of their claims.

I am not unsympathetic to Citron's efforts to control speech that I agree is heinous, vicious, and often sexually assaultive. But I am less sanguine than she that statutes can be written in a way that is clear enough to give notice, and that does not allow the government to suppress or prosecute speech that the Constitution requires us to allow regardless of how repulsive we find it.

It is not enough to say, as Citron does, that "[p]reventing harassers from driving people offline [or, as she has shown, out of their homes, schools and workplaces] would 'advance the reasons why we protect free speech in the first place,' even though it would inevitably chill some speech of cyber harassers"

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[7] *Elonis*, 135 S.Ct. at 2006.

[8] *Id.*

(197). First Amendment doctrine is clear that the government cannot prefer one kind of speaker or speech over another, or choose to protect the preferred speaker or the object of assaultive speech at the cost of silencing the unpopular (even hated or hateful) speaker. The government cannot be left to decide what speech is worthless and what speech has merit and promotes self-governance or personal autonomy.

Citron hopes to rely on some laws that are already on the books to tame cyber hate (such as laws addressing defamation, harassment and true threats). But those laws may be similarly vulnerable to legal challenges. Harassment statutes, for example, have proven notoriously difficult to craft with precision so that they provide clear notice of what expression is barred, and so that they don't reach too much expression that the Constitution protects. Harassment codes are intentionally designed to be vague, in part, as Aaron Caplan has explained, because it is impossible to anticipate every noxious act (or form of harassing expression), leading legislators to a "value judgment—that it is better to enact a broader, vaguer law than to allow unforeseen bad actions to go unremedied."[9] This tendency encourages adoption of statutes that bar "annoying" behavior, which are susceptible to being overturned by courts.[10]

In the first appellate opinion involving a criminal cyber bullying statute, New York's highest court overturned a brand new law in 2014. The court held that the statute as written could not "coexist comfortably with the right to free speech" because it reached too much annoying or embarrassing speech that the First Amendment protects.[11]

Even the lesser civil standard does not guarantee a victory for the victim of online cruelty. In a case involving high school students, the court denied relief to a girl who sued a classmate for defamation based on a Facebook post that announced the plaintiff had contracted AIDS in Africa where "she was seen fucking a horse, . . . sharing needles with heroin addicts . . . screw[ing] a baboon [and later] hired a male prostitute who came dressed as a sexy fireman."[12] Presentation of falsehood as fact is an essential element of a defamation claim, and the judge found the posting so hyperbolic no one could have regarded it as truthful. "Utter[ly] lack[ing in] . . . taste and propriety," yes, hurtful and humiliating, yes, actionable, no.[13]

Citron is, however, convincing and on strong ground when she urges that private (non-governmental) groups, including service providers, and individuals (like parents and members of the online community) push back against online offenses. Those participants are not bound by the First Amendment. Moreover, the Speech Clause always prefers more and better speech as a way of driving or

[9] Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 791 (2013).

[10] ROSS, *supra* note 3 at 162-63, 327 n.6.

[11] People v. Marquan M., 24 N.Y.3d 1 (2014).

[12] Finkel v. Daubert, 906 N.Y.S.2d 697, 700 (N.Y. Sup. Ct. 2010).

[13] *Id.* at 702.

drowning out the worthless speech in the marketplace of ideas. Beyond efforts to promote norms of responsibility in cyberspace, Citron's recommendations that host entities monitor their sites more vigorously, that users unite to protest noxious speech, and her call for greater transparency in how cyberspace is governed can all be pursued without implicating the Speech Clause. So too her advice that parents educate and monitor their children. She wants to build on movements by Wikipedia co-founder Jimmy Wales and other cyber leaders to encourage bystanders to report and shout down noxious expression, just as anti-bullying efforts in schoolyards increasing rely on training bystanders to be empathetic and to stand up. None of these proposals raise any constitutional concerns, and all hold the potential to transform cultural norms.

Cultural norms of course are key. The sexualized and other vile trolling in Citron's account do not occur in isolation. The news today is full of revelations about sexual harassment and assault on college campuses and in the military.

More than legal change is needed, as Citron argues: "Legal reform won't come to fruition immediately and because law is a blunt instrument, changing social norms requires the help of online users, Internet companies, parents and schools" (254). Social movements (online and off) can promote change by condemning and delegitimizing social practices that are taken for granted today, discrediting them (99). "We must," Citron urges, "finish this work together" (255). On this part, I'm all in.