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## ONLINE ENGAGEMENT ON EQUAL TERMS

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In 2007, when the media started covering the phenomenon of cyber harassment, the public's reaction was disheartening. Although the abuse often involved threats, defamation, and privacy invasions, commentators dismissed it as "no big deal." Harassment was viewed as part of the bargain of online engagement. If victims wanted to enjoy the Internet's benefits, they had to bear its risks. Victims should stop "whining" because they chose to blog about controversial topics or to share nude images of themselves with confidantes. Victims were advised to toughen up or go offline.<sup>1</sup>

Anti-harassment legal proposals met with disapproval. Commentators argued that the law would jeopardize the Internet's role as a forum for public discourse. The benefits of legal action were outweighed by the costs to free expression. For the good of free speech, abusers needed to be let alone.<sup>2</sup>

Curiously absent from discussions about the Internet's speech-facilitating role was individuals' difficulty expressing themselves in the face of online assaults. In response to the abuse, individuals often withdrew from online discourse. They shut down their blogs, sites, and social network profiles not because they tired of them, but because they hoped to avoid provoking their attackers. No attention, however, was paid to the silencing of victims.<sup>3</sup>

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<sup>1</sup> See DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014) (exploring entrenched social attitudes trivializing cyber harassment); Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009).

<sup>2</sup> *Id.* Indeed, victims who invoked the law faced criticism and much worse. *Id.* at 39-44 (discussing the vicious cyber harassment of two Yale law students after they sued 39 pseudonymous individuals for defamation, privacy invasions, and intentional infliction of emotional distress).

<sup>3</sup> See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (arguing that combating cyber harassment with a cyber civil rights legal agenda would help preserve online dialogue and promote a culture of political, social, and economic equality).

Much has happened since that time to change public attitudes towards cyber harassment. In 2008, female journalists began writing about the rape and death threats filling their email inboxes and Twitter feeds. In an award-winning article, Amanda Hess described law enforcement's refusal to help her in the face of online threats. As Hess poignantly noted, rape threats made all women feel unwelcome online.<sup>4</sup> Victims of revenge porn (also known as non-consensual pornography) started to speak publicly about their suffering. Cyber Civil Rights Initiative (CCRI), End Revenge Porn, and Without My Consent were founded to educate the public about cyber harassment and spearhead reform.<sup>5</sup> In 2014, after a data breach led to the viral spread of female celebrities' nude photos, actress Jennifer Lawrence condemned the gawking as an invasion of sexual privacy. That year, cyber mobs targeted women in the video-gaming industry with doxxing, swatting, impersonations, threats, and defamation. After victims fled their homes and canceled speaking engagements, the attacks were roundly condemned.

Government officials began to intervene against online abuse. California's Attorney General Kamala Harris brought extortion and identity theft charges against site operators who solicited nude photos and charged hefty fees for their removal.<sup>6</sup> Inspired by AG Harris, the Federal Trade Commission entered into a consent decree with a revenge porn operator for inducing the disclosure of confidential information for financial gain. In 2005, only New Jersey banned the nonconsensual disclosure of nude images. By 2015, 25 states criminalized the practice.<sup>7</sup> Congresswoman Jackie Speier has drafted a sexual privacy bill that would make revenge porn a federal crime. Federal lawmakers updated the Violence Against Women Act to ensure that the federal cyber stalking statute covered defendants who terrorized victims who lived in the same state. Congresswoman Kathleen Clarke urged federal authorities to investigate online threats.<sup>8</sup>

Thanks to these efforts, cyber harassment's harms are now part of the national conversation. The public is more aware of victims' suffering—their difficulty

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<sup>4</sup> Amanda Hess, *Women Aren't Welcome Here*, PACIFIC STANDARD MAG., Jan. 2014, at 42-47 (discussing her personal experience with online threats with an extensive discussion of the cyber civil rights legal agenda articulated in article *Cyber Civil Rights* published by the Boston University Law Review).

<sup>5</sup> See <http://www.cybercivilrights.org/about>; <http://www.endrevengeporn.org/>; <http://www.withoutmyconsent.org/>.

<sup>6</sup> Kevin Bollaert, the operator of UGotPosted, received a seventeen-year prison sentence for engaging in extortion and identity theft. AG Harris set up a task force to combat the exploitation of networked technologies to disadvantage women and other vulnerable groups, of which I am an adviser.

<sup>7</sup> This unusually swift turn of events is thanks in large part to the work of Holly Jacobs's Cyber Civil Rights Initiative and its legislative director Professor Mary Anne Franks who helped draft state laws and the federal revenge porn bill.

<sup>8</sup> My book *Hate Crimes in Cyberspace* explores potential legal reforms and their First Amendment implications.

getting and keeping jobs, increased risk of physical attack, and emotional distress. It is now uncontroversial to suggest that cyber harassment interferes with expression, even as it is perpetrated via expression. The esteemed civil liberties group, the Electronic Frontier Foundation (EFF), has recently called online harassment a pressing “digital rights issue.”<sup>9</sup> As EFF noted in a blog post, cyber harassment is “profoundly damaging to the free speech and privacy rights of the people targeted.”<sup>10</sup> EFF recognized the fact that online harassment silences people, especially those with “less political or social power” and “women and racial and religious minorities.”<sup>11</sup>

As EFF’s statement suggests, we have come a long way in our understanding of cyber harassment. No longer are we focusing on the speech interests of online harassers to the exclusion of the speech interests of victims. No longer are we ignoring the fact that harassers deprive victims of the ability to engage in life’s important opportunities, including the ability to speak and interact with others. Victims’ expressive interests are attracting concern, and rightly so.

Of course, recognizing victims’ expressive interests does not make it any easier to regulate cyber harassment. Our concern for victims’ ability to engage online does not, and should not, clear the path for legal claims or prosecutions at odds with our commitment to “uninhibited, robust, and wide open public discourse.” Law cannot, and should not, censor hateful or offensive viewpoints. The legal agenda articulated in *Hate Crimes in Cyberspace* comports with First Amendment doctrine and honors the reasons why we protect free speech, as it should.

What about online providers who can address cyber harassment without concerns about the First Amendment or liability for others’ content? Recently, social media companies have been considering if certain abuse is permitted on their platforms. Victims’ expressive interests are behind their bans on threats, harassment, and revenge porn.<sup>12</sup> Some companies have attributed their updated policies to the concept of digital citizenship—the various ways networked tools can foster expression and civic engagement.<sup>13</sup>

Consider Twitter’s evolving policies. For years, Twitter only required users to refrain from engaging in copyright violations, spam, and impersonations. Its terms-of-service agreement has been expanded to prohibit threats, targeted harassment, and disclosures of private and confidential information (including

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<sup>9</sup> See Post of Nadia Kayyali & Danny O’Brien, Facing the Challenge of Online Harassment, ELECTRONIC FRONTIER FOUNDATION (Jan. 8, 2015), <https://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> As private actors that enjoy immunity from liability for the postings of others under Section 230 of the federal Communications Decency Act, content hosts can host as much or as little of their users’ speech activities as they wish.

<sup>13</sup> Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1446 (2011).

social security numbers and nude images posted without consent).<sup>14</sup> Twitter's General Counsel attributed the company's policy changes to its responsibility to "ensure that voices are not silenced because people are afraid to speak up." Users have to "feel safe . . . to fully express themselves."<sup>15</sup> For Twitter, "online safety is a shared responsibility, and digital citizenship is essential to fostering a safe environment for all."<sup>16</sup>

Other providers should consider structuring terms-of-service (TOS) agreements around users' rights and responsibilities, much as Twitter has done.<sup>17</sup> What would this entail? Users would enjoy the right to express themselves on issues large and small. They could contribute to social, cultural, and political dialogue. They could criticize others' views without the fear of private censorship. Such policies would secure the conditions for robust and confident citizenship envisioned by John Stuart Mill and Justice Louis Brandeis. At the same time, users would be barred from using platforms to threaten, harass, and invade sexual privacy. Such behavior "shuts down more expression than it opens up by causing silence, retreat, isolation, or intimidation."<sup>18</sup> Of course, platforms would need to explain what they mean by the terms threats, targeted harassment, and privacy invasion. Users should be told what happens if their speech violates TOS; they should be given a chance to appeal decisions about their speech. These efforts would help protect the expression of all users.

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These developments suggest a growing commitment to online expression for all on equal terms. Of course, much work needs to be done in the law, education, parenting, and far more. But let's take our wins where we can.

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<sup>14</sup> One by one, social media platforms updated their community guidelines to ban revenge porn during 2015. Search engines Google and Microsoft's Bing have pledged to de-index nude images from victims' search results if victims did not consent to their posting.

<sup>15</sup> Shreyas Doshi, *Policy and Product Updates Aimed at Combating Abuse*, TWITTER BLOG (Apr. 21, 2015), <https://blog.twitter.com/2015/policy-and-product-updates-aimed-at-combating-abuse>.

<sup>16</sup> Patricia Carter, *Introducing the New Twitter Safety Center*, TWITTER BLOG (July 20, 2015), <https://blog.twitter.com/2015/introducing-the-new-twitter-safety-center>.

<sup>17</sup> *Digital Citizenship*, PINTEREST, <https://www.pinterest.com/edutopia/digital-citizenship/>.

<sup>18</sup> Sarah Agudo & Alex Feerst, *The Story*, MEDIUM (July 27, 2015), <https://medium.com/the-story/we-ve-been-thinking-hard-about-how-to-create-a-medium-where-people-treat-each-other-well-8a62695850cb>.