

# THE BANALITY OF CYBER DISCRIMINATION, OR, THE ETERNAL RECURRENCE OF SEPTEMBER

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What, if some day or night a demon were to steal after you into your loneliest loneliness and say to you: “This life as you now live it and have lived it, you will have to live once more and innumerable times more” . . . Would you not throw yourself down and gnash your teeth and curse the demon who spoke thus?

– Friedrich Nietzsche, *The Joyful Wisdom*

[E]very year in September, a large number of new university students . . . acquired access to Usenet, and took some time to acclimate themselves to the network's standards of conduct and “netiquette.” After a month or so, these new users would theoretically learn to comport themselves according to its conventions. September thus heralded the peak influx of disruptive newcomers to the network.

In 1993, America Online began offering Usenet access to its tens of thousands, and later millions, of users. . . . AOL made little effort to educate its users about Usenet customs . . . . Whereas the regular September freshman influx would soon settle down, the sheer number of new users now threatened to overwhelm the existing Usenet culture's capacity to inculcate its social norms.

Since that time, the dramatic rise in the popularity of the Internet has brought a constant stream of new users. Thus, from the point of view of the pre-1993 Usenet user, the regular “September” influx of new users never ended. The term was first used by Dave Fischer in a January 26, 1994, post to alt.folklore.computers: “It's moot now. September 1993 will go down in net.history as the September that never ended.”

– From the Wikipedia entry for *Eternal September*

## INTRODUCTION

Much virtual ink has been spilled on the ever-increasing phenomenon of cyber harassment by a wide range of individuals writing from a wide range of perspectives. The voices weighing in on the heated discussion include scholars (legal and otherwise), lawyers, bloggers, techies,

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Internet users whose offline identities are largely unknown, and many who fit into more than one of these categories. The varying opinions on cyber behavior often revolve around a conception of “seriousness,” and seem to fall roughly into one of the following categories:

1. Cyber harassment is a serious problem that should be legally regulated through civil rights, tort, and criminal law;
2. Cyber harassment is a serious problem that can be adequately dealt with through tort and criminal law;
3. Cyber harassment is a serious problem but legal regulation is not the right way to address it;
4. Cyber harassment is not very serious and accordingly should not be legally regulated; and
5. “STFU, b\$itches!” In other words, not only is cyber harassment not serious, even using the term “cyber harassment” marks you as a whiny, oversensitive PC’er/feminazi/old dude who doesn’t “get it” (where the referent for “it” ranges from “the free-wheeling, often mindlessly derogatory way that digital natives interact with each other” to “the First Amendment”); accordingly, not only should cyber harassment not be legally regulated, it should be legally protected.<sup>1</sup>

For simplicity’s sake, let us call those in category 1, 2, and 3 “condemners,” and those in category 4 and 5 “defenders.” What condemners seem to mean by calling cyber harassment serious is that it creates some kind of harm, whether criminal, tortious, discriminatory, or some combination of the three. What defenders seem to mean by arguing that cyber harassment is not serious is that it is an expected, predictable, and even valuable aspect of Internet interaction, the virtual equivalent of frat boy antics and bathroom wall scribbles.

While I have many things to say on the topic of cyber harassment,<sup>2</sup> I want to frame my remarks here around a very specific claim: the defenders are largely correct in their description of cyber harassment as predictable, commonplace, and juvenile—in a word, banal—and that this very banality is what makes it both so effective and so harmful, especially as a form of discrimination. There is little that is new or radical about the *content* of cyber harassment. The racist, sexist, and homophobic epithets, the adolescent exultation in mindless profanity, the cheap camaraderie of

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1. It is worth pointing out that legal scholars of *all* categories, including 1 and 2, are to my knowledge quite well aware of the existence of the First Amendment and the issues that must be confronted when dealing with regulations of speech, despite the impression created by some members of categories 3, 4, and especially 5.

2. See Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace* 19 COLUM. J. GENDER & L. (forthcoming Feb. 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1374533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374533); Mary Anne Franks, *Sexual Harassment 2.0* (working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1492433](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492433).

sexual objectification and violence are all familiar tropes from a familiar setting, namely, High School. What is different is the *form* of online harassment, namely, the way that cyberspace facilitates the amplification, aggregation, and permanence of harm. The first part of this piece will address defenders in category 4 and 5; the second part of the piece will address the divide between category 1 and category 2 condemners on the necessity of a civil rights approach to cyber harassment, leaving aside category 3 condemners for another article.<sup>3</sup>

### I. THE ETERNAL JUVENILE

One may well ask why the drearily familiar sludge of juvenile hostility has informed so much of cyberspace's conventions and norms. One plausible reason is that the social norms of cyberspace are overwhelmingly determined by the young. The "norm entrepreneurs" of cyberspace, if you will, are twenty-somethings and teenagers. Sergey Brin and Larry Page were barely out of their twenties when they created Google; none of the founders of YouTube had hit 30 when they developed the video-sharing website; teenagers and college students set the tone of many online environments, having more time to spend in them and being quicker to access and adopt new technologies. The Internet as we know it is in large part driven and populated by individuals whose norms and customs are closer to those of high school than to adulthood. This is likely part of the story of the Internet's creative and innovative potential; it is also part of the story of the Internet's more depressing side.

As many know from personal experience, school harassment can be a vicious phenomenon. It can range from the trivial to the traumatizing, from teasing a shy kid about his haircut to physically assaulting a student rumored to be gay. School harassment can cause pain, embarrassment, and self-consciousness, and its effects sometimes follow its victims into adulthood. Importantly, however, school harassment used to be bounded in three significant ways: by audience, scope, and time. Those who witnessed the harassment were fellow students, perhaps some teachers and school administration officials—traumatic indeed for the teenager who feels her peers make up the entire world of relevant individuals, but objectively a very small part of the population. The scope of the harassment was also bounded, focusing mostly on appearance, mannerisms, and alleged activities of the targets, but not usually extending to information not readily available to the school community. Perhaps most importantly, school harassment used to have a temporal end—for the most part, rumors and taunts began to fade minutes after graduation, to be eventually forgotten or at least recorded only in the minds of individuals.

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3. As the reasons for condemning cyber harassment yet refraining from legal intervention can be considerably complex. See Franks, *Unwilling Avatars*, *supra* note 2.

With the increasing accessibility and influence of the Internet, however, what was once an often negative but largely containable phenomenon has been dramatically transformed. Harassment in cyberspace is not bounded by any of the three limitations of the pre-Internet High School. The audience for harassment, as targets, participants, and witnesses, is virtually unlimited. Any person of any age can be singled out for harassment, any person can join in the harassment, and the entire online world is now a potential witness to that harassment—one's peers, to be sure, but also one's family, employers, children, co-workers. The scope is also no longer limited, as technology makes it simple to locate and broadcast a wealth of information about a target: home addresses, telephone numbers, social security numbers, sexual activities, medical information, vacation pictures, test scores. And, perhaps most importantly, cyber harassment is not limited by time, as harassing posts, comments, pictures, and video are often impossible to erase, so that a target may never be able to leave them behind.

This, then, is the response to the defenders of categories 3 and 4: while the substance of cyber harassment might seem familiar, harassment writ large in cyberspace—expanded so drastically in target, scope, and reach—has far greater impact than any schoolyard attack.

## II. WHEREFORE DISCRIMINATION?

Now let us turn to the condemners. There are many who do not need to be convinced of the seriousness of cyber harassment, but who nonetheless disagree about the best way to approach it. One of the biggest divisions among condemners, it seems, is whether tort and criminal law are sufficient to address the problem of cyber harassment, or whether it is necessary to develop what Danielle Citron calls a “cyber civil rights” approach.<sup>4</sup> Much of the discussion at this symposium revolved around this divide.

First, it should be made clear that those who advocate a civil rights approach do not do so to the exclusion of tort or criminal approaches. I am not aware of any advocate of a cyber civil rights approach who believes that tort or criminal law should not be used wherever possible. Though my recent work does not focus on this, I am fully in support of attempts to make tort claims regarding cyber harassment more viable and efforts to strengthen the criminal prosecution of online stalking and harassment. The driving idea behind a cyber civil rights agenda, to my understanding, is simply that online harassment can be a form of discrimination.

*Can* be—the argument is not, of course, that all cyber harassment constitutes discrimination. Some online harassment is best characterized

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4. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

as bullying; some as defamation; some as invasions of privacy. It is only when the harassment in question is directed at a historically marginalized group in a way that reinforces their marginalization and undermines their equal participation in the benefits of society that harassment should be considered discrimination. There are, no doubt, some difficult questions about which groups should be considered marginalized, but settled discrimination law has recognized, at the very least, that racial minorities, religious minorities, the disabled, and women are among these groups. This does not mean that every time a woman or an African-American is harassed online it is a case of discrimination. But when, for example, a woman is attacked by name with unwelcome, graphically sexual or violent commentary that invokes and celebrates derogatory and objectifying sexist stereotypes, and results in significant interference with her ability to work, study, or take advantage of the resources and opportunities available to men, then that is discrimination and should be treated as such.

Why is it important to recognize that the harassment of marginalized groups on the basis of their identity as members of these groups is not simply a tort, or in some cases, a crime? Because both tort and criminal law are primarily aimed at individuals who are harmed *as* individuals, not as members of a group. When a woman is attacked on the basis of being a woman, it sends a message to women as a group: you do not belong here, you do not have the right to be here, you will not be regarded on the basis of your talents and abilities but rather on your sexuality, your appearance, your compliance with traditional gender roles. To interrupt the all-too-familiar process of unjust social segregation—whether it be along gender, racial, or religious lines—our legal response must express the condemnation of discrimination above and beyond any individual harm.

### III. THE END OF SEPTEMBER

It is certainly easier not to, of course. If cyber harassment can be considered discrimination, that means making tough calls about what is merely offensive and what is genuinely discriminatory. It means running the risk that in regulating discriminatory speech we chill valuable speech. It means, at least in the regime I suggest—holding website owners liable for discrimination that occurs on their sites—imposing costs on third parties, which in turn might mean that fewer people decide to create websites and that those who do will over-regulate. It likely means legislative reform. It means a possibly long period of uncertainty about reasonable responses and clumsily worded anti-discrimination policies. It means that we might end up with a “sanitized” cyberspace, whatever that might mean. In other words, doing this will mean *changing how things are and how they’ve always been done here*.

All of this is true. And we have seen it all before. The same obstacles and objections were pointed out in the fight to have sexual harassment recognized as sex discrimination. Courts struggled to define “severe or pervasive” harassment and “unwelcomeness.” There were warnings about overdeterrence. There were concerns that sexual harassment policies and procedures would place an undue burden on employers. The EEOC had to develop and promulgate guidelines on sexual harassment and preemptive policies. Employers and schools are still struggling to develop best practices for dealing with sexual harassment. Some bemoan the rise of the “sanitized” workplace, whatever that means.

But after sexual harassment was recognized as sex discrimination, the universe didn’t implode. Employers weren’t bankrupted by the implementation of sexual harassment policies. Free speech has not, by most accounts, become an endangered species in workplaces or schools. What *has* happened, slowly, is that social norms have started to change. The blatantly unwelcome sexual advances considered common practice in the workplace twenty years ago are not acceptable today. Whereas would-be harassers in the past could simply continue the cycle of behavior that they saw all around them, harassers now have to consider the possible repercussions of violating institutional defaults set to non-discrimination. In other words, recognizing sexual harassment as sex discrimination has *changed how things are and how they’ve always been done here*.

Isn’t much modern discrimination, after all, a form of protracted adolescence, a refusal to change the ideas to which one is accustomed, an insistence on one’s arbitrary schoolyard privilege, an arrogant dismissal of the rights of those who seem different? Perhaps to be ignored, dismissed, or merely disciplined if kept well within the confines of a small space with a limited audience and an expiration date; but when discrimination’s dull repetitive damage is given an eternal forum, a loudspeaker, a stage, to join forces with the realities of persistent inequality—then it must be interrupted, loudly, eternally, forcefully. And then, perhaps, we might reach October.