

# UNREGULATING ONLINE HARASSMENT

BY ERIC GOLDMAN<sup>†</sup>

## INTRODUCTION

I learned a lot from Danielle Keats Citron's articles *Cyber Civil Rights*<sup>1</sup> and *Law's Expressive Value in Combating Cyber Gender Harassment*.<sup>2</sup> I realized that women are experiencing serious harms online that men—including me—may be unfairly trivializing. I was also convinced that, just like the 1970s battles over workplace harassment doctrines, we will not adequately redress online harassment until we first acknowledge the problem.

However, finding consensus on online harassment's normative implications is trickier. Online harassment raises cyberspace's standard regulatory challenges, including:

- Defining online harassment, which may range from a coordinated group attack by an "online mob" to a single individual sending a single improper message.
- Dealing with anonymous or difficult-to-identify online harassers.
- Determining how online harassment differs from offline harassment (if at all)<sup>3</sup> and any associated regulatory implications.
- Deciding if it makes more sense to regulate early or late in the technological evolution cycle (or never).
- Allocating legal responsibility to intermediaries.

## PROTECTING SECTION 230

In 1996, Congress addressed the latter issue in the Communications Decency Act, 47 U.S.C. § 230, which provides a powerful immunity for websites (and other online actors) from liability for third-party content or actions. Empowered by this immunity, some websites handle user-

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

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

3. *Compare* Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003) (holding that Title II discrimination claims do not apply to virtual spaces such as AOL chatrooms), *aff'd* No. 03-1770, 2004 WL 602711 (4th Cir. Mar. 24, 2004) (per curiam), *with* Nat'l Fed. of the Blind v. Target Corp., 452 F. Supp. 2d 946 (N.D. Cal. 2006) (allowing an ADA claim against a non-ADA compliant retailer's website based on the interaction between the retailer's physical store and its online activity).

generated content (“UGC”) in ways that may facilitate online harassment, such as tolerating harassing behavior by users or deleting server logs of user activity that could help identify wrongdoers. As frustrating as these design choices might be, they are not surprising, nor are they a drafting mistake; instead, they are the logical implications of Congress conferring broad and flexible immunity on an industry.

Though we might question Congress’ understanding of UGC in 1996, it turns out Congress made a great (non)regulatory decision. Congress’ enactment of § 230 correlates with the beginning of the dot com boom—one of the most exciting entrepreneurial periods ever. Further, the United States remains a global leader in UGC entrepreneurial activity and innovation; note that many of the most important new UGC sites founded in the past decade (such as Facebook and YouTube) were developed in the United States. Although I cannot prove causation, I strongly believe that § 230 plays a major role in both outcomes.

Frequently, § 230’s critics do not attack the immunization generally, but instead advocate a new limited exception for their pet concern. As tempting as minor tweaks to § 230 may sound, however, we should be reluctant to entertain these proposals. Section 230 derives significant strength from its simplicity. Section 230’s rule is actually quite clear: except for three statutorily enumerated exceptions (intellectual property, federal crimes and the Electronic Communications Privacy Act), websites are not liable for third-party content or actions—*period*. Creative and sympathetic plaintiffs have tried countless attempts to get around § 230’s immunity, but without any meaningful success.<sup>4</sup> Given the immunity’s simplicity, judges have interpreted § 230 nearly uniformly to shut down these attempted workarounds. Increasingly, I notice that plaintiffs omit UGC websites as defendants knowing that § 230 would moot that claim.

Operationally, § 230 gives “in the field” certainty to UGC websites. Sites can confidently ignore meritless demand letters and nastygrams regarding UGC. Section 230 also emboldens UGC websites and entrepreneurs to try innovative new UGC management techniques without fear of increased liability.

Any new exceptions to § 230, even if relatively narrow, would undercut these benefits for several reasons. First, new exceptions would reduce the clarity of § 230’s rule to judges. Second, service providers will be less confident in their immunity, leading them to remove content more frequently and to experiment with alternative techniques less. Third, plaintiffs’ lawyers will try to exploit any new exception and push

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4. See *e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (holding that § 320 shielded Consumeraffairs.com because plaintiff failed to establish that Consumeraffairs.com constituted an information content provider by exceeding its “traditional editorial function.”).

it beyond its intent. We saw this phenomenon in response to some plaintiff-favorable language in the Ninth Circuit's *Fair Housing Council of San Fernando Valley v. Roommates.com* en banc ruling.<sup>5</sup> Judges have fairly consistently rejected plaintiffs' expansive interpretations of *Roommates.com*,<sup>6</sup> but only at significant additional defense costs.

#### CONCLUSION: EDUCATION AND "NETIQUETTE"

While the debate about regulating intermediaries' role in online harassment continues, education may provide a complementary—or possibly substitutive—method of curbing online harassment. On that front, we have much progress to make. For example, most current Internet users started using the Internet without any training about bullying, online or offline. Not surprisingly, some untrained users do not make good choices.

However, future generations of Internet users will have the benefit of education about bullying. For example, my seven-year-old son is learning about bullying in school. The program<sup>7</sup> teaches kids—even first graders—not to bully each other or tolerate being bullied. It even shows kids how to deal with bullies proactively. Anti-bullying programs like this may not succeed, but they provide a reason to hope that online harassment will abate naturally as better trained Internet users come online.

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5. *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

6. As of December 31, 2009, I have tracked 13 cases citing *Roommates.com*, 11 of which have done so while ruling for the defense. See Posting of Eric Goldman to Technology & Marketing Law Blog, Consumer Review Website Wins 230 Dismissal in Fourth Circuit—Nemet Chevrolet v. ConsumerAffairs.com, [http://blog.ericgoldman.org/archives/2009/12/consumer\\_review\\_1.htm](http://blog.ericgoldman.org/archives/2009/12/consumer_review_1.htm). (Dec. 29, 2009, 14:53 PST).

7. See Project Cornerstone, <http://www.projectcornerstone.org>.