

REGULATING CYBERHARASSMENT: SOME THOUGHTS ON *SEXUAL HARASSMENT 2.0*

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INTRODUCTION

Professor Franks' *Sexual Harassment 2.0*¹ valuably builds on Professor Citron's substantial contributions to our understanding of cyberharassment in at least two ways. First, Professor Franks joins Professor Citron in powerfully challenging the idealistic narrative of the internet as a primarily egalitarian institution. Both persuasively document the use of cyberharassment to target and punish traditionally subordinated groups.

Second, Professor Franks thoughtfully responds to Professor Citron's call for a conversation about what a cyber civil rights agenda might involve. Professor Citron started that dialogue in *Cyber Civil Rights*,² where I was particularly fascinated by her discussion of the Violence Against Women Act's³ prohibition on the use of telecommunications devices to deliver certain anonymous threats or harassment. I am less optimistic than Professor Citron, however, that other existing civil rights laws—such as Title VII,⁴ Title IX,⁵ and 42 U.S.C. § 1981⁶—might capture and address cyberharassment's harms.

The barriers to addressing cyberharassment under those statutes have very little to do with the space in which the harassment occurs but instead everything to do with whether the harasser is someone within the regulated institution's control. Cyberharassers (assuming we can identify them) are rarely supervisors, co-workers, teachers, or others subject to control by covered employers and schools. In other words, the harasser frequently has no connection with, and is thus not controllable by, the actors regulated by current civil rights laws.

Addressing such cyberharassment instead requires a new civil rights law. Professor Franks, for example, intriguingly proposes that we hold website operators liable for the cyberharassment facilitated by their web-

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1. Mary Anne Franks, *Sexual Harassment 2.0* (University of Chicago Law School, Working Paper, Feb. 5, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1492433.

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

3. Violence Against Women Act, 18 U.S.C.A. § 2261 (1994).

4. 42 U.S.C. § 2000(e) (2006).

5. 20 U.S.C. § 1681–88 (2006).

6. 42 U.S.C. § 1981 (2007).

sites. Here I raise some thoughts and questions for Professor Franks and others interested in that route.

I. WHAT WE CAN LEARN FROM THE PAST

This, of course, is just the most recent in a longstanding and important series of conversations about the theoretical and practical relationship between speech and equality. Indeed, debates over whether and when we should regulate hate speech and other forms of harassment in various spaces are by no means new. So we might consider when and why we have—and have not—protected certain spaces from harassment in the past and then ask how the contemporary conversation over cyberspace compares to those past deliberations.

There may be a number of differences between those conversations past and present, but I flag just one for now. As a practical matter, the regulation of harassment at work and school took two steps. First, Congress claimed the space as protected by regulating conduct within that space: it prohibited discrimination in employment through the enactment of Title VII in 1964 and barred sex discrimination by federally funded educational institutions in 1972.⁷ Those statutes' plain language focused on discriminatory conduct, such as discriminatory decisions about hiring, firing, pay, admissions, scholarships, and so on.

Years later courts, policymakers, and the public took the second step when they came to understand that illegal discrimination can include harassment, which often (but not always) takes the form of speech. In other words, only later did we realize that meaningful protections against discrimination in those spaces required the regulation of some speech in those spaces as well. So, advocates first had to convince policymakers to regulate the space at all in the face of vigorous resistance from opponents who raised concerns about free market interference and the constraint of institutions' discretionary choices, among others. And, second, we later recognized that some forms of speech in that space can create equality harms sufficient to justify further regulation.

Here, Professor Franks seeks to take both steps in the same bold move: to protect, and thus regulate, a certain space that has not yet been regulated *and* (because speech comprises a substantial part of what happens in that space) to regulate speech in that space.

To persuade folks to make that big leap, one must show that the harms of harassing speech in this space are so great as to justify its regulation. This strikes me as a substantial challenge, especially in light of our experience with civil rights legislation that targets very tangible harms. For example, nearly twenty years passed before this year's en-

7. 42 U.S.C. § 2000(e) (2006).

actment of the Hate Crimes Prevention Act,⁸ which addresses acts of physical violence in which the victims bleed, and sometimes die. Sixteen years after its introduction (and more than thirty years after the introduction of the first gay rights bill in Congress), the Employment Non-Discrimination Act⁹—which would prohibit job discrimination on the basis of sexual orientation and gender identity—has yet to be enacted. A cyberharassment statute strikes me as a particularly heavy lift in light of this history.

Can that lift be made? In addition to preparing for a long haul, advocates for a new cyberharassment law must answer at least two key questions. First, *can* we identify an agent of control—someone who has the actual power to control equality harms that might occur in that space? Second, *should* we hold them liable for harms that occur in this space? In other words, should we regulate this space at all? Should we consider cyberspace a space in which participants should be protected from harassment?

II. CRAFTING A VIABLE CYBERHARASSMENT STATUTE

Professor Franks has persuasively answered the first question by identifying website operators as agents of control over the cyberspace they create and manage. Holding them liable, however, triggers a number of other challenges. The matter of remedies, for example, raises theoretical and practical concerns about over-deterrence. If one parallels the remedies available under Titles VII¹⁰ and IX¹¹ to hold website operators liable for money damages for the injuries caused by cyberharassment that occurs on their sites, the potential costs to website operators are quite great—especially when compared to those faced by the harassers themselves, who (as Professor Franks notes) would simply risk being denied access to those websites or having their posts removed. This dynamic might well lead many website operators simply to prohibit private parties from offering comments or postings—an outcome many might find troubling.

One response to those concerned by that outcome might be to build on the work of Charles Lawrence, Catharine MacKinnon, and others in other contexts involving hate speech and harassment. In other words, one might challenge a traditional zero-sum understanding of speech and liberty (that treats speech restrictions as inevitably shrinking the universe of available speech in a way that damages important First Amendment values) by explaining how cyberharassment actually undermines free speech values by silencing the voices of members of traditionally subordinated

8. 18 U.S.C.S. § 249 (2009).

9. H.R. 2981, 111th Cong. (2009).

10. 42 U.S.C. § 2000(e) (2006).

11. 20 U.S.C. § 1681-88 (2006).

groups. Under this view, regulations specifically targeted at cyberharassment that effectively silences other speakers may actually increase the overall universe of expression that furthers significant First Amendment interests.

So there may be responses to such objections. But, on the other hand, legitimate concerns about over-deterrence may suggest the need to think creatively about remedies, such that an entirely new remedies regime might be appropriate in this context.

This leads to the second question: whether we should be protected from harassment in cyberspace at all. Advocates must nail down with precision the underlying justification for regulating those who control chunks of that space if they are to develop the political momentum for, and to ensure the First Amendment validity of, such a statute.

In the past, policymakers chose to regulate harassment in employment and education largely because such harassment caused such great harm to families' economic security as well as to individual dignity and autonomy in important spheres of American life. Quantifying the gravity of harassment's harm in those spaces not only made a strong case for regulation as a policy matter, but also helped justify the regulation of speech in those spaces as constitutional under the First Amendment. In other words, one way (but certainly not the only way) to explain anti-harassment laws' constitutionality is to recognize the regulated speech as posing substantial harms without significantly furthering traditional First Amendment values. Indeed, we frequently understand the First Amendment to permit the regulation of expression where the harms of the targeted speech appear to outweigh its value in facilitating significant First Amendment interests in self-expression, the discovery of truth, and participation in democratic self-governance. Examples include threats, solicitation, defamation, fighting words, obscenity, and misleading commercial speech.

Drawing these lines, however, has always been difficult and deeply controversial. A viable cyberharassment law thus must target specific expression that both causes grave harms *and* is of little First Amendment value. The Supreme Court sought to strike that balance under Title VII¹² with its requirement that speech rises to the level of actionable harassment only when it is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. A new statute's political and constitutional prospects thus depend in great part on identifying the nature and degree of cyberharassment's harm with precision by carefully articulating the importance of participating in cyberspace to our lives today apart from any connection to workplace or educational harm. To be sure, cyberharassment's harms can include po-

12. 42 U.S.C. § 2000(e) (2006).

tential interference with employment or educational opportunities, as both Professors Citron and Franks have explained. But what if the victim is unemployed or retired, or no longer in school? Is there no harm caused by her cyberharassment? Regulating on-line website operators requires advocates to focus on cyberharassment's specific on-line harms, rather than the harms that play out off-line in areas like employment and education that are beyond operators' scope of control.

CONCLUSION

Professors Citron and Franks have taken an important first step in identifying cyberspace harassment issues and suggesting legislative responses to those harms. Those seeking legislation must next make the case that deterring women from participating in cyberspace is a sufficiently great harm to justify regulation of website operators or others who have control of that space, and then to target that regulation to speech that is both harmful *and* of relatively low First Amendment value (assuming that one seeks to regulate expression other than that which is already actionable as threatening or defamatory).

Professor Franks starts to get at the first part of this calculus when she writes: "A world in which members of certain groups avoid places, professions, opportunities, and experiences because they fear not de jure discrimination but de facto discrimination, based not on their ideas but on their bodies . . . is not a world that maximizes liberty."¹³ Professor Citron has similarly described how cyberharassment raises the price that subordinated groups must pay for their participation in cyberspace. These are just the first steps in a long-term project for those who seek to develop a statute with strong chances both to generate political support and withstand First Amendment scrutiny.

13. Mary Anne Franks, *Unwilling Avatars: Idealism and Objectification in Cyberspace*, 19 COLUM. J. GENDER & L. (forthcoming Feb. 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374533.