
**A COMMENT ON DANIELLE CITRON'S
*HATE CRIMES IN CYBERSPACE***

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Danielle Citron's *Hate Crimes in Cyberspace* is a breakthrough book. It has been compared, and with good reason, to Catherine MacKinnon's *Sexual Harassment of Working Women*. The book makes three major contributions. All are central to furthering the equality of women and men both in cyberspace and elsewhere.

First, Citron convincingly catalogues the range of harms, and their profundity, done to many women and some men by the sexual threats, the defamation, the revenge pornography, the stalking, and the sexual harassment and abuse, all of which is facilitated by the internet. The second contribution, and the bulk of the book—the middle third to half—is a legal analysis of these harms. Citron begins by comparing the current status quo regarding our understanding of gendered harms in cyberspace with the legal environment surrounding domestic violence and sexual harassment thirty or twenty years ago. As was domestic violence and sexual harassment, Cyber-harassment today is, first, relentlessly cast as the victim's fault, routinely dismissed as the relatively trivial cost of the much-to-be-desired wild-westiness of the unregulated internet, or the unavoidable price of the free speech rights we all enjoy. Meanwhile the victims are dismissed as whiners, or thin-skinned, or overly sensitive, as incapable of manning up to the slings and errors that go with the territory on the internet, as too dull or humorless to take a joke, as too prone to hysterics to recognize harmless or pathetic barbs when they see them, and as incapable of understanding the importance of First Amendment values. As Citron says, we have been here before.

Citron rehearses the parallel history of the treatment of domestic violence and sexual harassment, however, to make a constructive and re-constructive point, not just a descriptive one: the national conversation was profoundly altered by legal campaigns to construe domestic violence, marital rape, and sexual harassment as harms, as crimes, and as violations of women's civil rights. The same, Citron argues, could be and should be happening here. We need to massively shift the conversation, and law will need to play an outsized role—perhaps the major role—in doing so.

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The third contribution, and last third of the book, is her discussion of possible objections, and then her turn to extra-legal reforms, with a particularly helpful focus on the roles of educators, parents, and the providers themselves (“Silicon Valley” for short). The bulk of the section on objections is devoted to responding to First Amendment challenges. The chapter on schools, parents and Silicon Valley sensibly discusses the actions these private actors and parties can take, and singles out for praise those providers and Silicon Valley companies, such as Facebook, that police against hate speech on the sites and platforms they sponsor. These discussions are immensely valuable.

The book thus serves as a blueprint for what Citron insightfully calls a new civil rights movement. It gives legal representatives and victims a roadmap for charting out legal actions that can be taken to halt the abuse being currently suffered, and to compensate for past harms. It gives state and federal legislators a menu of options for strengthening the law in this area, so that cyberspace can be a safe as well as robust domain for the expression of views on all subjects. It responds to First Amendment worries about the possibility that her proposed reforms might chill valuable speech, and it suggests paths for interested private parties who want to affect the trajectory here outside the law. It’s a *tour de force* and I believe it will succeed. It will change the law, change the conversation, and change attitudes toward and regarding this extraordinarily abusive and harmful behavior. This is a book to celebrate, to study, to argue over, and, mostly, to use.

UNANSWERED QUESTIONS

The book also, though, raises a host of questions it doesn’t come close to answering. The first is descriptive or explanatory: why? Why is there so much hate speech online? This book provides no answer. The second is prescriptive: what could we do about this, *short of* better employing the criminal justice system, feeding still more defendants into an overcrowded penal system? The third is theoretical: why has the law been so slow to recognize, much less provide recourse for, these harms occasioned by some citizens on others? The book doesn’t provide an explanation. I’ll comment very briefly on each.

First, on the cause of the hate crimes themselves. Citron shows, and argues, that the internet magnifies the consequences of hateful conduct. Perpetrators are shielded to some degree by anonymity, and victims are not confronted in real space and time, thus giving perpetrators some sense of detachment both from the nature of their actions and their consequences. But this doesn’t explain its origin. Citron is a lawyer and legal academic, and not a sociologist, so perhaps it is simply beyond the scope of the project. But it is a question that the book implicitly poses from start to finish. Where is all of this hate coming from? Why are these people so bent on destroying the reputations, the careers, the sense of safety, the pleasures, and the speech of women who are total strangers to them? Is some of this rage prompted by the targeted women’s relative privilege and success? Does the successful female law student bound for a high visibility career in public service or a well-paid successful career track in the private sector

trigger *rage* in men, some of whom may feel she has displaced them, and so much rage that they are prompted to sexual assaults? Or, do women, particularly those on feminist sites, or those who post on sexuality issues, provoke fury by sometimes implicitly removing themselves, and perhaps their readers, from the sexual marketplaces of availability? Does that alone provoke rage, by seemingly shrinking the opportunities perceived by their perpetrators and tormenters for sexual opportunities or release? More simply, is this a backlash against strong women speaking their minds—women who but for the availability of the internet, might be servicing men's needs, both sexual and domestic, rather than expressing opinions on the world's woes? And why is the fury so sexualized? After decades now of voluminous scholarship on pornography, rape, and sexualized violence, we are woefully short of answers to these questions. Citron's book though raises the question anew, and if anything with a greater sense of urgency. What she shows is that the sexual assaults, and the fury and rage behind them, are not deniable, they are not jokes, they are not harmless, women are not complicitous in their creation, and they clearly are obstacles to women's equal participation in public spheres. Surely we would be better off all around if we could not only criminalize some of this behavior, but if we could understand it as well.

Second, on Citron's prescriptive arguments for reform. Any number of otherwise sympathetic readers will find troubling Citron's possible over-reliance on criminal law as the hoped for legal response to much of this behavior. We already over-incarcerate our co-citizens. We put people in prison for trivial offenses, for way too long, and in inhumane conditions. This book however (and in contrast to MacKinnon's anti-harassment and anti-pornography campaigns) seeks yet another expansion of the role the criminal justice in maintaining social order. There will be strongly felt resistance to it for just that reason. Are there alternatives to the criminal law, and to criminal justice, for coming to grips with these behaviors? What might they be? Citron suggests some answers in her last chapter, but those suggestions are a little too fleeting and a little too late. Internet service providers could require all contributors to identify themselves. Schools could more actively encourage civil online behavior. Parents should monitor, and where appropriate punish, their children's misogynist or hateful online behavior. And, while norms are changing, perhaps there is a necessary role for more robust enforcement of the criminal law. But it too carries its own injustices, and the book might have acknowledged as much. The development and conceptualization of non-penal responses to these harms, I believe, is one of the large and most important areas of inquiry the book opens, but doesn't adequately address.

And finally, on legal theory: the book gestures toward, but doesn't fully develop, why it might be that the law has been so slow to respond to these obvious threats to the safety of half of its subjects. The behavior itself, after all, is not that different from the non-cyber assaults, threats and defamatory utterances on the streets, in homes and workplaces, all of which are fully understood to be crimes, torts, or violations of civil rights. Some of the harms

suffered by the same sort of conduct in cyberspace is if anything worse. So, where are the police, the prosecutors, the courts, the judges and the lawyers? Part of the explanation for the absence of robust enforcement of laws against this behavior is legal, as Citron shows: the law is inadequate and in need of reform. Part of the explanation is technological: the perpetrators are anonymous, which raises obvious difficulties, but also, to understand the consequences of the behavior requires a degree of technological sophistication still beyond the ken of police, prosecutors, bench, and bar. And a part of the explanation is constitutional: there is a widespread if erroneous belief that this conduct is “speech” and therefore “protected speech” under the First Amendment, and therefore beyond the reach of tort, criminal, or civil rights law. But there are other currents at work as well, that run a little deeper than all of these. Let me just name a few, all of which fall under one umbrella: for various reasons, or at least for the following three reasons that I’ll briefly catalog, these harms are likely to be unnoticed, or invisible. Therefore, the attempt to articulate them is likely to be shut down or muted.

Why has the occurrence, and even the prevalence of these harms been so relatively unnoticed? First, like domestic violence, although in very different ways, cyber violence and cyber harms are almost entirely “privatized”—by which I mean that they occupy a space beyond the immediate purview of the state. Criminal law exists primarily to keep the King’s peace—not to rectify injustices between private parties. Criminal cases, after all, are actions brought by the state, not victims, against defendants who have transgressed against the state’s norms. Cyber violence, though like domestic violence, doesn’t really threaten the King’s peace: domestic violence doesn’t threaten the King’s peace because it takes place within a private space ruled over by a different sovereign—the patriarch—and cyberspace doesn’t threaten the King’s peace because it takes place in a free Hobbesian wilderness not ruled over by anyone, or at least we like to think it does. In both realms, though, the home and cyberspace, in our popular imagination, as well as in the ruminations of any number of legal commentators, law has no role to play. The patriarch rules the home, and can punish accordingly, and in cyberspace, as in a Hobbesian world, the naturally strong rule, and as well they should—the strong in cyberspace, after all, have only words at their disposal, not sticks and stones, and can do no real harm to the King or his subjects.

The second reason for the relative invisibility of these harms, I believe, is the relative degradation of tort law. Whether or not the kinds of behavior Citron describes constitute crimes or civil rights violations, they are all, clearly, torts: they are intentionally harmful acts by an actor against a victim that cause injury. Tort law, however, as a body of law that seeks to provide redress for private wrongs, has been widely discredited and its efficacy badly compromised by all sorts of forces, and consequently, it simply doesn’t present itself to the minds of victims or their counselors as a credible vehicle for pursuing justice against those who wrong them. Tort is viewed academically as a body of law that reallocates the cost of accidents, not a body of law that provides a path toward justice for

victims of intentional wrongs, and it is viewed popularly as a body of law that facilitates ungrounded complaints by people who refuse to take responsibility for their own actions, brought by greedy trial lawyers looking to exploit the suffering of others. As Professors Zipursky and Goldberg have shown in their groundbreaking scholarship on the subject, tort law has largely lost its original meaning: a body of law that provides those whose legal interests, such as an interest in bodily integrity and freedom from fear, have been infringed, with a vehicle for recourse against their wrongdoer. We are all the worse for it, and women active in cyberspace, and who suffer because of that fact, perhaps more than the rest of us.

In the area of gendered harms, though, tort has been even further devalued for an additional reason, of direct relevance here. Feminist legal reformers of the 1970s and 1980s, and most prominently Catherine MacKinnon, quite consciously turned away from tort, and to civil rights, and likewise away from the concept of harm, and to the concept of equality, when they conceptualized the wrongs of sexual harassment. There were good reasons to do so, and there was much to be gained through that turn, but there was also a price to be paid, and Citron's book perhaps inadvertently shows what that price has turned out to be. Briefly, by turning to equality and civil rights, rather than by seeking to expand upon the utility of tort remedies, feminist reformers forewent the opportunity to focus on the physical and psychic injuries occasioned by harassment and assault in *all* spheres: employment, the home, the street, and cyberspace all. The civil rights action, unlike a possible tort action, requires a showing of cognizable harm to pocketbook interests, rather than harm to the psyche, reputation, or emotional wellbeing. The very idea of the civil right to be free of sexual harassment is consequently tied to economic equality, and hence to the workplace, where incomes are threatened, rather than to psychic or physical injury, wherever it occurs. The turn to civil rights, then, in the development of this area of law, carried an educational and political opportunity cost: tort actions permit and require the claimant to delineate the exact nature of the injury, whether or not it is tied to lost income. That delineation might have educated an otherwise oblivious public to the harms of sexual harassment that go beyond the monetary, and well beyond the particular and peculiar locale of the workplace.

And lastly, the cyber harms that Citron delineates are invisible in part simply because they are *sexual* assaults. Sex occupies a peculiarly venerated status in our contemporary cultural imagination, included our legal-cultural imagination. Our current zeitgeist is relentlessly "sex-positive:" both in pop cultural and in academic life, sex itself—the activity, that is—can simply do no wrong. "Sexual assault," in a thoroughly sex positive world, is nearly oxymoronic: regarded not as assaultive and wrongful, but as the result of a sex panic, or of repressed desire coupled by a Freudian displacement of self contempt. Sex sells, but it also legitimates: there is a widely shared interest among sexual actors, sexual predators, and the .01 percent alike in maintaining the perception that with a celebrated right to sex, all is right in the world. Claims of sexual assault upset

that venerated status. It is not entirely surprising that they are now met with a wave of skepticism at least as ferocious as that which met their nineteenth and eighteenth century counterparts.

So, for all of these reasons—the Hobbesian natural world of the internet, the decreasing viability of tort as a body of law meant to provide justice for those whose legal interests are harmed by private actors, and the construction of sexual harassment as a civil rights violation limited to the workplace and schools—the harms done to women and men by virtue of sexual assaults on the internet are likely to go unreckoned. That is clearly changing: the scholarship (and advocacy) of both Danielle Citron and Mary Anne Franks has already gone a long way toward making those harms visible. This book makes a powerful case that we must do something about this conduct, and that we must use law to do it. There simply must be a more robust legal response to harmful, hateful, and misogynistic behavior, in cyberspace, no less than in workplaces and the home. That is a huge contribution, to women's equality, to the quality of our social and civic life, and to the justice of our law.