

Civil Rights

in the Cyber World

By Danielle Citron

THE INTERNET IS A DOUBLE-EDGED SWORD. While it can facilitate the empowerment of people who often face discrimination, it can also be exploited to disenfranchise them. Anonymous mobs employ collaborative technologies to terrorize and silence women, people of color, and other minorities, effectively denying them the right to participate in online life as equals.

Consider the case of Bonnie Jouhari, a civil rights advocate and mother of a biracial girl, who was targeted by a white supremacist website. The site posted her child's picture and Ms. Jouhari's home address and showed an animated picture of Ms. Jouhari's workplace exploding in flames next to the threat that "race traitors" are "hung from the neck from the nearest tree or lamp post." After Ms. Jouhari and her daughter began receiving harassing phone calls at home and work, she left her job and moved. Today, neither she nor her daughter maintains a driver's license, voter registration card, or bank account because they fear creating a public record of their whereabouts.

Another example: Kathy Sierra, a programmer and game developer, who maintained a popular blog on software development called "Creating Passionate Users." In 2007, anonymous individuals attacked Ms. Sierra on her blog and two other websites. Posters threatened rape and strangulation. They revealed her home address and Social Security number. Doctored photographs featured her with a noose beside her neck; another depicted her screaming while being suffocated by lingerie. After the attack, Ms. Sierra canceled speaking engagements and feared leaving her yard. In April 2009, she explained that her "blog [once] was in the Technorati Top 100. I have not blogged there—or anywhere—since."

Many view these attacks as isolated instances of cyber bullying. But anonymous mobs accomplish something far

more systematic than that. Rather than attacking a random mix of individuals, cyber mobs disproportionately target women. The non-profit organization Working to Halt Online Abuse explains that, from 2000 to 2007, 72.5 percent of the individuals reporting cyber harassment identified themselves as women and 22 percent identified themselves as men. Half of those individuals had no relationship with their attackers. Similarly, the National Center for Victims of Crimes' Stalking Resource Center reports that approximately 60 percent of online harassment cases involve male attackers and female targets. Cyber mobs often target lesbian and/or non-white women with particular virulence. They also focus on men of color, religious minorities, and gay men.

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When online mobs attack individuals because of their race, gender, or other protected characteristic, they damage individuals, their groups, and society in unique ways. To be sure, traditional criminal and tort law can reach some of their injuries. Criminal law punishes online harassment and threats. For instance, the Violence Against Women Act (VAWA) punishes anyone using a telecommunications device without disclosing his identity and with the intent to "abuse, threaten, or harass any person who receives the communication." Tort law would provide redress for a cyber harasser's actions. Individuals can bring defamation suits if online lies ruin their reputations. They can seek money damages for emotional distress that a defendant intentionally or recklessly causes. They can bring privacy claims against defendants who publicly disclosed private facts that would be "highly offensive to the reasonable person."

These traditional remedies are important—but they have a limited role. Defamation law, for instance, remedies a plaintiff's reputational harm caused by online lies, but does not address the stigma and economic injuries that individuals experience. Nor does it redress the harm that targeted groups and society suffer in the wake of bias-motivated conduct. Civil rights laws are designed to respond to such harm. Antidiscrimination laws guarantee the right to be free of unequal treatment on the basis of race, gender, or other protected characteristics. Civil rights remedies would combat a cyber mob's interference with individuals' right to work and participate in discourse online as equals.

Existing civil rights laws provide tools to combat anonymous online mobs. The Civil Rights Act of 1968, for instance, punishes "force or threat[s] of force" designed to intimidate or interfere with a person's private employment due to that person's race, religion, or national

origin. Courts have sustained convictions of defendants who made death threats over employees' e-mail and voicemail.

Current law should be amended to criminalize online threats made because of a victim's gender or sexual orientation.

Although the Supreme Court struck

down VAWA's regulation of gender-motivated violence on the grounds that such criminal conduct did not sufficiently affect interstate commerce to justify congressional action under the Commerce Clause, Congress could amend VAWA pursuant to its power to regulate an instrumentality of interstate commerce—the Internet—to punish anonymous cyber mobs that threaten individuals because of their gender or sexual orientation. The Department of Justice would presumably support such a development as it currently encourages federal prosecutors to seek hate crime penalty enhancements for defendants who subject victims to cyber harassment because of their race, color, religion, national origin, or sexual orientation.

Civil rights laws also sanction private lawsuits against cyber mobs for their discriminatory actions. Under section 1981 of Title 42 of the U.S. Code, courts have allowed plaintiffs to bring claims against masked mobs that use tactics of intimidation to prevent members of racial minorities from “making a living” in their chosen field. And targeted individuals can sue attackers under Title VII of the Civil Rights Act of 1964 for preventing them from making a living because of their sex.

Many will, of course, oppose a cyber civil rights agenda on the grounds that it would interfere with our commitment to free speech. A cyber civil rights agenda, however, comports with First Amendment doctrine and free speech values. First Amendment jurisprudence would not immunize a cyber mob’s conduct from regulation and does not prohibit states from using criminal and civil law to forbid threats. Threats of violence made via new technologies are not immunized from penalty on free speech grounds.

The First Amendment does not prohibit states from using criminal and civil law to forbid threats. Threats of violence made via new technologies are not immunized from penalty on free speech grounds. This issue, however, becomes more complicated with crimes that are interwoven with arguably expressive activity. Is the burning of a cross on the lawn of an African-American family best characterized as a threat? Or is it the expression of a view about race which, though noxious, is protected by the First Amendment? The Court answered these questions in *Virginia v. Black*, where it held that a state may ban cross burning if the defendant carried it out with the intent to intimidate. As the Court explained, the First Amendment does not protect “true threats” that communicate a serious intention to commit violence against particular individuals. The Court distinguished cross burnings done with the intent to intimidate, which it deemed a proscribable “true threat,” from cross-burning for other purposes, which it held constituted a protected expression of viewpoint.

The Court’s reasoning applies here. Postings can constitute “true threats” if they convey a serious intention to inflict bodily harm upon the targeted individual, even if they combine the threatening language with protected offensive views. The anonymous threats to inflict bodily harm upon Kathy Sierra, and others like them, are afforded no protection under First Amendment law. Reputation-harming falsehoods similarly enjoy no First Amendment protection if they assert or imply facts.

The First Amendment does not bar antidiscrimination actions even though civil rights violations communicate bigoted views. It poses no obstacle to civil rights claims because they proscribe defendants’ unequal treatment of individuals and the unique harm that such discrimination inflicts, not the offensive messages that defendants send. In *Wisconsin v. Mitchell*, the Court considered a First Amendment challenge to a Wisconsin statute enhancing the penalty of certain crimes if the perpetrator selected the victim because of race, religion, color, disability, sexual orientation, national origin, or ancestry. The Court unanimously rejected the defendant’s claim that the statute punished him for his racist views. It explained that the statute did not transgress the First Amendment because it penalized the defendant’s discriminatory motive for his conduct, not his bigoted ideas. The Court analogized the Wisconsin statute to federal and state antidiscrimination laws such as Title VII’s prohibition of sexual harassment, which, it explained, constituted “content-neutral regulation of conduct.”

Intimidating Ms. Sierra with rape threats and sexually-demeaning comments so that she shuts down her income-generating blog is equally offensive, and equally proscribed, no matter the anonymous perpetrators’ specific views. When law punishes online attackers due to the special severity of the social harm produced by targeting individuals because of their gender or race, and not due to the particular opinions that the attackers or victims express, no First Amendment values are implicated.

Not only does a cyber civil rights agenda comport with First Amendment doctrine, it is consistent with prominent free speech theories that emphasize the importance of autonomy, cultural innovation, and the promotion of truth. Restraining cyber gender harassment is essential to defending the expressive autonomy of its victims. Although harassers express themselves through their assaults, their actions directly implicate their targets’ self-determination and ability to participate in political and social discourse. Self-expression should receive little protection if its sole purpose is to extinguish the self-expression of another.

In short, cyber mobs inflict serious injuries that law must address. Combating their cyber assaults requires a comprehensive approach, one that includes traditional criminal prosecutions, tort remedies, and civil rights actions. Together, traditional remedies and antidiscrimination laws have great potential to deter, punish, and remedy the abuse of online mobs. We can harness law’s coercive power to reverse the backward-looking trend without sacrificing our commitment to free speech.

Professor Danielle Citron’s scholarly interests include information privacy law, cyberspace law, and administrative law, with an emphasis on legal issues surrounding the government’s reliance on information technologies. For the full law review article from which this essay was excerpted, visit: www.law.umaryland.edu/cyber.

