

September 2014

Abuse and Harassment Diminish Free Speech

Anita Bernstein
Brooklyn Law School

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Civil Rights and Discrimination Commons](#), [First Amendment Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 Pace L. Rev. 1 (2014)
Available at: <https://digitalcommons.pace.edu/plr/vol35/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Abuse and Harassment Diminish Free Speech

Anita Bernstein*

I. Introduction

Resolved: *Abuse and harassment diminish free speech.*

With attention to cyberspace, agree or disagree?

Should you disagree, or reject the stark binary (“Sometimes, not always,” “They do, but the cure may be worse than the disease,” “It’s complicated”), read on. I’ll try to persuade you that the proposition is true. If you agree you too might want to read on, if only to find out whether we have reached our shared destination by the same route.

The First Amendment scholar Owen Fiss laid out a useful starting point for the project I broach here in an elegant little pre-Internet book.¹ The irony explored in *The Irony of Free Speech* is that “censorship, to some degree, enhances freedom.”² Fiss argued for state action in support of free expression. Although he refrained from endorsing particular outcomes for disputes that have divided the Supreme Court over decades, he expressed approval of government funding to support controversial works of art, the criminalization of cross burning, hate speech restrictions, the much-maligned Fairness Doctrine,

*Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. Thanks to Leslie Garfield Yalof and Ann Bartow for helpful comments—and their inspired leadership that made this Symposium possible—and to Jennifer Fried, Brooklyn Law School Class of 2015, for furnishing a variety of supports.

1. See generally OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996). The book runs not even a hundred pages including footnotes and index. See Anita Bernstein, *Real Remedies for Virtual Injuries*, 90 N.C. L. REV. 1457, 1458 n.1 (2012), for a discussion on the use of pre-Internet, a term I use a bit loosely and for which it has been determined that 1994 is an approximate date of origin.

2. AMAZON, Book Review, <http://www.amazon.com/Irony-Free-Speech-Owen-Fiss/dp/0674466616> (last visited Sept. 16, 2014).

and the perhaps even more-maligned civil rights remedy crafted by Catharine MacKinnon for harms ascribed to pornography.³

Uniting these interventions, according to Fiss, is that although they constrain and silence, they make speech stronger and more audible. Restrictions that allow “the underfunded, underrepresented, or disadvantaged voice” to speak and be heard “can be defended in terms of the First Amendment, not despite it.”⁴ Fiss focused on “the robustness of public debate” to conclude on his last page: “The autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights.”⁵

This article embraces the same values but more conservatively. Whereas Fiss defended state-sponsored coercion, I leave the government mostly outside the descriptions and arguments presented here.⁶ Scholars have sought to apply the law—of crimes, torts, intellectual property, and statutory allotments and immunities—as remedies for online abuse and harassment.⁷ A few states have modified their penal codes in this direction.⁸ I applaud many of these innovations but do not rely on them. They can be rejected for purposes of the thesis that I sketch in these pages.

Like writings that come before it, this article challenges the chestnut that freedom comes at the expense of another

3. FISS, *supra* note 1, *passim*.

4. This quote arises from the publisher’s description in FISS, *supra* note 1.

5. FISS, *supra* note 1, at 83. Agreeing with Fiss, in this article I use without sarcasm “the marketplace of ideas.” *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The discursive realm is not exactly a market, but it has enough in common with a marketplace for the metaphor to work.

6. *Cf.* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1107 (2011) (favoring extralegal interventions against this problem because legal ones raise First Amendment concerns).

7. *See* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2027-29 (2013) (summarizing a range of proposals offered in scholarly writing).

8. Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 438 (2014) (noting codified crimes in nine states).

progressive good. Equality, to some writers;⁹ antisubordination, to others;¹⁰ “civil rights” also serves.¹¹ In contending that free speech advances and supports these progressive goals, I step into big footprints—not just those of Owen Fiss but before him, *inter alia*, Harry Kalven, who argued when the sixties revolution was young that white speakers ought to thank “the Negro” and his civil rights struggle for enlargement of their First Amendment rights delivered to them by the Supreme Court.¹² But my connection to free speech is more literal than what these great precedent-writings teach. Abuse and harassment pull valuable words out of the marketplace of ideas, I argue. They lessen the discourse.¹³

Also following in the path of other writings, this article notes a few higher stakes present in online speech as contrasted with its lower-tech antecedents. Electronic discourse adds anonymity, amplification, and permanence; within this medium, these conditions reinforce each other.¹⁴ Think of a rock thick and opaque enough to hide behind, durable enough to intimidate, heavy enough to inflict a real blow.

9. Hillel Steiner, *Liberty and Equality*, 29 POL. STUD. 555, 555 (1981) (noting the “perennial” nature of the question). See generally JAN NARVESON & JAMES P. STERBA, ARE LIBERTY AND EQUALITY COMPATIBLE? (2006) (featuring a debate between the two authors on the point).

10. Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853 860 (2003) (reviewing sources that juxtapose antisubordination against freedom); Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 256 (2010) (linking the two with the Thirteenth Amendment).

11. See generally Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. the Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805 (2007).

12. See generally HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

13. See Laura Bates, *Shutting Us Down: How Online Misogyny Prevents Women from Fully Participating in Democracy*, WOMEN’S MEDIA CENTER (Oct. 24, 2013), <http://www.womenundersiegeproject.org/blog/entry/how-misogyny-is-preventing-women-from-fully-participating-in-the-democratic> (“Somehow the freedom of *their* [i.e. women’s] speech is something we rarely hear spoken about.”) (emphasis in original).

14. Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 255-56 (2011) [hereinafter Franks, *Unwilling Avatars*].

Don't stop there. Think also of a rock's majesty and beauty. Opacity, durability, and weight are strengths as well as dangers. In this article, I advocate measures against abuse and harassment because (not "even though") I cherish free speech.¹⁵

II. Dramatis Personae

Where speech occurs, who speaks, and who injects abuse and harassment into the conversation are questions that identify the dramatis personae on the stage before us. Below, a playbill.

A. *Fora*

Social media enlarge the Internet. Thirty years ago, early adopters built communities in newsgroups connected by servers. Social media today make this contact easy and cheap. Amateurs, teenagers, and the tech-unsavvy generally can participate.

For purposes of this article, fora include but are not limited to social media that I have heard of: Twitter, Facebook, LinkedIn, Instagram, MySpace, Pinterest, Tumblr, Flickr, StumbleUpon, varied offerings from Google. My ragged dozen or so circa 2014 is different from the group I would have assembled a few years ago. They will soon seem absurdly quaint, if they do not already,¹⁶ but for illustration they stand

15. At the live version of this Symposium, Leslie Garfield Yulof added a breath of fresh air when she said that she "love[s] social media." Well said. Occupational pessimism—"What sanctions should we impose?" "Look at this danger!" "Society and the state must anticipate and deter anti-social conduct"—a trait that I have explored in another context, *see* Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479 (2009), ought to acknowledge the excitement, education, entertainments, insights, communities, and joy that human beings find online.

16. In late 2013, a little café popped up near the train station in my not-fashionable Brooklyn neighborhood. I would like it to stay open, and so I try to stop by whether I want its coffee or not. At a recent visit of mine, a man came in, introduced himself to the barista as a local deejay, and asked how he could participate in the café's community. "Do you follow us on Instagram?" said the barista, "or even [faint eyeroll] Twitter or Facebook..." I looked

well enough on our stage.

Proprietary social media sites like these connect individuals to the wider Internet. The speech that interests me most in this article gets published in spaces anyone can reach without difficulty: online journalism, websites, blogs, blog comment pages. Accordingly “fora” here encompass all venues whose content can be linked, copy-pasted, or quoted without resort to paper.

B. *Speakers Targeted by Abusers*

Enter human beings. I start with speakers and move to abusers; even though individuals can sometimes hop on both sides of the binary, this division sets up the stakes. Both “speakers” and “abusers” speak. This article focuses on speakers mainly as the targets of abuse.¹⁷

Speakers can gain attention via the Internet for an almost infinite array of reasons. The reason under consideration in this article is their having expressed an opinion or perspective, using words.¹⁸ Expression of this kind falls in the center of what the right to free speech values. In the paradigm that I work with, an essay or comment published online that contains argument or narrative draws verbal responses, also conveyed online, that fall within abuse as adumbrated below.

As I will elaborate, and has been frequently noted, women receive more and worse abuse in response to their online speech than do men.¹⁹ This gender gap has altered the

around. Everyone seemed terribly young.

17. Referring to them as “targets” or even “victims” makes their status on the receiving end clearer, but at the cost of diminishing them as holders of free-speech rights.

18. And so I omit, among other topics related to my concerns, “revenge porn,” a subject well covered in this symposium by John Humbach and others, and the problem of celebrities’ or other performers’ images published without their consent. See generally John A. Humbach, *The Constitution and Revenge Porn*, 35 PACE L. REV. 194 (2015); Caitlin Dewey, *A Comprehensive, Jargon-Free Guide to the Celebrity Nude-Photo Scandal and the Shadowy Web Sites Behind It*, WASH. POST, Sept. 2, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/09/02/a-comprehensive-jargon-free-guide-to-the-celebrity-nude-photo-scandal-and-the-shadowy-web-sites-behind-it>.

19. Still striking is a 2006 University of Maryland study that found that

discourse. From their experience, men can understand the phenomenon, but what they in the aggregate face is a gentler version than what women face. Attacks on male speakers are less in both the quantitative and qualitative senses: fewer instances and lower severity per unit of attack.²⁰ Internet abuse for men is unpleasant but not *that* unpleasant. From their vantage point, measures to discourage the phenomenon or make it less hurtful may look like overreaction.²¹

Having noted gender and promised to return to the topic, I wish to de-emphasize it here, as the subject of this article is free speech writ large. Anyone can practice it. It is everyone's right. Furthermore, online abuse and harassment burden individuals who are not women: and so if these conditions diminish free speech, then the losses to speech extend beyond what women say or would have said if they were not thwarted.

C. *Abusers and Abuse*

We now need something like a working definition of the abuse and harassment that this article addresses. I put the two nouns together even though they are amenable to separate definitions: the proposition "abuse and harassment diminish free speech" sets out to describe behaviors that overlap.

As for which behaviors they include, I have two general categories in mind. The first category is familiar from state and

female-named participants in chatrooms received "25 times as many sexually explicit and malicious messages as males." Ellen Nakashima, *Sexual Threats Stifle Some Female Bloggers*, WASH. POST, (Apr. 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/29/AR2007042901555.html>.

20. See Amy Wallace, *Life as a Female Journalist: Hot or Not?*, N.Y. TIMES, Jan. 20, 2014, at A17 (observing that although two male colleagues had suffered hostile photoshopping, just as she had in contrast to her experience neither of them "has ever been pictured in a Speedo holding hands with a Monsanto executive; that apparently is women's work.").

21. Occasionally a woman will defend current levels of abuse and harassment by deeming them better than their cure. See, e.g., Wendy Kaminer, *Stamp Out Online Misogyny?*, THE ATLANTIC (Nov. 10, 2011, 12:36 PM), <http://www.theatlantic.com/technology/archive/2011/11/stamp-out-online-misogyny/248236/> ("But when women complain about speech they consider abusive or downright frightening, I have to say, welcome to the fray.... Besides, women who speak out against misogyny can't claim to have been silenced by it.").

federal penal codes: threats of violence and related deployments of speech toward antisocial ends, such as incitement. In this article, the category is not coterminous with the codified law of crimes. So, for example, although criminal law might not proscribe behaviors like publishing speakers' home addresses or social security numbers in the context of hostile online commentary about the speech or speaker, I presume that these actions would be experienced as threats by the target and understood by readers of the site as alarming.

The second category, offered by law professor Nancy Leong in a sequence of blog posts about her experience as a speaker who has been targeted by abusers, is less familiar in the literature but very pertinent: negative commentary that focuses on a speaker's identity rather than what she or he has argued or stated. Drawing on what she encountered after publishing "a controversial article" in the *Harvard Law Review*,²² Leong contrasted criticisms of her thesis as rendered in the *Harvard Law Review's* online forum and pseudonymously on a blog called *Opus Publicum*, which Leong said she welcomed, on the one hand, and negative references to Leong's gender, Native Hawaiian identity, and even surname ("she love someone leong time to get herself a law professor position at such a young age") on the other.²³ Ideas are fair game for attack; identity is not.

Drawing the line between identity and ideas can pose a challenge for which Leong has an answer.²⁴ She suggests that if an employer would tolerate the verbiage in question on the job, what got said is in bounds, whereas if "[the] comment would not be tolerated in any workplace," it warrants at least

²² Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

²³ Nancy Leong, *Identity and Ideas*, FEM. L. PROFESSORS (Nov. 13, 2013), <http://www.feministlawprofessors.com/2013/11/identity-ideas/> [hereinafter Leong, *Identity and Ideas*].

²⁴ Cf. Simon Hill, *Watch What You Tweet: How Online Troll Crackdowns Threaten Freedom of Speech*, DIGITAL TRENDS (Aug. 9, 2012), <http://www.digitaltrends.com/social-media/watch-what-you-tweet-how-online-troll-crackdowns-threaten-freedom-of-speech/#!S7z1F> ("There is a distinction between expressing an opinion and sending a threatening or abusive message, but where exactly is the line?").

attention if not discouragement or containment.²⁵ The reason employment considerations pertain to the question is that because “a lot of us do a substantial portion of our work online,” an attack that focuses on who the speaker is rather than what she says “directly targets our work and our professional identities.”²⁶

D. *The Role of Social Media*

With these dramatis personae onstage, we can situate them inside and around social media, the center of this Symposium. Social media turn individuals into publishers, content creators, and news sources. A majority of Americans participate in these realms.²⁷

The paradigm that occupies this article features a speaker who expresses an opinion that reaches these media. She might do so on a blog, as did the British activist Caroline Criado-Perez²⁸ and the software developer Kathy Sierra;²⁹ she could use Kickstarter, a social media platform,³⁰ as did media critic Anita Sarkeesian;³¹ she might write for a periodical that predates the Internet and expanded into online publication.³²

25. Leong, *Identity and Ideas*, *supra* note 23.

26. *Id.*

27. Maeve Duggan & Aaron Smith, *Social Media Update 2013*, PEW RES. INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013/>.

28. See Jessica Best, *Twitter Trolls Jails for Sending Abusive Messages to Feminist Campaigner Caroline Criado-Perez*, MIRROR (Jan. 24, 2014, 4:49 PM), <http://www.mirror.co.uk/news/uk-news/twitter-trolls-jailed-sending-abusive-3058281>.

29. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 64-65 (2009) (recounting attacks on Sierra) [hereinafter Citron, *Cyber Civil Rights*].

30. Jay Weight, *Is Kickstarter a Social Media Platform?*, VIRTUAL MARKETING BLOG (July 15, 2013), <http://www.virtelmarketing.com/blog/is-kickstarter-a-social-media-platform/> (Kickstarter fits at least one definition of social media).

31. Christie Blatchford, *Harassment in the Hashtag Age*, EDMONTON J., May 8, 2014, at A10.

32. Vanessa Thorpe & Richard Rogers, *Women Bloggers Call for a Stop to ‘Hateful’ Trolling by Misogynist Men*, THE OBSERVER (Nov. 5, 2011), <http://www.theguardian.com/world/2011/nov/05/women-bloggers-hateful-trolling/print>.

Or she might find herself a social-media speaker even though she started out speaking in more traditional fora. The Cambridge don Mary Beard, for instance, received aggressive attacks on Twitter and other social media after she appeared on television to discuss an array of issues including immigration.³³ Another target, Moms Demand Action for Gun Sense in America, won more than a hundred thousand followers on Facebook and encountered “aggressive online harassment” along with this fan base.³⁴ Attacks included antagonistic new Facebook pages with names like “Hypocrisy and Stupidity of Gun Control Advocates” and “Moms Demand Action for Gun Sense in America is a Fraud”—along with violent graphic imagery, a reference to one leader’s four-year-old child, and letters addressed to the founder’s home that mentioned where her husband works and her children go to school.³⁵

Online abuse and harassment that follow the publication of speech spread beyond social media. Among the alternative electronic conduits are e-mail messages sent privately to the speaker and blog comments. But because social media lie close at hand for both speakers and abusers, one can expect to see them enlisted. Tweeting and retweeting spread the word from abusers tersely and fast.³⁶ Facebook has plenty of room for invective. One site with a reputation for fostering abuse and harassment, Reddit—a social-media platform in that it uses a friend system—offers a wide-open bulletin board and a community of readers. Online abuse did not start with the rise of social media around 1994,³⁷ but this innovation has given it a

33. Mary Beard, *A Don’s Life*, TIMES LITERARY SUPPLEMENT (Jan. 27, 2013), http://timesonline.typepad.com/dons_life/2013/01/internet-fury.html#more.

34. Alec MacGillis, *Gun Lovers Are Targeting Newtown Activists with Violent, Misogynistic Messages*, NEW REPUBLIC (Dec. 2, 2013), <http://www.newrepublic.com/article/115790/gun-control-moms-face-misogynistic-violent-online-harassment>.

35. *Id.*

36. Beard, *supra* note 33 (“I know that I have had a lot gentler treatment from Twitter than other women, who have been really aggressively harassed by tweets.”).

37. See Jamie Bartlett, *The Internet Has Always Been a Hunting Ground for Women-Hating Trolls*, TELEGRAPH (Dec. 17, 2013), <http://blogs.telegraph.co.uk/technology/jamiebartlett/100011811/the-internet->

big boost.

III. Abuse as Less Speech Than a Silencer of Speech

In my search for robust, serious support of online abuse and harassment expressed in the name of free speech—not a defense of any particular reported attack-episode but instead a generalization, going beyond the banal slippery slope, about the value it offers—I had to go back even earlier than *The Irony of Free Speech*. In 1986, the First Amendment scholar Lee Bollinger found artful diction to commend the acquisition or cultivation of thicker skin. He acknowledged human pain when he deemed tolerance regrettably necessary. Free speech, Bollinger wrote, “carv[es] out one area of social interaction for extraordinary self-restraint.”³⁸ In the context of the United States and its Constitution, the First Amendment functions “to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.”³⁹

Agree or disagree, this rationale for tolerating what Bollinger in his book title called “extremist speech” sets up the poles of this Part. Control and constraint, or what Bollinger labeled “self-restraint,” are inevitable. Silencing abuse and harassment generates a set of consequences. Silencing *through* abuse and harassment generates another.

A. *On One Hand, the Speech-Value of Abuse*

Any attempt to deal with the problem described in this article ought to acknowledge that abuse-and-harassment speech is speech. It expresses what someone wished to say. Even an inarticulate threat using crude words that newspapers find too objectionable to publish is speech.

Putting abusing-and-harassing words online rather than, or in addition to, a piece of paper does extra harm for the

has-always-been-a-hunting-ground-for-women-hating-trolls/ (“Unfortunately, the internet has always been a hostile place for women.”) For whatever it may be worth, Jamie Bartlett is a man.

38. LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 10 (1986).

39. *Id.*

reasons that we have noted,⁴⁰ but these sources of detriment strengthen the communicative force of the message. Whatever the abusive speech brings to its marketplace gets larger when it can reach more people faster and be retrieved more easily. Electronic permanence also builds a record. Our successors will want to know about these early days we are in, where abuse was typed and mass-blasted. They will have ledgers to review. Even in our fleeting lifetime, we can learn from online abuse and harassment stored in ready reach—not only about the pathology of abusers but the substance of what they say. A concatenation of ideology and anxiety connects to more respectable ideas.

B. *On the Other Hand, the Silencing of Speech by Abuse: A Partial Inventory*

Harms of abuse and harassment assembled in this Section, like the gains noted above and the rest of this article, focus on free speech. So, for example, I include severe emotional distress not as a bad end in itself, which it is, but (only) as a silencer of human expression. Civil rights violations in cyberspace, a topic on which scholars like Danielle Keats Citron and Mary Anne Franks continue to shed light,⁴¹ also go far beyond the speech-related study offered here.

1. Individual Speakers Leave the Internet

When human beings feel threatened or tormented they respond, trying to ease their distress.⁴² This motive is everywhere that human beings live: think of “self-medication,”

40. See Franks, *Unwilling Avatars*, *supra* note 14 and accompanying text.

41. See Citron, *Cyber Civil Rights*, *supra* note 29; Franks, *Unwilling Avatars*, *supra* note 14. See generally Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009) [hereinafter Citron, *Law's Expressive Value*]; Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655 (2012) [hereinafter Franks, *Sexual Harassment*].

42. The idea dates back at least to ancient Greece. See Epicurus, *Letter to Menoecus*, available at <http://classics.mit.edu/Epicurus/menoec.html> (observing that “the end of all our actions is to be free from pain and fear”).

street protests, escapes and attempted escapes from prison, job-quitting, divorce, suicide, political revolutions. It likely impels abusers to abuse (although abusers' interests are peripheral to this article), and it presses upon victims.

Leaving the Internet is, of course, one of several possibilities for victims. Squaring off against an assailant can occur instead. For example, Nancy Leong, whose experiences with online abuse were noted, figured out the identity of one attacker who wrote under a pseudonym; she denounced him to an occupational authority.⁴³ Other targets of online attacks choose a posture of stoicism and soldiering on.⁴⁴ But at least some of them leave the Internet because they find the treatment they receive there intolerable. Leong wrote about a "half dozen other professors" of her acquaintance—all women, some of them women of color—who stopped or curtailed their online writing because of repeated threats they received.⁴⁵

The recipient of abuse who leaves the Internet because she finds conditions there intolerable necessarily experiences displacement. She forfeits a conduit of communication. She loses social and professional gains that she would have enjoyed absent abuse and harassment. *Ceteris paribus* she writes less, learns less, teaches less, holds less power.

Consequences for the private life of an individual speaker can include impacts on her health. The blogger Jill Filipovic described life under attack via the AutoAdmit website when she was a law student at NYU: "I wore a lot of hoodies to school because they shielded my face. I skipped classes if I suspected I would be called on. I glared at anyone who made eye contact with me. I made no friends."⁴⁶ Working as a lawyer and

43. Debra Cassens Weiss, *Blogging Law Prof Requests Ethics Probe of 'Dybbuk' Commenter*, A.B.A. J. (Jan. 7, 2014, 12:13 PM), http://www.abajournal.com/news/article/blogging_law_prof_files_ethics_complaint_against_pd_after_concluding_he_was.

44. See, e.g., Beard, *supra* note 33 (remarking on her own "thick skin").

45. Nancy Leong, *Anonymity and Abuse*, FEM. L. PROFESSORS (Nov. 19, 2013), <http://www.feministlawprofessors.com/2013/11/anonymity-abuse/> [hereinafter Leong, *Anonymity and Abuse*].

46. Jill Filipovic, *Let's Be Real: Online Harassment Isn't 'Virtual' for Women*, TALKING POINTS MEMO (Jan. 10, 2014, 6:00 AM), <http://talkingpointsmemo.com/cafe/let-s-be-real-online-harassment-isn-t-virtual-for-women>.

blogging, still slandered by the AutoAdmit assault campaign, Filipovic used dissociation to cope. “And every two or three years, something small would set me off. . . I’d go to therapy, I’d go to yoga, I’d even go to a spinal surgeon. . . .” This physician informed her that stress “had pulled two discs in my neck out of place and contributed to a nice case of spinal arthritis, which could be managed but would cause me physical pain for the rest of my life.”⁴⁷

2. Points of View Are Lost to Discourse

Just as free speech functions as both an individual right and a source of social-institutional utility, the silencing of speech by abuse not only trammels on what individuals ought to hold but is also a source of social disutility. Recall the marketplace of ideas metaphor. It references not a zero-sum struggle among competitors, wherein only one seller and one buyer can enjoy the gains of a sale, but an institution that benefits participants and onlookers even when they themselves do not sell or buy. Living near or inside a marketplace of ideas, individuals are enriched by the chance to match notion with listener but much more by the vibrant and generative climate of debate.

Recall Anita Sarkeesian, who launched an investigation into gendered imagery in video games.⁴⁸ In response to this undertaking she experienced defamatory rewrites of her Wikipedia page, numerous threats via Twitter, efforts to hack into her online accounts, attempts to ban her Kickstarter campaign, images of herself doctored into pornography, and flaggings of her YouTube videos as ostensible terrorism.⁴⁹ She also received the encouragement of Kickstarter money and numerous expressions of support. Although she soldiered on, she must have considered quitting, or been urged by her friends and family to put her safety first.

Sarkeesian’s project mattered. The United States video

47. *Id.*

48. See Blatchford, *supra* note 31 and accompanying text.

49. Emily Greenhouse, *Twitter’s Free-Speech Problem*, THE NEW YORKER (Aug. 1, 2013), <http://www.newyorker.com/tech/elements/twitters-free-speech-problem>.

game market generated more than \$15 billion in revenue in 2013⁵⁰—nowhere near what gets spent on pets in this country,⁵¹ but comparable in dollar volume to important sectors (spas, Internet telephony).⁵² Unlike other mainstays of the national manufacturing economy like automobiles, video gaming is expected to grow. A young and fluid industry lies within reach of the kind of commentary Sarkeesian had set out to build. Her feminist inquiry might have been on to something and might not, but the relevance of what she set out to say is indisputable. If online attacks had left her too intimidated to continue speaking, an investigation would have died and a concern would have lost its most prominent and effective spokesperson.

By hypothesis Sarkeesian stands in for other speakers whose names and words we do not know. Losses chargeable to abuse and harassment cannot be measured, but individual writers have written about what they do not say. They report feeling frightened and ambushed. Unwarned about the risk of abuse before she entered online publication, the British journalist Eleanor O'Hagan wrote that she now tries to fend off attacks before she writes. She has started “watering . . . down” her views, O'Hagan told a reporter, “or not expressing them at all. I noticed that making feminist arguments led to more abuse and, as a result, I rarely wrote about feminism at all.”⁵³

50. STEPHEN E. SIWEK, ENT. SOFTWARE ASS'N, VIDEO GAMES IN THE 21ST CENTURY 3, http://www.theesa.com/wp-content/uploads/2014/11/VideoGames21stCentury_2014.pdf.

51. Estimates vary: \$52 billion is conservative. See Derek Thompson, *These 4 Charts Explain Exactly How Americans Spend \$52 Billion on our Pets in a Year*, THE ATLANTIC (Feb. 23, 2013, 9:00 AM), <http://www.theatlantic.com/business/archive/2013/02/these-4-charts-explain-exactly-how-americans-spend-52-billion-on-our-pets-in-a-year/273446>.

52. *US Spa Industry Revenue Increase to \$14 Billion*, SKIN INC. (Aug. 13, 2013), <http://www.skininc.com/spabusiness/trends/US-Spa-Industry-Revenue-Increases-to-14-Billion-219924161.html>; Fred Donovan, *U.S. VoIP Market Generates \$15 Billion in Annual Revenue*, FIERCE ENTERPRISE COMM. (Jan. 3, 2013), <http://www.fierceenterprisecommunications.com/story/us-voip-market-generates-15-billion-annual-revenue/2013-01-03> (Internet telephony, or VoIP).

53. Helen Lewis, “*You Should Have Your Tongue Ripped Out*”: *The Reality of Sexist Abuse Online*, NEW STATESMEN (Nov. 3, 2011), <http://www.newstatesman.com/blogs/helen-lewis-hasteley/2011/11/comments-rape-abuse-women>.

In 2014, having dialed back her blogging to a noticeable degree,⁵⁴ Jill Filipovic made a similar point more obliquely: “What does an online landscape look like when the women most able to tolerate it are the same ones who are best capable of bucking up and shutting parts of themselves down?”

One staff writer at *The Atlantic* reflected on losses to discourse from a unique vantage point.⁵⁵ Although Conor Friedersdorf writes under his name—which happens to sound male, white, as-far-as-we-know-straight, and unattached to celebrity—he once had passwords to the inboxes of two more famous writers, (female) Megan McArdle and (gay male, very openly so) Andrew Sullivan. Friedersdorf had come of age writing in the Internet era. Before reading through messages addressed to McArdle and Sullivan, he assumed he had long been “subject to all manner of vile and ad hominem insults” in online comments. He was to learn that he had had no idea. He gained another informative vantage point when, as a commissioning editor for a web magazine, he would pitch story ideas and get turned down by female writers “who’d have *killed* the assignments” but did not want to face the gendered vitriol they expected to receive.⁵⁶ Although their caution silenced them, these writers may have made the right second-best decision under distressing and unjust conditions.

Meanwhile, rivals of these silenced individuals flourished in a more indulgent online workplace. From their relative shelter, their talents could leverage their blogs into careers as

54. Browse the archives of *Feministe*, on which Filipovic has published more than five thousand posts, to look at this trajectory. As of now, year-end 2014, Filipovic remains an active writer, publishing regularly on *The Guardian* site and elsewhere, but her online output has diminished. How much of the diminution derived from harassment and abuse and how much to more benign origins—having started in 2005, this blog may have run its course—is unknowable from the outside, but I for one miss what Filipovic has to say. See generally Citron, *Law’s Expressive Value*, *supra* note 41, at 382 (noting that Filipovic said, in a private communication, that she “has toned down her positions to avoid future attacks”).

55. Conor Friedersdorf, *When Misogynist Trolls Make Journalism Miserable for Women*, *THE ATLANTIC* (Jan. 7, 2014, 7:15 AM), <http://www.theatlantic.com/politics/archive/2014/01/when-misogynist-trolls-make-journalism-miserable-for-women/282862/>.

56. *Id.*

“national pundits.”⁵⁷ Friedersdorf went on to wonder, in the subtitle to his essay, “[h]ow many talented women dropped out of the blogosphere rather than deal with hateful Internet feedback.”⁵⁸

Amanda Hess found more losses when she talked to other writers and reviewed research. She mentioned that years of the death-and-rape threats that permeate this article caused the feminist writer Jessica Valenti to “stop[] promoting her speaking events publicly.”⁵⁹ Lower turnouts at these gatherings presumably follow; lower turnouts mean less of a hearing for Valenti’s ideas. The Pew Research Center, Hess continued, found that the percentage of Internet users who participate in chat rooms and discussion groups dropped eleven points from 2000 to 2005, a diminution that happened “entirely because of women’s fall off in participation.”⁶⁰

It is reasonable to infer that women did not exit these conversations simply because they found something else more entertaining to do. Hess remarks:

Just appearing as a woman online, it seems, can be enough to inspire abuse. In 2006, researchers from the University of Maryland set up a bunch of fake online accounts and then dispatched them into chat rooms. Accounts with feminine usernames incurred an average of 100 sexually explicit or threatening messages a day. Masculine names received 3.7.⁶¹

Omissions in the discourse follow a predictable pattern. Abuse and harassment drives some speakers out while others, unharmed in the mode of Matt Yglesias and Ezra Klein, keep speaking. The comfort of sheltered writers takes form in ideological expression: they can commend Bollinger-style

57. *Id.* (mentioning Matt Yglesias and Ezra Klein).

58. *Id.*

59. Amanda Hess, *Why Women Aren’t Welcome on the Internet*, PAC. STANDARD (Jan. 6, 2014, 3:00 AM), <http://www.psmag.com/navigation/health-and-behavior/women-arent-welcome-internet-72170/>.

60. *Id.*

61. *Id.*

tolerance of attacks because they, participating as what Mary Anne Franks has called free speech elitists, “know the burden of this tolerance will not fall on them.”⁶² When speakers get mistreated based on their group membership, what gets spoken and heard does not represent what would have been spoken and heard under more egalitarian conditions.⁶³

3. Time and Money Get Spent in Pursuit of Safety

Having considered abuse as a speech-suppressant that violates both individuals’ rights of expression and the larger collective interest in robust discourse, we move here to losses that individuals suffer when they decide to keep speaking and writing rather than withdraw entirely into silence. The choices for recipients of abuse fall into a binary: try to keep going as a speaker and pay the price, or abandon one’s speech as too costly.

The virtual world presents self-defense opportunities that come at a cost. Danielle Citron gives as examples adopting “gender-disguising names” and engaging in stereotypically male behavior, which can even include abuse and harassment aimed pointedly at other women online.⁶⁴ Job applications in the tech sector require a good appearance as yielded by search engines: if one’s Google hits include abuse-and-harassment online commentary, an attacked individual can suffer occupational detriment.⁶⁵ A victim can pay a search engine optimizer. She can, as always, retreat.

Any speaker who chooses to keep going in the face of one subcategory of abuse and harassment, the serious-sounding threat of physical violence, will have to consider contacting law enforcement personnel. Local police in the United States will

62. Mary Anne Franks, *Free Speech Elitism: Harassment Is Not the Price We’ Pay for Free Speech*, HUFFINGTON POST (Jan. 23, 2014, 11:06 AM), http://www.huffingtonpost.com/mary-anne-franks/harassment-free-speech-women_b_4640459.html [hereinafter Franks, *Free Speech Elitism*]. See also Citron, *Law’s Expressive Value* *supra* note 41, at 375-76 (summarizing commentary that characterizes online abuse and harassment as trivial).

63. See generally Nancy Leong, *Discursive Disparities*, 8 FLA. INT’L U. L. REV. 369 (2013) [hereinafter Leong, *Discursive Disparities*].

64. Citron, *Law’s Expressive Value*, *supra* note 41, at 387.

65. *Id.* at 386.

take the call but often remain baffled by jargon like ISP address, screenshot, username, and even Twitter.⁶⁶ Non-local police, including the FBI and computer-crimes units at the state level, will not be baffled but they might not be interested: remote authorities are not obligated to investigate complaints of online abuse.⁶⁷ Targets who find protection unavailable and wish to persevere have to take steps to protect themselves.

What price do they pay? Like losses to discourse, this detriment evades exact reckoning. Amanda Hess reports that sociologist Nathan Jurgenson tallied “a monetary penalty for being a woman.”⁶⁸ In a much-read magazine essay called “Why Women Aren’t Welcome on the Internet,” Hess describes repeated attempts to engage the police, the FBI, and the local family court in response to only a fraction of her Twitter death threats; she tried to ignore most of them.⁶⁹ “Every time we call the police, head to court to file a civil protection order, or get sucked into a mental hole by the threats that are made against us, zeroes drop from our annual incomes.”⁷⁰ Out-of-pocket costs can include legal fees, time away from freelance work, and privately hired security.

Victims report unhelpful advice they frequently hear from police when they make a report: *Just retreat from social media. Turn off the computer.*⁷¹ “The officers were unanimous in advising me to take a break from Twitter, assuming, as many people do, that Twitter is at best a time-wasting narcotic. . .,” wrote Catherine Mayer, a journalist writing for *Time* magazine in London.⁷² Mayer said she could not heed this counsel

66. See Hess, *supra* note 59.

67. *Id.* (reporting that the blogger Rebecca Watson enlisted the interest of an FBI investigator at first, but then stopped receiving replies to e-mail messages she sent).

68. *Id.*

⁶⁹ *Id.*

70. *Id.*

71. This advice was echoed in a recent news story that advised readers on how to cope with the “cruelty” they encounter on social networks. See Stephanie Rosenbloom, *Dealing With Digital Cruelty*, N.Y. TIMES, Aug. 23, 2014, at SR1 (“Sometimes it’s smart to do as Ms. Williams [Zelda Williams, daughter of comedian Robin Williams] ultimately did [in response to the online abuse she experienced]: disconnect.”).

72. Catherine Mayer, *I Got a Bomb Threat on Twitter. Was I Right to Report It?*, TIME (Aug. 2, 2013), <http://world.time.com/2013/08/02/i-got-a->

because she believed that Twitter was as central to her work as the telephone and e-mail.⁷³ Hess agrees: “We use our devices to find supportive communities, make a living, and construct safety nets.”⁷⁴

Another piece of unhelpful law enforcement advice is to ramp up one’s paranoia. The FBI advised Jessica Valenti “to leave her home until the threats blew over, to never walk outside of her apartment alone, and to keep aware of any cars or men who might show up repeatedly outside her door.”⁷⁵ Individuals under house arrest or electronically monitored confinement following accusations or convictions of crimes typically live under freer conditions.⁷⁶

4. Hierarchies Condemned by Existing Law Are Reinforced

When subordinated groups experience exceptionally strong levels of online abuse and harassment, as was reported, they will withdraw from cyberspace at a comparable rate, and this withdrawal will have speech-related consequences in multiple realms, virtual and physical alike. “The virtual world,” Mary Anne Franks has observed, “has not only reproduced the various forms of discrimination that exist in the physical world, but allowed them to flourish in ways that would not be possible in the physical world.”⁷⁷ The experience of being demeaned and silenced online travels into a victim’s offline life, if only in that attacks on a speaker will include the same words that these speakers have heard on the street.⁷⁸ The online space

bomb-threat-on-twitter-was-i-right-to-report-it/.

73. See Larry Magid, *After Threats Twitter Updates Rules To Emphasize No Tolerance For Abusive Behavior*, FORBES (Aug. 3, 2013, 6:28 PM), <http://www.forbes.com/sites/larrymagid/2013/08/03/after-rape-threats-twitter-updates-rules-to-emphasize-no-tolerance-for-abusive-behavior/>.

74. Hess, *supra* note 59.

75. *Id.*

76. See Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1365-67 (2014) (describing alternatives to incarceration in current use).

77. Franks, *Unwilling Avatars*, *supra* note 14, at 229.

78. See generally Amanda Marcotte, *Harassment of Women is Nothing New—The Internet Just Makes It Easier*, THE DAILY BEAST (Jan. 17, 2014), <http://www.thedailybeast.com/articles/2014/01/17/harassment-of-women-is->

minus speakers who have abandoned it thus becomes a world less enriched by the ideals of civil rights law.

In condemning this result, I reference an argument I have developed elsewhere at greater length: Legislatures that enact civil rights legislation have put the imprimatur of democratic deliberation on a progressive stance.⁷⁹ State legislators and executives who have proscribed discrimination in particular contexts, such as employment, have declared an elevated imperative. So if I favor fair and equal treatment for persons who suffer disproportionately from online abuse and harassment while you—a rhetorical “you” here; bear with me—are more inclined to say, to quote the Reddit member who favored usernames like “chokeabitch” and “rapebait,” “I just like riling people up in my spare time,”⁸⁰ then civil rights legislation changes the impasse between us: the two stances are no longer to-may-to-tomahto. “We the People” support only one of the points of view and not the other.

Legislatures also write criminal law, and criminal prohibitions against online abuse and harassment have drawn stronger resistance than civil remedies.⁸¹ Critics argue that at least in some iterations, they violate the First Amendment. Should a court strike them down they would lose the force of law but retain their democratic imprimatur. As John Humbach argues in this volume, legislatures can consistent with the Constitution codify criminal penalties against one type of online abuse and harassment.⁸² They may be able to

[nothing-new-the-internet-just-makes-it-easier.html](#).

79. See Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 933-34 (2010) [hereinafter Bernstein, *Civil Rights Violations*].

80. Hess, *supra* note 59. Isaiah Berlin described the point about an impasse as it pertains to political philosophy: “For Berlin, the model of a relativist statement is ‘I like my coffee white, you like yours black; that is simply the way it is; there is nothing to choose between us; I don’t understand how you can prefer black coffee, and you cannot understand how I can prefer white; we cannot agree.’ Applied to ethics, this same relativist attitude might say: ‘I like human sacrifice, and you do not; our tastes, and traditions, simply differ.’” JOSHUA CHERNISS & HENRY HARDY, ISIAH BERLIN, THE STAN. ENCYCLOPEDIA OF PHIL. (2004), available at <http://plato.stanford.edu/entries/berlin/>.

81. See generally Humbach, *supra* note 18.

82. *Id.*

proscribe more. Perhaps not. Judicial invalidation of any abuse-and-harassment crime would send the project back to the drafting table rather than extinguish the liberty imperative that this article defends.

Of course, whether any particular instance of online abuse or harassment violates a prohibition on the books is a separate question that I do not purport to answer affirmatively here. American legal practice and customs preclude a definitive yes answer until a complainant protests in court and receives a judgment.⁸³ That success could grow, particularly on the non-criminal side. Judges may come to agree with Danielle Keats Citron that some online abuse or harassment violates existing civil rights law, with no revisions or amendments needed.⁸⁴ For present purposes, my claim is only that even if this consensus does not form, democratically-enacted law in the United States already opposes online abuse and harassment that burden members of subordinated groups.

5. Severe Emotional Distress Shuts Down Speech

The last cost that I will note in the ledger of this Part is severe emotional distress—again with attention only to discourse even though severe emotional distress imposes other important detriments. Two aspects of emotional distress that follow online abuse and harassment warrant mention here.

First, conditions of the sort reviewed here as reported by several writers—including being put in fear of their lives by convincing threats at the same time they are worn out by the noise of repetitive lower-level vitriol—have to inhibit the speaker’s speech in other realms, if only because she cannot write an essay and report a threat, or show up in court, at the same time. When the abuse hammers down hard enough to cause severe emotional distress, even casual speech must diminish. Stances about debates in the speaker’s office job, for

83. Bernstein, *Civil Rights Violations*, *supra* note 79, at 899 (noting that “[c]ivil rights violations go unremedied all the time”).

84. Citron, *Cyber Civil Rights*, *supra* note 29.

example, grow more silent.

Second, severe emotional damage imposed on one speaker can function to silence other persons.⁸⁵ The insightful Jill Filipovic hints at harms of distress that land on third parties—”How many people like me, damaged and lashing out, paid their online cruelties forward?”—with consequences that include losses to discourse. Severe emotional distress impedes work as a writer-speaker, and recipients of abuse and harassment can indeed pay it forward, harming other writer-speakers.

C. *Why So Little Attention to Diminished Speech?*

If current levels of online abuse were checked, then abusers would lose the full benefit of their present opportunity to slur, intimidate, threaten, and insult their targets. If abuse remains unchecked, then the losses grow and most of these losses amount to lost speech. Words not published, ideas cut off before they can ripen, arguments not articulated, stances and analogies and narratives pushed from the marketplace of ideas. Why has the trammeling of free speech gone so unnoticed? A gap this size needs a big explanation. The silencing of women in so many cultures, most pertinently our own, is strong enough to be the explanation of the part of the problem relating to gender in abuse-and-harassment: Women get told all the time to shut up.

Linguist Janet Holmes gathered pertinent folk sayings on point from around the world. She found “nothing is so unnatural as a talkative man or a quiet woman” in Scotland, a Jutlandic aphorism that “the North Sea will sooner be found wanting in water than a woman at a loss for words,” and, from her homeland, a bit of Maori advice: “The woman with active hands and feet, marry her, but the woman with overactive mouth, leave well alone.”⁸⁶

85. Consistent with the rest of this article, I intend this point to address speech rather than moral blame or responsibility. If speakers pay “cruelties forward,” then an online harasser may well be perpetuating or repeating abuse experienced in the past. Making cyberspace less cruel could thus reduce cruelty-generating—and speech-suppressing—pain in the aggregate.

86. Janet Holmes, *Language Myth #6*, PBS (1999), available at

The accusation that women talk too much, Holmes documents, is nonsense. What she numbers as Language Myth #6, “Women Talk Too Much,” earns a crisp rejoinder: “No, they don’t. Rather, they don’t in every situation. Social context and relative power determine who talks more, men or women.”⁸⁷ A much-forwarded factoid that women speak much more than men, 20,000 words a day and men only 7,000, is utter nonsense backed by nothing whatsoever, but it has legs: the media repeatedly repeat it. Another linguist followed the factoid to its point of origin, a bit of Christian-fundamentalist propaganda circa 1993 that told women that because they are natural gabbers and their husbands naturally taciturn, they must not expect the compatibility of shared conversation with their menfolk.⁸⁸ Media reports of a study about a substance called *foxp2* have said that because girls have more of it than boys, we now know why women talk more than men. Nonsense again. The data associate *foxp2* with the ability to talk *better*, not talking more—a stronger power of speech.⁸⁹ But popularizations read the study to say the ladies sure do chatter.⁹⁰

Christian sources support anyone who wishes to say that women need to put a sock in it. Quoth 1 Corinthians, in the King James translation: “Let your women keep silence in the churches: for it is not permitted unto them to speak; but *they are commanded* to be under obedience, as also saith the law.”⁹¹ The Book of Timothy agrees, speaking in the voice of the apostle Paul: “Let a woman learn quietly with all submissiveness. I do not permit a woman to teach or to

<http://www.pbs.org/speak/speech/prejudice/women>.

87. *Id.*

88. Mark Liberman, *Sex-Linked Lexical Budgets*, LANGUAGE LOG (July 3, 2007), <http://itre.cis.upenn.edu/~myl/languagelog/archives/003420.html>.

89. Tracie Egan Morrissey, *The Whole ‘Women Talk More than Men’ Thing is a Myth*, JEZEBEL (Feb. 21, 2013, 5:40 PM), <http://jezebel.com/5986026/the-whole-women-talk-more-than-men-thing-is-a-myth>.

90. See, e.g., Fiona MacRae, *Sorry to Interrupt, Dear, But Women Really Do Talk More Than Men (13,000 Words a Day More to Be Precise)*, DAILY MAIL ONLINE (Feb. 20, 2013, 2:49 PM), <http://www.dailymail.co.uk/sciencetech/article-2281891/Women-really-talk-men-13-000-words-day-precise.html>.

⁹¹ 1 *Corinthians* 14:34 (King James) (emphasis in original).

exercise authority over a man; rather, she is to remain quiet.”⁹² I do not intend to single out this religion, as the one in which I grew up condemns *kol isha*, the voice of a woman, as lewdness;⁹³ it also withholds from women, no matter how learned, the power to assert for the larger community *issur v’heter*, the boundary between forbidden and permitted; that privilege of speech is reserved to male decisors.⁹⁴ Conservative sects and strands of Islam have drawn attention for more oppressive strictures than disapproval of speech—physical confinement, dress rules that can include the burqa, severe exclusions from work and leisure—but disapproval of speech by women is central to these prohibitions and suppressions.⁹⁵

The consensus that women ought to be more silent is related to doctrinal mistakes courts make when interpreting the First Amendment. What would normally appear to be basic entitlements, as Caroline Mala Corbin has argued, seem to confuse the courts. For example, forcing physicians to speak words they find false and odious apparently lies within the power of a state if those words seek to deter abortion, and the idea that a for-profit corporation enjoys freedom of religion—and, from there, the power to harm human beings—has been taken seriously by courts only when the freedom pursued is the freedom to deprive women of birth control.⁹⁶ Winners of academic freedom claims are overwhelmingly male.⁹⁷

92. 1 *Timothy* 2:11-15 (King James).

93. TALMUD BERAKHOT 24a. “Lewdness” is how I read *ervah*, an ambiguous Hebrew word sometimes rendered in English as nakedness, shame, exposure, disgrace. See BIBLE TOOLS LEXICON, <http://www.bibletools.org/index.cfm/fuseaction/Lexicon.show/ID/H6172/%60ervah.htm>.

94. See Blu Greenberg, *Will There Be Orthodox Women Rabbis?*, 33 JUDAISM 23, 30 (1984).

95. For the devaluation of testimony by female witnesses, see Qur’an surah 2:282. For the rule that women may not lead congregational prayers, see Abu Hashem W.Q. Malick, *Why Women Can’t Be Imams – Capabilities vs. Inabilities*, MAJID AN-NOOR. See also *Women-Led Prayers*, ONISLAM, <http://www.onislam.net/english/ask-the-scholar/acts-of-worship/prayer/congregational-prayer/170904.html>.

96. Caroline Mala Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175 (2014); Franks, *Free Speech Elitism*, *supra* note 62 (reporting that women suffer disproportionately from “free speech elitism” not only when speaking online but when entering a clinic for an abortion).

97. I define “winners” generously here, not insisting that the individual

IV. “There’s No Silver Bullet for Addressing this Problem”⁹⁸:
Starting With an Affirmation

The sentence that heads this Part comes from Danielle Keats Citron, quoted in a story about online abuse and harassment. Citron has worked to lessen the problem without silver bullets, crafting several proposals and defending them energetically.⁹⁹ I share her goals and endorse much of the online-harassment law reform agenda. More than law reform is needed, however. The recommendations I propose here do not emphasize the prohibitions that characterize positive law—crimes, torts, civil rights claims—but would coexist happily with formal constraints toward the same end. They also might be easier to install than new laws.

Here is another quotation. We have heard it before: “Abuse and harassment diminish free speech.” Starting this article with this sentence, I followed up with “*Agree or disagree?*” and then, recalling a similar claim as rendered by Owen Fiss, argued for an affirmative answer. Here I direct that question to social media businesses and platforms that publish user-generated content accessible to the public, including blogs and news websites with comments sections. I hope that they too will answer affirmatively.

Providers like these have taken steps over the years to identify and discourage online abuse and harassment. Their

gets to keep his job or prevail in court. Both of these results are relatively rare when defenders or critics bring up academic freedom. I consider a claimant a winner if his claim of academic freedom gained some positive attention in the media. Having kept attuned to this issue for decades, I can barely think of a single instance where anyone spoke up in public for the academic freedom of any woman. The point is hard to support because it is so sweeping; Wikipedia, whose uncredited authors scour the digital realm for sources, lends the only available hand. The subsection “Specific cases” in its entry on Academic Freedom gives a list naming numerous men and only one woman, who withdrew from an appointment at New York University. *Specific Cases*, WIKIPEDIA, http://en.wikipedia.org/wiki/Academic_freedom#Specific_cases (last visited Mar. 6, 2015).

98. Hess, *supra* note 59.

99. See Citron, *Cyber Civil Rights*, *supra* note 29; see also *supra* note 41 and accompanying text.

terms of service typically state condemnations; the “report abuse” link marks a more recent development. Clickable buttons make denunciation easy and permit a range of responses that can result in the removal of offensive content.¹⁰⁰ One notorious wave of abuse and harassment carried out over Twitter in Britain prompted Twitter in 2013 to expand its one-click report-abuse function to all users.¹⁰¹ In 2014, the company gave users more powers to identify harassment, though it stopped short of letting these targets block particular IP addresses they associated with repetitive abuse.¹⁰²

“It is essential,” wrote the English journalist Tanya Gold shortly after the 2013 Twitter episode, “that in seeking to enhance our freedoms, we do not in fact diminish them. Everyone with a laptop now has a voice – we should remember that.”¹⁰³ Agreed, but with a twist: whereas for Gold the danger to freedom is the creation of new speech crimes,¹⁰⁴ I have noted a comparable threat to free speech in both suppression and neglecting to suppress. Managers of the virtual world know about the behaviors and consequences described in this article. Providers have the information they need to affirm that abuse and harassment diminish free speech.

They can insert the sentence near the top of their terms of service. In so doing, they would take stand up for the rights of an underdog. Contemporary decisional law about the constitutional right to free speech tends to favor topdogs. The

100. One important social medium illustrated this option with a large infographic diagram that shows the teams, classifications, and categories included in each click of the Report button. Graham Cluley, *What Happens When You Report Abuse on Facebook?* NAKED SECURITY (June 21, 2012), <http://nakedsecurity.sophos.com/2012/06/21/what-happens-report-abuse-facebook/>.

101. Dara Kerr, *Twitter ‘Report Abuse’ Button Now Live on All Platforms*, CNET (Aug. 28, 2013, 3:49 PM), <http://www.cnet.com/news/twitter-report-abuse-button-now-live-on-all-platforms/>.

102. Hayley Tsukayama, *Twitter Rolls Out New Anti-Harassment Tools*, WASH. POST, Dec. 2, 2014, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/12/02/twitter-rolls-out-new-anti-harassment-tools/>.

103. Tanya Gold, *How Do We Tackle Online Rape Threats?*, THE GUARDIAN (July 28, 2013), <http://www.theguardian.com/commentisfree/2013/jul/28/how-to-tackle-online-rape-threats>.

104. *Id.*

First Amendment scholar (a former journalist) Garrett Epps wrote grimly about three opinions, illustrative of this tendency, handed down by the Supreme Court on the same Monday in June:

We have the right to listen to TV ads from PACS. When the executive branch wants to lecture the rest of us about how we should believe in God, we have no right to challenge their actions, taken in our name and with our funds. And when the government sets out to make our children conform, they'd better not give back any guff about the emperor lacking clothes.

You, reading this: Welcome to American freedom, ca. 2007. And wipe that smile off your face.¹⁰⁵

Recognizing the speech of speakers as worth hearing even when they are not powerful enough to overcome abuse and harassment would share an important form of wealth. Virtual-world businesses could showcase leadership from which more established social institutions could learn. If it sounds right, just say it. *Abuse and harassment diminish free speech.*

V. Conclusion: A Base for Further Action

Fast forward. Imagine that prominent cyber-spaces, including enough of the major social media, agree with the claim of this article. They announce their view that abuse and harassment not only hurt individuals and make people feel unwelcome and unsafe—one premise behind their current policies—but also diminish free speech. Such an announcement would impose no additional penalties on users for violating providers' terms of service, criticize no putative individual abuser-harasser, and urge nobody to punish any offender.

105. Garrett Epps, *Free Speech for the Rich and Powerful*, SALON (June 29, 2007, 7:59 AM), http://www.salon.com/2007/06/29/supreme_court_24/.

One declarative sentence only. Six words. Call it The Pledge. What would follow? I predict three related but distinct consequences.

For starters, abuser-harassers would forfeit at least part of their most respectable rationale. An observer might disapprove of what these assailants say online and yet, in the name of freedom, defend to the death their right to say it.¹⁰⁶ In this way abuser-harassers benefit from Bollingerian tolerance and pluralism about values that characterize modern liberal thought.¹⁰⁷ But once abuse and harassment are understood to diminish free speech, the implicit metaphor of a competitive marketplace retreats.

Abuser-harassers necessarily go on the defensive. Perhaps they can contend that disapproving of what they say is abuse and harassment of them, reminiscent of complaints about “liberal fascism”¹⁰⁸ or “the real racism.”¹⁰⁹ Alternatively, they can claim that what they said online was benign: not abuse or harassment but trenchant criticism, or dissent from orthodoxy, or the rough and tumble of the Internet for which participants need a thick skin. They avail themselves of these options even in our current pre-pledge days; but once social media and other virtual-world spaces note in the Pledge a diminution of free speech imposed by these attacks, assailants must work harder and from there have less time on their hands to abuse and harass. Speakers who had been vulnerable to abuse and harassment gain a correlative increase in their free speech.

These speakers, freed from the silencing of abusive words, can use the opportunity opened by the Pledge to shape public

106. See WHAT THEY DIDN'T SAY – A BOOK OF MISQUOTATIONS 55 (Elizabeth Knowles ed., 2006) (reprinting the quotation mistakenly attributed to Voltaire: “I disapprove of what you say, but I will defend to the death your right to say it.”).

107. See *supra* notes 37-38, 79 and accompanying text.

108. See generally JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF MEANING (2008).

109. See Ed Brayton, *DeLay: Mentioning Inequality is the Real Racism*, FREE THOUGHT BLOGS (May 23, 2014), <http://freethoughtblogs.com/dispatches/2014/05/23/delay-mentioning-inequality-is-the-real-racism/> (quoting Tom DeLay, former Speaker of the House, as saying that when Michelle Obama mentioned that segregation in public schools persists, she was “pushing for ... racism.”).

opinion in favor of reasonable speech-fostering shelters. When they are cut off from the normative force of free speech as a value, speakers who protest abuse and harassment may appear weak, censorious, inarticulate, even cowardly. It is easy to interpret their need for help as yet more inferiority of the lower orders.¹¹⁰ If lifting the jackboot now on their necks will encourage more speech from them, as I have suggested, then the online spaces in which they wish to participate will become more tolerant and open.

Second, the Pledge could generate new enhancements of speech-fostering virtual conditions. Hard to say what they would be, but I can think of a couple offhand. Participants might enlarge the “trustmark,” a concept familiar from electronic commerce.¹¹¹ A trustmark, visible as a logo or seal, seeks to assure customers that a site is safe. According to one purveyor, a trustmark can reassure that a site protects user information, connects to a reputable business, encrypts and validates transmissions, or scans regularly to find vulnerabilities.¹¹² Commercial security is not the only type of safety available in a particular location; new trustmarks could announce attention to abuse and harassment. Another innovation might be new spaces to store anecdotes about maltreatment, paste abusive content before it gets hastily taken down,¹¹³ or host writings about the experience of attacks. Both measures do not need the Pledge to be installed, but announcements from major media that abuse and harassment diminish free speech would bolster their prestige and increase their power.

My final prediction is to expect more speech from members of subordinated groups offline as well as on. Recall that *Abuse and Harassment Diminish Free Speech* did not get asserted for

110. See Bernstein, *Civil Rights Violations*, *supra* note 79, at 917 (arguing that stereotypes do the work of invidious discrimination).

111. See generally MCAFEE, TRUSTMARKS 101: BUILDING TRUST TO BUILD BUSINESS (2010), available at http://www.wedomarketing.com/portfolio/wp_trustmarks_101_0710_fnl_lores.pdf (explaining the category).

112. *Id.* at 3.

113. Amanda Hess reported that a well-meaning friend used Twitter’s reporting function to destroy inadvertently an instance that Hess wanted to report to the police. See *supra* note 80 and accompanying text.

the first time in this article. Instead, I took a venerable idea and moved it to cyberspace.¹¹⁴ Recall also that the interferences that occupy this article have ties to the offline world: the quest to put images of women other than the Queen on British currency,¹¹⁵ television appearances,¹¹⁶ old-media magazine journalism.¹¹⁷ Public speech connects to public speech.

And so individuals whose words pre-Pledge were discouraged by abuse and harassment can join a larger project to enlarge the ranks of who may add to the dialogue and how much they may say. The Pledge does not confine its message to virtual realms, after all. Participants open to the irony of free speech,¹¹⁸ an instructive teaching even more compelling online than off, will find that it pertains to discourse everywhere.

114. *See supra* notes 1-12 and accompanying text.

115. *See Best, supra* note 28 and accompanying text.

116. *See Beard, supra* note 33 and accompanying text.

117. *See supra* notes 72-73 and accompanying text.

118. FISS, *supra* note 1.