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INFORMATION SUPERHIGHWAY PATROL

For Mary Anne Franks, cyber harassment is a civil rights issue.

This past December, the state of Illinois passed some of the most comprehensive legislation criminalizing nonconsensual pornography. Unlike similar laws, the bill included forethought regarding whether perpetrators knew the victim; whether the victim took the photo herself; or if a photo contained no nudity but was still explicit.

Come June 1, 2015, perpetrators of "revenge porn" could find themselves with a felony charge punishable by up to three years in jail and a fine of up to $25,000. And thanks to Mary Anne Franks, victims can finally feel like their voices are being heard.

Franks is an associate professor of law at the University of Miami and the vice president of the Cyber Civil Rights Initiative, a nonprofit that raises awareness about online harassment and advocates for legal and social reform. Her career in law has largely focused on shaping policies to protect victims of online exploitation and harassment. Before assisting in the Illinois legislation, she worked with more than a dozen other states on drafting legislation against nonconsensual pornography that was eventually made into laws.

Franks's first run-in with the issue was In 2007, during her last year at Harvard Law School. The law-student website AutoAdmit came under scrutiny when two Yale University law students sued the site to unmask anonymous harassers who had posted false and disparaging comments about them. The posts had not only caused the plaintiffs emotional distress, but also Google searches hurt their career prospects when it would pull up the web forum posts in its results. At the time, there was no legal recourse to force the website runners to pull the posts or stop the harassment.

Years later, these kinds of issues are just starting to be taken more seriously, though it has taken high-profile harassment cases (such as Gamergate doxxing and the celebrity nude leaks of September 2014) for more people to talk about what many women have been experiencing online for years. Thanks to Franks and others, such as Danielle Citron and Holly Jacobs, there is now more legal action—and groundwork—for fighting nonconsensual image distribution online. Here, Franks discusses some of the legal points of regulating cyber harassment and why it's important to have real protection in the "virtual" world.

How did you become interested in the issue of online harassment?

I published my first article on cyberspace in 1999, when I was a 19-year-old undergraduate. Back then, it wasn't clear just how much or in what ways the Internet was going to transform society. I was struck by the ideology that had already sprung up around cyberspace—the Internet as the pathway to our true selves. [At the time,] that struck me as naive and dangerous, and I am all the more convinced of that today.

The AutoAdmit controversy came to light during my last year in law school. This brought together my concerns about cyberspace ideology and my work on violence and discrimination—including a master's thesis and doctoral dissertation on the construction of women's sexual enjoyment in literature, film, and art—and legal research and clinical work on discrimination on the basis of race and sex.

About two years ago, a woman e-mailed me to say she was a victim of "revenge porn." She told me that she had been sure that what her ex had done to her was a crime and was devastated to learn from police officers and lawyers that it wasn't. She had read [my law review article] "Unwilling Avatars: Idealism and Discrimination in Cyberspace"

and thought that I might be able to help her, as she put it, "change the world." While deeply sympathetic to what she had experienced, I was very skeptical about the possibility of changing either legal or social norms around a practice that seemed to bring together all the worst aspects of misogyny and abuse of technology.

Since that day nearly two years ago when Holly Jacobs sat down in my office with a huge binder documenting every website that posted her pictures, every abusive e-mail message she had received, every mocking response from a site operator she'd asked to remove the pictures, the Cyber Civil Rights Initiative has helped 19 states and the federal government draft legislation prohibiting nonconsensual pornography, worked with major social media companies to develop innovations to combat online abuse, created training programs for law enforcement, and given presentations on revenge porn as a form of sexual abuse for anti–domestic violence organizations and schools.

Your proposed legislation includes mention of a reasonable expectation of privacy. Is this based on a specific standard of reasonableness? Is it possible for women to ever have an expectation of privacy?

When I work with legislators, I offer two model state statutes, one including reasonable expectation of privacy (REP) language and one not. The benefit of including it is that it can provide some useful narrowing of scope; the drawback is that the concept of REP is highly contested and laden with Fourth Amendment baggage. It seems that many people believe that a woman who consents to being photographed or recorded naked has relinquished her expectation of privacy, which is deeply troubling. If a statute does include REP language, it should clearly state that a person who consents to the disclosure of an image within the confines of a confidential relationship retains an REP with regard to disclosures outside that relationship.

You place the need for new laws to address online harassment within a civil rights framework, contextualizing the issues victims face from online harassment alongside domestic violence and sexual harassment. You argue for new civil rights laws to expand the scope of these laws to non-employers/non-educational settings and to individuals who interfere with another person's ability to pursue crucial life activities—school, work, and self-expression—due to gender bias. Why is this a direction that you have decided to focus efforts?

I argue in "Unwilling Avatars" and "Sexual Harassment 2.0" that online harassment is often a civil rights issue because it so often targets individuals based on gender and race. In "Sexual Harassment 2.0," I suggested that we need to move beyond the idea that people are protected from discrimination only in certain places, such as workplaces and schools. If the goal of anti-discrimination laws is to ensure equality in civic life, then online harassment should be taken at least as seriously as workplace or school harassment.

Many people's workplaces and schools are literally online; for almost everyone, technology has dissolved the boundaries between our professional, educational, public, and private lives. We need to reflect upon the insights of the civil rights and anti-discrimination movements, beginning with the recognition that targeted harassment based on race and gender has devastating effects on society. Such harassment inhibits the ability of women and racial and ethnic minorities to express themselves [and drives] them out of public discourse. We all lose when entire segments of already marginalized populations are terrorized into silence.

Supreme Court Justice Clarence Thomas stated in his dissent in a case about cross-burning that "just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point." Do you see statements that threaten rape or similar acts as threats not protected by the First Amendment?

The Supreme Court has been quite clear that credible threats are not protected by the First Amendment. The devil is in the details, however. What counts as a credible threat, and how do you address threats when you can't identify the speaker? Assessments of credibility tend to be gendered, and this does indeed have a lot to do with a failure to understand or empathize with the experiences of people different from you.

Many men simply do not seem to understand what the impact of a rape threat is in much the same way that many white people don't understand the impact of a lynching threat. The Supreme Court's jurisprudence on "fighting words" illustrates this quite starkly. [In 1942, the Supreme Court ruled that] calling someone a "God damn racketeer" was so offensive that it could inspire physical violence—and accordingly was not protected free speech. Calling someone the N-word, however, somehow does not *legally* rise to the same level of offense.

The concept of a fighting-words exception to the First Amendment is itself a gendered one—women rarely respond even to deeply offensive or threatening language with violence, which means that they effectively are barred from ever taking advantage of the exception. Why should not using violence mean that targets of hateful speech are *less* protected?

First Amendment absolutists take issue with how your suggested legislation "limits" speech. You state that you want all to be able to speak and that hate speech prevents all from being fully part of the community. How do you draw this line?

Generally speaking, First Amendment absolutists don't actually exist. Nearly everyone, even the staunchest self-proclaimed defender of the First Amendment, agrees that some speech is not protected under the First Amendment. Most self-identified

absolutists claim that there are only a few narrow categories of historically unprotected speech and that there should be no new exceptions.

The first problem with that position is that it's descriptively false—there are, by some scholars' counts, hundreds of exceptions. Secondly, there is no rational basis for assuming that we have achieved the ideal number of exceptions at this present moment in history. Child pornography wasn't an exception until the court said it was; First Amendment doctrine is not a matter of natural law. Consulting our long-standing free-speech values is useful, of course, and one of those values is fostering open discourse.

We decry chilling effects for good reason—when certain people fear punishment for expressing ideas, our collective discourse is deprived of diversity and genuine exchange. But that is exactly what targeted harassment does—it chills the speech of those targeted. When nonconsensual pornography, rape threats, and sexual harassment flourish, women are forced to censor themselves.

Women are frequently told that the answer to revenge porn is to not take naked pictures—few civil libertarians seem to notice or care that this "solution" demands that women refrain from engaging in intimate expression. When we single out a group of people for the message that the price of their participation in society is harassment, abuse, and violations of privacy, we teach them that their civil rights are simply not as important as other people's and that they have no genuine right to equal treatment.

Law enforcement has not yet learned to take offline harassment seriously, so it is not surprising that their response to online harassment is even worse.

One of the most enduring threads in the arena of online harassment is a lack of local police enforcing already-existing laws regarding harassment and stalking. This seems to be both an issue of law-enforcement priorities—which are focused primarily on physical crimes—and of a larger society who views victims as "not tough enough" to laugh it off. How do you think that law enforcement from the local to the national level can shift priorities to better address these issues?

Sadly, law enforcement has not yet learned to take *offline* harassment and stalking or even domestic violence or sexual assault seriously, so it is not surprising that their response to online harassment and stalking is even worse. There's a broader problem of long-standing trivialization of harms against women no matter what form they take. That has to change before anything else can change. We need to get to a place where we stop treating harms against women as natural or deserved. At the same time, we need more education for law enforcement and the broader public about how technology works and specifically how it can be used to escalate and outsource violence, stalking, and harassment.

There seem to be two overlapping types of harassment: victims who know the harasser and victims who do not personally know the harasser but who are targeted nonetheless. Do you think that there is a difference in perception for how these two types of victims are viewed by law enforcement and the public?

I do think there are complex differences in the way the two types are perceived. When victims are harassed by someone they know, victims often blame themselves—no doubt in part because they have internalized victim-blaming attitudes so often promulgated by law enforcement and the public. There's an analogy here, though not a perfect one, to the way that stranger rapes are generally taken more seriously and treated more sympathetically than acquaintance rapes. Many people deal with the cognitive dissonance of a victim being subjected to horrific treatment by someone she knows and loves by finding a way to hold the victim responsible in some way for what happened to her. At the same time, online anonymous threats are often not taken seriously by law enforcement or the public. This is in part because such threats simply don't seem "real" to many people. But anonymous threats can be even more terrifying for victims, as they have no way of assessing how serious the threat is.

Women are taught to be constantly vigilant to "prevent" the possibility of being harassed or raped and to take responsibility for "protecting" themselves. How can we as a society work to prevent harassment—and also to open our eyes to when it occurs? How can we be supportive to those going through this experience?

We first have to stop pretending that harassment, threat, and assault are inevitable. We have to stop believing in the selective incompetence of men to understand consent and to reject the culture of male entitlement to women's bodies. We have to stop normalizing male aggression. We can demand that our laws, our technology, and our public spaces reflect genuine commitments to equality. Anyone who truly believes in free speech should be on the front lines battling attempts to attack and silence people on the basis of their gender, race, sexual orientation, or class. b

Raizel Liebler is an editor at the Learned Fangirl and frequently writes about the interaction between new disruptive technologies and the law.