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Expanding the Regulation of Online Speech through the Commerce Clause to Reduce Cyber Harassment

by KATHERINE PARKER*

Introduction

It is a familiar trope that if you gather a group of women in one room, each one will have a personal story about abuse or harassment.¹ This Note focuses on one potential solution for harassment many women face online: federal regulation of cyber-threats and cyber harassment. This Note argues that speech used online to harass and intimidate women may be regulated because the speech is not protected under the First Amendment and because the mode of communication—the Internet—is a regulatable instrumentality of commerce.² Thus, online harassment can be regulated through the Commerce Clause.³ Part I of this Note demonstrates the extent of the harassment many women face by merely engaging with, and operating businesses, on the Internet. Part II analyzes whether such speech is protected by the First Amendment and whether the Internet is an instrumentality of commerce, capable of being regulated at all. Part III proposes methods the government could use to protect women online, through broader regulation. Essentially, this Note argues that the federal government can regulate cyber-threats and cyber-harassment under the Commerce Clause. Ultimately, this note suggests that such regulation will allow the Internet to become a space

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1. NPR recently found that 41% of women have been sexually harassed online. Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-per-cent-of-women-have-experienced-sexual-harassment>. (last visited Jan. 30, 2020). Similarly, the Women’s Media Center estimated in 2014 that between 20% and 40% of all Internet users had experienced harassment online. Women’s Media Center, <https://www.womensmediacenter.com/speech-project/research-statistics> (last visited Jan. 30, 2020).

2. Discussed *infra*, Part II.

3. U.S. CONST. art I, § 8.

where men and women are equally welcome and equally able to participate. Throughout this Note, the terms “harassment”⁴ and “threats”⁵ will be used to describe some of the messages directed towards women online. While these terms may be considered overbroad, they are accurate descriptors of the language many women encounter on a regular basis. Creating regulations to diminish online threats and harassment is vital because this language has a real and detrimental effect on women offline.⁶

I. The Problem: The Language Women Encounter Online

Women in America have historically experienced less protection of the law than men. As historian and author Joan Hoff⁷ remarked in her book *LAW GENDER AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN*, “the U.S. Constitution still does not explicitly protect women against discrimination.” The result that women have less ability to operate in public spaces because “fear has become a constant factor in the intellectual and physical lives of contemporary women.”⁸ Hoff’s book provides a historical analysis of the legal status of women in America and was published in 1991, but the issues she identified are as present on the Internet today, as they were off-line more than twenty years ago.⁹ In 2014, Simon Parkin, a journalist writing for *The New Yorker*, described the culture of intimidation that many women face online in order to earn a living.¹⁰ In an article titled “Zoe Quinn’s Depression Quest,” Parkin described Zoe Quinn and her experience releasing a video

4. The definition of harassment varies state by state but is “generally defined as a course of conduct which annoys, threatens, intimidates, alarms” another person or puts another “in fear of their safety.” U.S. LEGAL, <https://definitions.uslegal.com/h/harassment/> (last visited Mar. 12, 2019).

5. A threat is a “communicated intent to inflict or impose harm or damage or loss or injury on another . . . [or to] diminish a person’s freedom to act voluntarily.” U.S. LEGAL, <https://definitions.uslegal.com/t/threat-of-use-force/> (last visited Mar. 12, 2019).

6. The importance and impact of words on people has been described frequently. *See, e.g.*, “Words are . . . our most inexhaustible source of magic, capable of both inflicting injury and remedying it.” *HARRY POTTER AND THE DEATHLY HALLOWS: PART TWO* (Warner Bros. 2011).

7. Joan Hoff is the author of numerous texts that discuss American politics and political history. She is currently a research professor at Montana State University and she has delivered many lectures which focus on women’s rights.

8. JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 3, 5 (1991).

9. In *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN*, Hoff argues that women (and other minority groups) were only granted rights by law to act as their white male counterparts did when those in power no longer needed to have exclusive control over that privilege. *Id.* at 7. While this argument has historical merit, it is my hope that the trend can be reversed as we increasingly rely on the Internet for more than individual-to-individual interactions.

10. Simon Parkin, *Zoe Quinn’s Depression Quest*, *THE NEW YORKER* (Feb. 7, 2019), <https://www.newyorker.com/tech/annals-of-technology/zoe-quinns-depression-quest>.

game online earlier that year.¹¹ Quinn is an online game creator who developed a game that would mimic a day in the life of a person suffering from depression. Quinn's hope was that by playing the game, gamers would develop greater empathy for people struggling with mental illnesses.¹² Quinn also hoped that the game would create a safe space for those who struggle with mental illness to feel welcomed and accepted.¹³ However, Quinn's game was not well-received, as many users felt that its atypical plot arc did not conform to standard video game characteristics, and thus failed to meet their expectations.¹⁴ Users responded by threatening Quinn personally. On the web forum 4chan,¹⁵ an anonymous discussion board, one gamer suggested,

Next time [Quinn] shows up at a conference we . . . give her a crippling injury that's never going to fully heal . . . a good solid injury to the knees. I'd say a brain damage, but we don't want to make it so she ends up too retarded to fear us.¹⁶

Quinn ignored these and similar threats until her personal information was released online.¹⁷ This leak of Quinn's personal information allowed 4chan users to target Quinn more easily. The release of her private information led to a multitude of "prank calls, threatening e-mails, and abusive tweets [which] intensified to such a degree that Quinn, fearing for her safety, chose to leave her home and sleep on friends' sofas."¹⁸ Part of what frightened Quinn so much was that she was personally targeted and that the threats and criticism were not directed at the quality of her game, but towards her personally.¹⁹

Zoe Quinn is not the only woman receiving targeted threats and harassment online. In an article in the *Pacific Standard*, Amanda Hess

11. Parkin, *supra* note 10.

12. *Id.* (Quinn's game, *Depression Quest*, forces the player to make mundane decisions that the protagonist struggles to complete because of "depression's fug.")

13. *Id.* (Quinn decided to release this game as a "way to create an experience that built understanding between" those with mental illness and those without. Quinn's cocreator explained that they wanted to "communicate what it is like" to struggle with mental illness, rather than attempt to show it using "oblique . . . metaphor and symbolism".)

14. *Id.* (Players complained that the game does not have "typical attributes of video games" like "spatial reasoning puzzles . . . tests of reaction speed" or even "a victorious ending". Other players said that the game is either too simple or too complex.)

15. 4chan is a website where users anonymously publish posts under various message boards. The website is open to all, and has been linked to the alt-right. Users have threatened violence in order to elicit reactions from the public. <http://www.4chan.org> (last visited Jan. 30, 2020).

16. Parkin, *supra* note 10.

17. *Id.*

18. *Id.*

19. Parkin writes, "In Quinn's case, the fact that *she* was the subject of the attacks rather than the friend who wrote about her game reveals the true nature of much of the criticism: a pretense to make further harassment of women in the industry permissible." *Id.*

described her experiences with online harassment.²⁰ Hess, a female journalist with a robust Internet presence, comments early in her article that she regularly receives personal threats and has come to see them as ordinary.²¹ She describes being so accustomed to comments about her appearance that, after posting an article about her personal life, she found the comments she received about her looks and personal life were not “out of the ordinary.”²² However, Hess realized that readers had posted other, more concerning comments in addition to the usual comments about her appearance.²³ Hess noted a distinction between those tweets and comments that merely generalized statements about readers’ perceptions of their appearance and those that were clear threats.²⁴ For example, one Twitter user wrote,

I am 36 years old, I did 12 years for ‘manslaughter’, I killed a woman, like you, who decided to make fun of guys cocks Happy to say we live in the same state. Im looking you up, and when I find you, im going to rape you and remove your head You are going to die and I am the one who is going to kill you. I promise you this.²⁵

Hess contacted a local police department, but they indicated they were treating her concern for her own safety as an overreaction to an Internet ruse.²⁶

While Hess faces a particularly extreme volume of threatening messages online because she uses Twitter to communicate socially and professionally,²⁷ overall, women are exposed to more online criminal behavior than men. In a 2014 *Time Magazine* article, media critic Soraya Chemaly noted that:

Department [of Justice] records reveal that 70 percent of those stalked online are women. More than 80 percent of cyber-stalking defendants are male. Similarly, a study of 1,606 revenge porn cases showed that 90 percent of those whose photos were shared were women, targeted by men. In gaming, an industry known for endemic sexism, studies cited by Citron show that 70 percent of women in multiplayer games play as male characters in order to avoid abuse.²⁸

20. Amanda Hess, *Why Women Aren't Welcome on the Internet*, PACIFIC STANDARD (Jan. 6, 2014), <https://psmag.com/social-justice/women-arent-welcome-Internet-72170>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. Hess, *supra* note 20.

26. *Id.*

27. *Id.*

28. Soraya Chemaly, *There's No Comparing Male and Female Harassment Online*, TIME MAGAZINE (Sept. 9, 2014), <http://time.com/3305466/male-female-harassment-online/>.

Chemaly's research reveals that women are targeted online not due to their roles as authors, commenters, or creators, but due to their identity as *women*. Though women do not use the Internet more than men do, they are more prone to cyber-threats and harassment online. In 2005, the Pew Research Center reported that while women and men use the Internet in equal proportions, of the thousands of reports of cyber-harassment and stalking 72.5 percent of reporters were female.²⁹ More recent data suggest that, in "theory, these things can happen to anyone—but they don't. They happen overwhelming[ly] to women and the abusers are overwhelmingly men."³⁰

Moreover, men are reportedly using the Internet in order to intimidate and frighten women in cyberspace when in-person harassment is not possible.³¹ In a 2012 survey, the National Network to End Domestic Violence found that "89 percent of local domestic violence programs reported that victims were experiencing intimidation and threats by abusers via technology, including through cell phones, texts, and email."³² The very real and troubling experience of merely existing as a woman in the twenty-first century is that women are more likely to be threatened and harassed, both in person and online, than men are.³³ Chemaly and Hoff both argue that this reality is rooted in "specific discriminatory harms"³⁴ and social and legal efforts to prevent women from achieving real and meaningful control³⁵ over themselves. Chemaly adds that Internet harassment aimed at women *is rarely taken seriously* by (often male) police officers and legislators, both because these men interpret the messages women receive as mere "unpleasanties" and because they believe that these messages are "inconsequential" or unlikely to actually cause harm to the recipient.³⁶ Even if these messages seem unimportant to third parties, the messages often incur severe real-world costs to the women who receive them. Hess notes that "[t]hreats of rape, death, and stalking can overpower [women's] emotional bandwidth, take up [women's] time, and cost [women] money through legal fees, online protection services, and missed wages."³⁷

29. Hess, *supra* note 20.

30. Chemaly, *supra* note 28. *See also*, Working to Halt Online Abuse, *Online Harassment/Cyberstalking Statistics*, <http://www.haltabuse.org/resources/stats/Cumulative2000-2013.pdf>. (last visited Jan. 30, 2020.)

31. Chemaly, *supra* note 28. ("Online harassment is a key weapon in intensified stalking Intimate partners create impersonator content online, sometimes with brutal results)."

32. Chemaly, *supra* note 28.

33. NPR found in 2018 that while 41% of women have faced cyber sexual harassment online, only 22% of men have. NPR, *supra*, note 1.

34. Chemaly, *supra* note 28.

35. Hoff, *supra* note 7 at 10.

36. Chemaly, *supra* note 28.

37. Hess, *supra* note 20.

As of this writing, there are relatively few useful solutions available to women who experience online harassment. The first is to ignore the online messages. This strategy is inefficient because it places the fear and onus of dealing with these threats directly on women, the victims of the harassment, rather than on the actors themselves to change their behavior. This solution also makes the Internet less diverse and less useful for all users because it implies that women should just stop using the Internet.³⁸ It has been reported that women stop going online in order to avoid harassment, demonstrated by Pew Research in 2005 when “the percentage of Internet users who participate in online chats and discussion groups dropped from 28 percent to 17 percent.”³⁹ This decrease was “entirely because of women’s fall off in participation.”⁴⁰ In 2015, the Web Foundation found that of the people who do not use the Internet globally, “most of [the non-users] are women and girls,” in part because “women don’t feel safe on the web.”⁴¹

The second solution has been to enact legislation criminalizing this behavior. Hess notes:

There are three federal laws that apply to cyberstalking cases; the first was passed in 1934 to address harassment through the mail, via telegram, and over the telephone, six decades after Alexander Graham Bell’s invention. Since the initial passage of the Violence Against Women Act, in 1994, amendments to the law have gradually updated it to apply to new technologies and to stiffen penalties against those who use them to abuse. Thirty-four states have cyberstalking laws on the books; most have expanded long-standing laws against stalking and criminal threats to prosecute crimes carried out online.⁴²

At best, these laws regarding the online treatment of women are extremely outdated, and only address cyber-stalking.⁴³ Federal law fails to address the plethora of newfound ways women are harassed, harangued, and harmed online by others.

Some states have also attempted to criminalize this type of speech.⁴⁴ However, because online stalkers are able to use the Internet to threaten

38. Women’s Media Center, *supra*, note 1.

39. Hess, *supra* note 20.

40. *Id.*

41. Web Foundation, *Five Barriers, Five Solutions: Closing the Gender Gap in ICT Policy*, (June 9, 2015) <https://webfoundation.org/2015/06/five-barriers-five-solutions-closing-the-gender-gap-in-ict-policy/>.

42. Hess, *supra* note 20.

43. 42 U.S.C. 13701.

44. See, e.g., N.J. Stat. § 2C:33-4.1 (LEXIS through New Jersey 218th Second Annual Session, L. 2019, c. 153 and J. R. 15), which defines and criminalizes cyber-harassment. Tennessee, Pennsylvania, Nevada, and Texas have also criminalized cyber-bullying of minors and by public officials. See Tenn. Code Ann. § 49-6-4503 (LEXIS through the 2019 Regular Session),

others from almost anywhere, the result is that a woman threatened in one state may have no recourse against a stalker or harasser who happens to live in another.⁴⁵ This would also implicate procedural hurdles that litigation entails, and which this article will not discuss. Compounding the problem, law enforcement officers often dismiss women's complaints about Internet threats as non-immediate, boyish hoaxes rather than legitimate threats and crimes.⁴⁶ Given that many of these threats are made across state lines and that so many of these threats are directed at women based on their gender, it is critical that Congress address this harassment rather than waiting for a state-by-state approach which has not been effective in preventing harassment.

II. Internet Communications Can Be Regulated Without Infringing on Freedom of Speech Protections.

I propose that a potential solution to the issue of threatening and offensive online speech directed against women is to regulate this speech via federal law. Currently, the federal government has not taken a stance on these Internet threats, leaving content regulation and censorship in the hands of individual states and private companies who own various Internet platforms. Some platforms have cited the Free Speech Rights of all users to allow commenters to post offensive and threatening content.⁴⁷ The federal government is unable to regulate events and actions that take place within one state unless it has a jurisdictional hook.⁴⁸ However, the federal government can regulate the Internet because it is an instrumentality of interstate commerce.⁴⁹ Online speech directed at women could be

18 Pa. C. S. § 2709 (LEXIS through the 2019 Regular Session Act 118), Nev. Rev. Stat. Ann. § 388.135 (LEXIS through Chapters 1-39, 41-60, 62-69, 71-78, 80, 81, 84-86, 90-94, 96-99, 101, 102, 104-106, 108-110, 112-127, 134-138, 142-147, 149, 151-168, 173, 179-184, 190-195, 197-200, 202-206, 217-225, 229-231, 233, 235, 251, 253-255, 265-267, 277-281, 441-471, 522-525, and 576-587 of the 80th Regular Session (2019), including all legislation effective May 28, 2019 or earlier), Tex. Penal Code § 22.11 (LEXIS through the 2019 Regular Session, 86th Legislature, and 2019 election results).

45. Hess quips, “[t]he Internet is a global network, but when you pick up the phone to report an online threat, whether you are in London or Palm Springs, you end up face-to-face with a cop who patrols a comparatively puny jurisdiction.” Hess, *supra* note 20.

46. *Id.*

47. *Patriot Act with Hasan Minhaj: Content Moderation and Free Speech*, NETFLIX (Mar. 12, 2019), <https://www.netflix.com/watch/80990678>.

48. *U.S. v. Lopez*, 514 U.S. 549, 551 (1995). The Court found that the Gun-Free School Zones Act “neither regulates a commercial activity nor contains a requirement that [gun] possession be connected in any way to interstate commerce” and therefore “exceeds the authority of Congress.”

49. *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003) (holding that the Internet is an instrumentality of interstate commerce); *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491,

penalized—perhaps even criminalized—through the federal government’s ability to regulate the Internet. However, this regulation must also walk the fine line that Internet platforms have been struggling to toe: how to protect Internet users from harassment and online threats, while simultaneously protecting other users’ First Amendment right to free speech.

A. Some Online Speech Can Be Regulated

The First Amendment states that Congress may not pass any law that limits the freedom of speech.⁵⁰ Further, this constitutional amendment was made applicable to the states by incorporation under the Fourteenth Amendment.⁵¹ Courts have often cited freedom of expression, protected by these amendments, to permit communications considered lewd and offensive.⁵² For example, in *Cohen v. California*, the Court upheld Cohen’s right to wear a jacket⁵³ that offended many people around him because it expressed a strongly negative and incendiary opinion of the draft.⁵⁴ The Court reversed Cohen’s conviction for “disturbing the peace or quiet of any neighborhood or person by offensive conduct”⁵⁵ after concluding that Cohen did not act on the message written on his jacket, did not encourage or provoke others to act, and that seeing the message did not harm or insult anyone.⁵⁶ The Court further explained that preventing Cohen and others from expressing their opinions would be detrimental to society:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced

(N.D. Ga. 2006.) (holding that Congress may regulate the Internet because it is an instrumentality of interstate commerce.)

50. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

51. “All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States[.]” U.S. Const. amend. XIV. *See also*, *Gitlow v. New York*, 268 U.S. 652 (1925) (extending the First Amendment to the States through the Fourteenth Amendment).

52. *See, e.g.* *Kingsley International Pictures Corp. v. Regents of New York*, 360 U.S. 684 (1959) (holding that New York could not prohibit a theater from showing *Lady Chatterley’s Lover* simply because the film’s themes included adultery); *Hess v. Indiana*, 414 U.S. 105 (1973) (holding that Indiana could not prohibit anti-war statements when the words were not intended to produce imminent disorder and were not likely to produce disorder).

53. Cohen’s jacket read “Fuck the Draft.” *Cohen v. Cal.*, 403 U.S. 15 (1971).

54. *Cohen v. Cal.*, 403 U.S. 15, 16 (1971).

55. *Id.* at 16.

56. *Cohen*, 403 U.S. at 16, 20.

largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.⁵⁷

While freedom of speech protections are intended, among other things, to promote communication between individuals, this limit on the power of the federal government is not absolute.⁵⁸ The Court has held many times that “the Constitution does not protect true threats.”⁵⁹ A true threat is a “serious expression of intent to commit unlawful physical harm.”⁶⁰ This limitation on complete freedom of expression is required in favor of the public policy to protect others in society. In *Cantwell v. Connecticut*, the Court reasoned that

[c]onduct remains subject to regulation for the protection of society.

The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.⁶¹

The Court placed this stance on full display in *Virginia v. Black*, when Virginia argued that Black committed a felony when he led a Ku Klux Klan rally that culminated in a public cross burning, a violation of a state statute that prohibited burning a cross with the intent to intimidate.⁶² Black argued that the Virginia statute was unconstitutional because it prohibited him from freely expressing himself.⁶³ The Court noted that Black could make a First Amendment argument because the “First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.”⁶⁴ However, the Court clarified that even if cross burning was not an imminent threat, this expressive conduct could be banned because “a State may punish those words ‘which by their very utterance inflict injury or tend to incite an immediate breach of the peace.’”⁶⁵ If cross burnings are considered

57. *Cohen*, 403 U.S. at 24.

58. *Id.* at 20.

59. *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015).

60. *Id.* at 2009.

61. *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

62. *Virginia v. Black*, 538 U.S. 343, 349 (2003).

63. *Id.*

64. *Black*, 538 U.S. at 358.

65. *Black*, 538 U.S. at 359. The Court also explained that cross-burning is likely to breach the peace because it is used “as a tool of intimidation and a threat of impending violence.” *Id.* at 354. The Court further reasoned that “while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message convey[ed] . . . the burning cross often serves as a message of intimidation, designed to inspire in the victim fear of bodily harm.” *Id.* at 358 (emphasis added).

offensive expressions such that a First Amendment analysis is appropriate, then comments and messages posted online may also be expressive conduct even if these comments are not speech.⁶⁶ Although cross burnings and Internet threats could be distinguished based on the proximity of the message,⁶⁷ both forms of expression communicate threats. Moreover, both cross burnings and online threats are designed to be intimidating and are costly to the message's recipient.

The Court in *Black* went on to hold that even though cross burning is expressive conduct, not all speech or expressive conduct is protected by the First Amendment.⁶⁸ The Court reasoned that true threats do not receive First Amendment protection because the purpose of these statements is to "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."⁶⁹ The Court reasoned that since "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence,"⁷⁰ this form of expression was not guaranteed First Amendment protection.⁷¹

Like cross burnings, Internet threats and harassment are expressions that can be designed to intimidate, frighten, and silence other Internet users. For instance, after her game was published, Zoe Quinn's "home address, phone numbers [and] bank details" were published.⁷² This allowed strangers to "harangue and harass her" with "prank calls, threatening e-mails, and abusive tweets"⁷³ As such, it is likely that these communications are analogous to other expressive communications that are designed to intimidate others and are not entitled to First Amendment protections.

Unlike the regulation in question in *Black*, however, regulations of cyber-threats and cyber-harassment need not be overbroad. In *Black*, the Court ultimately found that while cross burning is not protected speech, the regulation that Virginia had enacted, which treated "any cross burning as prima facie evidence of intent to intimidate" made the statute unconstitutional.⁷⁴ Federal regulation of cyber-threats and cyber-harassment

66. The Supreme Court in this case ultimately struck down the Virginia law for over breadth, explaining that an action cannot by itself also be prima facie proof of intent. Thus, while Virginia could restrict its citizens' expression by prohibiting cross burning, it could not rely on this action to support finding of the actor's intent. *Id.* at 364.

67. Cross burnings on one's property are certainly more graphic and immediately dangerous than some online comments and messages.

68. *Black*, 538 U.S. at 358.

69. *Id.* at 359.

70. *Id.* at 360.

71. *Id.* at 363.

72. Parkin, *supra* note 10.

73. Parkin, *supra*, note 10. See also Hess, *supra*, note 20.

74. *Black*, 538 U.S. at 347.

would need to be drafted to make cyber-threats illegal without regard to the reason motivating the threat⁷⁵ while also distinguishing between the threatening act and the actor's intent.

Some courts have begun to curtail First Amendment protections to Internet communications designed to intimidate others. In *D.C. v. R.R.*, the Fourth District of the California Appellate Court applied the idea that certain forms of expression may not be entitled to freedom of speech protections to a cyber-bullying case involving a minor plaintiff and a minor defendant.⁷⁶ There, the plaintiff argued that the defendant defamed the plaintiff in a publication on the defendant's website.⁷⁷ The court first acknowledged that the First and Fourteenth Amendments protect freedom of speech in order to "allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomfoting."⁷⁸ The court went on to hold, however, that

[t]he First Amendment permits restrictions upon the content of speech in a few limited areas [which are] of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality⁷⁹ [and that a state may] punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.⁸⁰

As in *Virginia v. Black*, the court identified true threats among the types of speech that are not protected by the First Amendment, which it defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."⁸¹

In *D.C. v. R.R.*, the court outlined two possible tests to determine if a speaker's words or acts should be considered a "true threat."⁸² The court reasoned that the purpose of First Amendment speech protection is to encourage and facilitate open dialogue.⁸³ However, once a speaker has

75. See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (a city regulation prohibiting cross burning was struck down because the ordinance only prohibited burning symbols that could "arouse anger . . . on the basis of race, color, creed, religion, or gender.").

76. *D.C. v. R.R.*, 182 Cal. App. 4th 1190, 1210 (2010).

77. *Id.* at 1200.

78. *Id.* at 1211.

79. *Id.*

80. *D.C.*, 182 Cal. App. 4th at 1211.

81. *Id.* at 1213.

82. *D.C.*, 182 Cal. App. 4th at 1211.

83. "The notion that some expression may be regulated consistent with the first amendment . . . starts with the already familiar proposition that expression has special value only in the context of dialogue: communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs It is not plausible to uphold the right to use words as

begun to threaten others, then the right to protection shifts. When this happens, the person being threatened is deserving of protection against threats.⁸⁴ This includes protection from “fear of violence [and] from the disruption that fear engenders.”⁸⁵ The court then determined that the First Amendment protections afforded to a threat are based on whether the threat is a true threat under an objective standard or a subjective standard.⁸⁶ Different jurisdictions have adopted each test, and the Supreme Court seems to have adopted a hybrid approach.

i. The Objective Test for True Threats

Under an objective test, the question is “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”⁸⁷ Under this test, the intent of the speaker is less important than a reasonable interpretation of the message or communication, and is determined “in light of their entire factual context, including the surrounding events and reaction of the listeners.”⁸⁸ Under this test, any statement made online that a reasonable person would interpret as a serious expression of intent to harm another person, like the threats that Zoe Quinn⁸⁹ and Amanda Hess⁹⁰ received, would be considered true threats because a reasonable person would find the comments they received to be serious expressions of intent to harm them. Thus, these statements would not be entitled to First Amendment protections because these statements were not intended to further an exchange of ideas and could easily and reasonably be understood as actual intent to inflict harm.

ii. The Subjective Test for True Threats

Under a subjective test, however, “a true threat requires proof that the speaker or author intended the speech as a threat of bodily harm.”⁹¹ Under the subjective test, the threats Quinn⁹² and Hess⁹³ received would not easily qualify as true threats, because the intent of the message writers is not obvious. This test requires victims of harassment to show the intent of the

projectiles where no exchange of views is involved.”) *Id.* at 1212 (quoting *Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991) (internal quotation omitted)).

84. *D.C.*, 182 Cal. App. 4th at 1211.

85. *Id.*

86. *Id.* at 1212.

87. *Id.* at 1213.

88. *Id.*

89. Parkin, *supra* note 10.

90. Hess, *supra* note 20.

91. *D.C.*, 182 Cal. App. 4th at 1213.

92. Parkin, *supra* note 10.

93. Hess, *supra*, note 20.

harasser in order to receive any protection from the harassing and threatening message.⁹⁴ Proving intent of an anonymous commenter who could be almost anywhere is an almost insurmountable task for victims who may have limited access to the time and resources necessary to meeting the standards of the test. Thus, the subjective test falls short of fully protecting Internet users from the reasonable fear that these messages incite. However, in extreme cases like those of Hess and Quinn, the anonymous writers would likely find it difficult to argue convincingly that they understood their messages but did not intend the messages to convey threats of harm. While the Court has articulated both tests, until one is formally adopted, it will continue to be difficult for victims of cyber-threats and harassment to identify their rights and legal options. This in turn will allow harassers to threaten women without facing consequences for their actions.

iii. Hybrid Application of the Tests

In *Watts v. United States*, the Court applied a hybrid of the two tests after Watts was accused of threatening to assassinate the president in a political rally.⁹⁵ The Court held that even though Watts did use language that on its face could be interpreted as a threat, the communication was akin to “a kind of very crude offensive method of stating a political opposition to the President” and not a true threat.⁹⁶ In applying a blend of the subjective and objective tests, the Court used the context of the statement—a disgruntled student trying to avoid the draft and speaking to his peers⁹⁷—in order to conclude that Watts failed both tests.⁹⁸ First, the Court analyzed the location.⁹⁹ The Court noted that Watts was speaking at a rally, a venue where the expectation was that all speakers would speak in an exaggerated, unrehearsed fashion.¹⁰⁰ The Court held that a reasonable person was unlikely to interpret the statement as an expression of intent.¹⁰¹ Second, the Court used the context to infer that Watts was in fact speaking in “vituperative, abusive, and inexact” language and not as a precise expression of his “willfulness” or intent.¹⁰² The Court’s linguistic analysis could easily be applied to Internet communications as well, especially when they are concerned with cyber-threats or online harassment.

94. *D.C.*, 182 Cal. App. 4th at 1213.

95. *Watts v. United States*, 394 U.S. 705, 706 (1969).

96. *Id.* at 708.

97. *Id.*

98. *Id.*

99. *Id.* at 707.

100. *Id.* at 708.

101. *Watts*, 394 U.S. at 708.

102. *Id.*

In the case of cyber-threats, a court would likely adopt a similar approach to the one used in *Watts* because language used online is similar to language used at political rallies. I purport that Internet speech is not generally expected to be grammatically correct. Internet speech is also often more exaggerated and hyperbolic than in-person speech. Additionally, just as *Watts*' use of inexact language showed that he did not have an intent to harm the president, online speech is often disregarded as exaggeration. However, online threats that have clear and exact language or references to specific types of harm or location should not be disregarded. These expressions constitute a threat under either standard. Under an objective test, they are threats because that is how a reasonable person would interpret them. Under a subjective test, they are threats because the intent of the speaker is to intimidate. Moreover, these expressions do not promote an exchange of ideas that the First Amendment seeks to protect, and they do have clear indicia of intent to inflict harm, so they should be treated as true threats.

Crucially, the analysis of threatening language has not yet been applied to social media. In *Elonis v. United States*, the Supreme Court analyzed statements *Elonis* made on his Facebook page that seemed to threaten his ex-wife and their son's school.¹⁰³ *Elonis* argued that his speech on Facebook was protected by the First Amendment and that any attempt to censor him was unconstitutional unless the government could show that he actually intended to threaten his ex-wife.¹⁰⁴ The Court first noted that the government cannot censor all speech on a whim; only a true threat is not protected by the First Amendment.¹⁰⁵ The Court narrowly defined "true threat," saying that "[t]o qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely 'political hyperbole'; 'vehement, caustic, and sometimes unpleasantly sharp attacks'; or 'vituperative, abusive, and inexact' statements."¹⁰⁶ The Court reiterated that true threats are not protected by the First Amendment because they "have little if any social value"¹⁰⁷ while also having the ability to "inflict great harm."¹⁰⁸

After determining that *Elonis*'s speech was not necessarily protected by the First Amendment, the Court avoided the question of whether *Elonis*'s speech was protected under the First Amendment and instead remanded the case.¹⁰⁹ The majority held that at trial, the Government had failed to establish

103. *Elonis v. United States*, 135 S. Ct. 2001 (2015).

104. *Elonis*, 135 S. Ct. at 2009.

105. *Id.* at 2019.

106. *Id.* at 2019.

107. *Elonis*, 135 S. Ct. at 2016.

108. *Id.*

109. *Id.* at 2013

Elonis's mental state and had not adequately shown that Elonis was aware that what he was doing was wrong.¹¹⁰ However, this result does not mean that online harassment and threats could not be punished. Rather, the detail that the Court used to quote and paraphrase Elonis's speech indicates that the Court is troubled by cyber-threats and cyber-harassment¹¹¹ The Court could have omitted these quotations from its opinion and simply dealt with the overbroad language in the code section; including the specific language Elonis used demonstrates a preoccupation with these threats and a desire to grapple with the language. Further, the decision to remand the case instead of determining that the law is unconstitutional suggests that if the legislature specified that the required mental state for these harassing and violent messages was negligence, then victims would be likely to succeed when challenging this behavior in court.

In his dissent, Justice Alito addressed the issue of the First Amendment and social media explicitly. Justice Alito argued that statements on social media are not entitled to greater First Amendment protection than other statements and in fact may be more suspect.¹¹² He explained that since these statements are directed at a named victim, the threats are "much more likely to be taken seriously."¹¹³ He also noted that these threats should not be dismissed as mere hoaxes or parodies since this provides a get out of jail free card to "to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody, or something similar."¹¹⁴ Alito's dissent shows an interest in protecting victims of cyber-threats and cyber-harassment from threatening and abusive behavior, but also signals that the Legislature must take proactive steps to ensure that legislations adopted to support victims of cyber-harassment is clearly defined.

Taken together, *Virginia, D.C.*, and *Elonis* all suggest that the First and Fourteenth Amendments prohibit the state from interfering in some speech and speech-acts, but not all.¹¹⁵ They suggest that the State may not prohibit speech in print and online if the purpose of the speech or publication is to share ideas, but it may prohibit speech or other communications that contain

110. *Elonis*, 135 S. Ct. at 2011.

111. *Id.* at 2005-08 (quoting Elonis's posts and threats.)

112. *Elonis*, 135 S. Ct. at 2016.

113. *Id.*

114. *Id.*

115. See *Virginia v. Black*, 538 U.S. 343 (2003) ("certain types of content discrimination did not violate the First Amendment . . . Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate" *Id.* at 361, 362); *D.C. v. R.R.*, 182 Cal. App. 4th 1190 ("[t]he first amendment permits 'restrictions upon the content of speech . . . which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id.* at 1211.); *Elonis v. United States*, 135 S. Ct. 2001 (2015) (the federal government may regulate some speech online, but must provide a mental state requirement in the regulation).

true threats.¹¹⁶ The State may censor threats because the First and Fourteenth Amendments are intended to promote the free exchange of ideas rather than the ability of one speaker to bully, intimidate, or frighten another person. Much of the communication online may not rise to the level of a true threat. However, the speech that does is not protected, and it can be regulated if the federal government has a jurisdictional hook.

B. Congress May Regulate the Internet under the Commerce Clause

While Congress may regulate threats by prohibiting them or even criminalizing them, in order to avoid overreach, Congress must also have the authority to regulate the medium of communication. In other words, even if threats are not protected speech under the First Amendment, Congress cannot simply ban all threats. In order for the federal government to regulate the threats made against women online, it must be able to regulate the Internet as a medium. One hook for Congress to regulate the Internet is the Commerce Clause. The Commerce Clause gives Congress the power to regulate interstate commerce. In *United States v. Lopez*, the Court held that Congress may regulate three categories of activities under its Commerce Clause power:

- (1) “Congress may regulate the use of channels of interstate commerce”;
- (2) “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”;
- and (3) “Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.”¹¹⁷

Thus, under the *Lopez* doctrine, Congress may regulate the Internet if it is a channel of interstate commerce, an instrumentality of interstate commerce, or something that has a substantial impact on interstate commerce.

The limits of the Commerce Clause have been interpreted and expanded by multiple courts. This judicially-approved expansion became particularly notable in the mid-twentieth century. In *Heart of Atlanta Motel v. United States*, for instance, the Heart of Atlanta Motel argued that Congress exceeded its power to regulate interstate commerce when it passed the Civil Rights Act of 1964, making it illegal for the motel to refuse to rent rooms to African Americans.¹¹⁸ The Supreme Court held that because the motel

116. See *Virginia v. Black*, 538 U.S. 343 (2003); *D.C. v. R.R.*, 182 Cal. App. 4th 1190; *Elonis v. United States*, 135 S. Ct. 2001 (2015).

117. *United States v. Ambert*, 561 F.3d 1202, 1210 (11th Cir. 2009) (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

118. *Heart of Atl. Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

“serve[d] interstate travelers,”¹¹⁹ the business and business practices of the motel had an effect on interstate commerce, and Congress could regulate these business practices even though they were local and not interstate.¹²⁰ *Heart of Atlanta Motel* expanded the definition of what Congress could regulate under the Commerce Clause. This case indicates that the courts may continue to expand their definition of what can be regulated under the Commerce Clause and suggests that the Court is more inclined to approve of expansion when there is a matter of public accommodations in question. Like motels, the Internet is used to facilitate interstate commerce. Where motels are used to allow individuals to move through states in support of commerce,¹²¹ the Internet today facilitates “the interstate flow of goods and people.”¹²²

Similarly, in *United States v. Ballinger*, Ballinger was charged with intentionally destroying religious property while traveling across state lines.¹²³ Ballinger argued that Congress did not have the power to regulate his behavior as he travelled across state lines because destruction of private property does not have a substantial effect on interstate commerce.¹²⁴ The Eleventh Circuit explained that channels of commerce are the “interstate transportation routes”¹²⁵ that Ballinger had used, while “[i]nstrumentalities of interstate commerce . . . are the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods.”¹²⁶ The court reasoned that Ballinger could be regulated because Congress may “regulate the channels and instrumentalities of commerce . . . to prohibit their use for harmful purposes,”¹²⁷ even if the act is local.¹²⁸ The court finally held that Congress may use its Commerce Clause power to “reach criminal conduct in which the illegal acts ultimately occur intrastate, when the perpetrator uses the channels or instrumentalities of interstate commerce to facilitate their commission.”¹²⁹ Again, *Ballinger* shows both that the definition of what can be regulated is shifting and can be expanded to accommodate changing methods of communication, as well as change social understandings of what is appropriate.

119. *Heart of Atl. Motel, Inc.* 379 U.S. at 261.

120. *Id.* at 258.

121. *Id.* at 257.

122. *Id.* at 250.

123. *United States v. Ballinger*, 395 F.3d 1218, 1221-22 (11th Cir. 2005).

124. *Ballinger*, 395 F.3d at 1224.

125. *Id.* at 1225.

126. *Id.* at 1226.

127. *Ballinger*, 395 F.3d at 1226.

128. *Id.*

129. *Id.*

The definition of instrumentalities of commerce was further expanded in *United States v. Pipkins*.¹³⁰ There, the court held that Pipkins had engaged in interstate commerce by traveling across state lines to conduct business and had used instrumentalities of commerce, including “pagers, telephones, and mobile phones . . . [used] to communicate . . . while conducting business.”¹³¹ *Pipkins* demonstrates that the federal government can regulate technology when the technology is used in interstate commerce. Since the Internet is a technology that is used to conduct business across state lines, *Pipkins* suggests that the Internet could be regulated in the same way.¹³²

In *United States v. Panfil*,¹³³ the Eleventh Circuit expanded the government’s ability to regulate technology where it categorized the Internet as “an instrument of interstate commerce.”¹³⁴ This result clearly suggests that the federal government can regulate the Internet and online activities.

The reach of the Commerce Clause has expanded drastically over time. Courts have historically looked most favorably on expansions of the Commerce Clause that promote a positive social change or benefit. The history of Commerce Clause jurisprudence suggests that the limits of what Congress can regulate has shifted over time in response to changing technologies and modified understandings of acceptable behavior. In *Brooks v. United States*, the Court held that Congress can regulate interstate commerce to prohibit activities that “promote immorality, dishonesty, or the spread of any evil or harm.”¹³⁵ In *Ballinger*, the court further noted that Congress could use its Commerce Clause power to ensure that instrumentalities of commerce are not used “for harmful purposes, even if the targeted harm itself occurs outside the flow of commerce and is purely local in nature.”¹³⁶ Ultimately, these cases clearly show that instrumentalities of interstate commerce can, and should, be regulated to prevent harm and promote public policy.

Further, several appellate courts have categorized the Internet as an instrumentality of commerce. In *United States v. Pipkins*, “Pipkins used the Internet to promote his online escort service.”¹³⁷ The Eleventh Circuit held that this Internet use was analogous to his use of other interpersonal

130. *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004).

131. *Id.* at 1294-95.

132. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), in which the Court held that because the frequency of Internet use in conducting interstate commerce has increased, states may impose a sales tax on the sale of goods within its borders, even if the seller has no physical presence in the state.

133. *United States v. Panfil*, 338 F.3d 1299 (11th Cir. 2003).

134. *Panfil*, 338 F.3d at 1300.

135. *Brooks v. United States*, 267 U.S. 432, 436 (1925).

136. *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005). *See also* *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *Brooks*, 267 U.S. at 436.

137. *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004).

communication devices, including pagers, mobile phones, and telephones, because it allowed Pipkins to conduct business.¹³⁸ Similarly, in *Hillis v. Equifax Consumer Services*, the court held that “[d]efendants used an instrumentality of commerce, namely, the Internet.”¹³⁹ In both cases, the court held that since the defendants had used the Internet, they used an instrumentality of interstate commerce, and their actions could be regulated by federal laws.

III. Proposed Solution: Regulation

As Joan Hoff argues, women have never achieved full equality with men in America.¹⁴⁰ One reason is that women’s complaints and concerns are frequently dismissed as hysterical overreactions or as limited to women alone.¹⁴¹ Because these concerns are rarely taken seriously, little has been done by those in positions of power to protect women enough to create a space in which women are able to interact without fear of harassment.¹⁴² The problem is compounded by the fact that many legislators do not understand the power of the Internet or how social media and websites work.¹⁴³ Despite these barriers, women have an active online presence and should not be left with the only resort of being offline to avoid cyber-threats or online harassment.¹⁴⁴ Moreover, the active presence of a more diverse pool of Internet users is beneficial to other Internet users.¹⁴⁵ As such, when women are pushed off the Internet by harassers, overall Internet communication drops severely.¹⁴⁶ Ensuring that the Internet does not become a platform used to intimidate women is important not just to women who regularly put up with vitriol, but also to anyone who hopes to see increased use of and participation in online platforms. Thus, the increase in Internet diversity that curbing cyber-harassment would create is in the interest of all Internet users.¹⁴⁷ One way to make sure that all people continue to use the Internet freely and openly, in order to continue to push for a free trade of ideas and open commerce, is to make sure that unacceptable offline behavior and language is also taken seriously and prohibited online.

138. *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004).

139. *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 511 (N.D. Ga. 2006).

140. HOFF, *supra* note 7 at 1, 3.

141. HOFF, *supra* note 7 at 12.

142. *Id.* at 5.

143. See, e.g., *Senator Asks How Facebook Remains Free, Mark Zuckerberg Smirks: ‘We Run Ads’*, YOUTUBE (Apr. 10, 2018), <https://www.youtube.com/watch?v=n2H8wx1aBiQ>.

144. Hess, *supra* note 20.

145. Women’s Media Center, *supra* Note 1 (access to the Internet results in increased research for medical information, and increased incidence of friendship connection).

146. Hess, *supra* note 20.

147. Women’s Media Center, *supra* note 1.

As an instrumentality of interstate commerce,¹⁴⁸ the Internet can be regulated. The holdings in *Pipkins* and *Equifax* show that individuals who use the Internet may be regulated by federal laws when their use is for business purposes, and that criminal activity online can be punished under such laws. Further, *Ballinger* and *Heart of Atlanta Motel* suggest that nonbusiness activities of an entity using an instrumentality of interstate commerce are also regulatable. Finally, *Elonis*, *Black*, and *D.C. v. R.R.* demonstrate that not all speech is protected by the First Amendment freedom of speech. These cases suggest that online speech that is not subject to First Amendment protection can be regulated by the federal government because the speaker is using an instrumentality of interstate commerce.

However, not all speech that is perceived as threatening may be regulated. As *Elonis* and *D.C.* indicate, only true threats are not protected by the First Amendment,¹⁴⁹ so only true threats can be regulated. Additionally, as *Elonis* demonstrates, any regulation should include the requisite mental state.¹⁵⁰ Even if the required mental state were recklessness, operating under a subjective test¹⁵¹ would be an improvement over the current unregulated status of the Internet. Creating regulations that prohibit or criminalize the act of sending these offensive messages would keep the worst offenders offline by allowing law enforcement officers to work across jurisdictions to investigate. Additionally, this strategy might create, in the public imagination, the idea that some things should not be said in jest. Better still, Congress should adopt an objective standard by requiring only a negligent mental state. This would permit women who reasonably feel threatened or intimidated by comments made online to contact law enforcement officers and be taken seriously, instead of having their concerns dismissed. Moreover, law enforcement officers would be able to prosecute offenders regardless of where the victim and the harasser live.¹⁵² This policy could also help to protect victims of domestic abuse, who suffer online and offline.¹⁵³ Finally, this type of legislation would ensure that all Internet users are able to interact with each other, promoting the flow of ideas and capital.

148. See *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003).

149. See *Elonis v. United States*, 135 S. Ct. 2001 (2015); *D.C. v. R.R.*, 182 Cal. App. 4th 1190 (2010).

150. *Elonis*, 135 S. Ct. at 2013.

151. In *D.C.*, 182 Cal. App. 4th at 1190, the court explained that an objective test asks whether a reasonable recipient could perceive a message as a threat; a subjective test looks at the intent of the speaker.

152. Hess, *supra* note 18.

153. Chemaly, *supra* note 25.

Conclusion

The Internet is a global network that promotes the exchange of ideas and goods. It has also become a frightening place to communicate because of the lack of regulation surrounding how people conduct themselves online. The lack of regulation has impacted women in particular, who are subjected to an overwhelming volume of harassing and threatening messages. However, as an instrumentality of interstate commerce, the Internet can be regulated by the federal government. Moreover, many of these messages are likely not protected by the speaker's First Amendment freedom of speech because they are true threats. The government can regulate against such speech in order to promote public policy, thus keeping with the long tradition of expanding the Commerce Clause in order to ensure that our laws reflect our society's more nuanced views of what is, and is not, appropriate. Regulating these speech acts online is not a great step forward in terms of accepted legislative power, but it would promote a much safer and more welcoming cyberspace.
