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CYBERHARASSMENT AND WORKPLACE LAW

HELEN NORTON*

By documenting how cyberharassment can target and injure members of traditionally subordinated groups, Danielle Keats Citron's *Hate Crimes in Cyberspace* contributes importantly to our understanding of the relationship between speech and equality. For these reasons, as her opening contribution to this online symposium makes clear, policymakers and the public are now starting to rethink their longstanding hands-off approach to the regulation of online speech that inflicts such harms. Here I very briefly explore what this might mean for workplace law.

First, Professor Citron's work and related developments invite us to broaden our understanding of the universe of actors who shape access to job opportunities, as well as our understanding of how they can use speech to expand or constrain those opportunities. Although employment law has traditionally focused on regulating the relationship between "employers" and their "employees," the emergence of Uber, Lyft and other participants in the "sharing" or "gig" economy demonstrates how those who are hard to fit in traditional employer/employee categories increasingly control access to work. In describing the ways in which online harassers can limit their victims' job prospects by damaging their online reputation with employers, potential references, and others, *Hate Crimes in Cyberspace* similarly encourages us to reconsider our assumptions about who holds power over important work opportunities.¹

This is not the first time that we have had to rethink our assumptions about the relationship between speech and the workplace. Recall, for example, the evolution of Title VII of the Civil Rights Act: policymakers in 1964 first chose to regulate discrimination in employment largely because of its great harm to families' economic security as well as to individual dignity and autonomy. Only decades later did courts, policymakers, and the public come to understand that illegal discrimination can include harassment, which often (but not always) takes the form of speech. More specifically, the Supreme Court ratified the Equal Employment Opportunity Commission's position that employers' unwelcome speech (or other workplace behavior) that is sufficiently severe or pervasive to

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¹ DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 158 (2014) (describing how cyberharassers "e-mailed damaging statements to [their victim's] summer employer to prevent her from receiving a permanent offer; the entire Yale Law faculty, who would serve as future job recommenders, received e-mails with defamatory lies about her; readers were urged to contact law firms to talk them out of hiring her").

create a hostile work environment can constitute unlawful discrimination by altering the target's terms and conditions of employment on the basis of protected class status.² In other words, just as compelling workers to endure miserable working conditions (e.g., assigning them an unforgiving schedule or a hazardous worksite) on the basis of protected class status alters the terms and conditions of employment in violation of antidiscrimination law, so too does creating miserable working conditions by requiring individuals to endure verbal abuse on the basis of their class status. For these reasons, courts and enforcement agencies have treated employers' harassing speech as akin to coercive conduct unprotected by the First Amendment.³

Although antidiscrimination law now recognizes that employers can drive women and people of color from the workplace (or can permit coworkers to do so) through harassing speech, it has yet to acknowledge that nonemployers can use online speech with the same intent and to the same effect. This suggests the possibility of expanding civil rights laws to prohibit those other than traditional employers from constraining job opportunities on the basis of protected class status. As Professor Citron writes, "Civil rights laws should penalize on-line harassers who interfere with someone's right to pursue life's crucial opportunities—work, education, and self-expression—due to group bias."⁴ To be sure, our contemporary political climate of polarization and gridlock indicates that enacting such legislation would be no easy task, at least in the short term.⁵ But the ongoing conversation itself remains of great value in illuminating our understanding of the contemporary workplace, its new challenges as well its opportunities.

² *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

³ *See Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (referring to Title VII as "an example of a permissible content-neutral regulation of conduct"); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. Thus, for example, sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.") (citations omitted).

⁴ CITRON, *supra* note 1, at 142.

⁵ California may offer a counterexample. Professor Citron describes California law as permitting "civil penalties for bias-motivated threats or intimidation interfering with someone's state or federal statutory or constitutional rights" that include employment and education, among others. *Id.* at 154.

Second, Professor Citron not only proposes new work-related legislation, but also draws from existing employment law to suggest that employers who rely on online reputation in screening applicants for hire may violate Title VII's prohibition on disparate impact discrimination. More specifically, she proposes that

[t]he EEOC could and should interpret Title VII to ban employers from using search engine results as the basis for denying individuals' employment opportunities. Employers' reliance on searches to research candidates has a disparate impact on women given the gendered nature of cyber harassment. Cyber harassment victims often have difficulty obtaining and keeping jobs because searches of their names prominently display the abuse. Employers admittedly rely on social media information in making hiring and hiring decisions.⁶

Here the barriers to her proposal are legal rather than political. Recall that plaintiffs seeking to establish illegal disparate impact discrimination must start by demonstrating that the challenged practice causes an adverse impact based on protected class status.⁷ Even if the plaintiff makes such a showing, employers can successfully defend the practice by demonstrating that it "is job related for the position in question and consistent with business necessity."⁸ Plaintiffs may encounter difficulties in establishing, as a threshold statistical matter, that employers' use of online search results imposes a disparate impact on the basis of protected class status. Plaintiffs may also confront challenges in rebutting employers' likely assertions that online searches are in fact job-related and consistent with business necessity in that they may gather information relevant to employment decisions—e.g., by confirming applicants' representations on their resumes.

Despite these legal obstacles, here too there is great value simply in the conversation that such challenges would provoke, as they might well encourage employers to think hard about whether online searches are more likely to operate as discriminatory screens rather than as valuable sorting mechanisms. Indeed, at its best, disparate impact law encourages employers to reconsider and justify longstanding but often-underexamined practices. In this way, disparate impact law seeks both "to identify[] and reward[] individual merit as well as achiev[e] antidisubordination goals[,] . . . ensuring that candidates are selected on actual merit rather than on unexamined yet entrenched assumptions that replicate

⁶ *Id.* at 183.

⁷ *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). For example, applicant flow analysis (a common means of determining disparate impact) would assess whether online searches result in statistically significant differences between an employer's selection rates for male as opposed to female applicants. *See* 29 C.F.R. § 1607.4(D) (explaining that federal enforcement agencies will generally consider as evidence of an employment practice's adverse impact a selection rate for protected class members that is less than 4/5 of the rate for the group with the highest selection rate).

⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

patterns of subordination.”⁹ To this end, Professor Citron relatedly suggests that employers who receive training about the phenomenon of cyberharassment “would be more likely to scrutinize negative information appearing online and to appreciate its potential peril to traditionally subordinated groups.”¹⁰

In short, Professor Citron has cast a spotlight on cyberharassment that valuably encourages us to consider how law might respond to the emerging ways in which speech can control and limit access to meaningful work opportunities.

⁹ Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 250 (2010); see also *id.* at 253 (“Disparate impact provisions’ attention to unjustified disparities also substantially enhances social welfare by improving the practices used to fill key positions.”).

¹⁰ CITRON, *supra* note 1, at 184. For a related suggestion see *id.* at 184-85 (“Professor Frank Pasquale has proposed a fair reputation reporting act, which would require employers to reveal online sources that they use in evaluating applicants. The act would give applicants a chance to review the digital dossiers compiled about them.”).