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## When Law Frees Us to Speak

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# WHEN LAW FREES US TO SPEAK

Danielle Keats Citron\* & Jonathon W. Penney\*\*

*A central aim of online abuse is to silence victims. That effort is as regrettable as it is successful. In the face of cyberharassment and sexual-privacy invasions, women and marginalized groups retreat from online engagement. These documented chilling effects, however, are not inevitable. Beyond its deterrent function, the law has an equally important expressive role. In this Article, we highlight law's capacity to shape social norms and behavior through education. We focus on a neglected dimension of law's expressive role: its capacity to empower victims to express their truths and engage with others. Our argument is theoretical and empirical. We present new empirical research showing cyberharassment law's salutary effects on women's online expression. We then consider the implications of those findings for victims of sexual-privacy invasions.*

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#### INTRODUCTION

In 2016, a cybermob descended upon Leslie Jones, the *Ghostbusters* actress and *Saturday Night Live* cast member. Trolls and hackers targeted Jones with sexist and racist abuse.<sup>1</sup> Tweets featured doctored photos of Jones with semen on her face. Harassers compared Jones to an ape with menacing photos to match. Jones's website was hacked; its contents were replaced by photographs of her license and passport, fake nude photographs of Jones, and a video tribute to a dead zoo gorilla.<sup>2</sup> Jones subsequently shut down her Twitter account.<sup>3</sup> Friends described Jones as "rattled" and "shell-shocked."<sup>4</sup>

Jones's experience is reminiscent of far too many others. In 2014, a hacker published more than 500 private sexually explicit images of female celebrities online, which had been stolen from victims' email and iCloud accounts.<sup>5</sup> Actress Jennifer Lawrence told *Vanity Fair*: "I can't even describe to anybody what it feels like to have my naked body shoot across the world like a news flash against my will."<sup>6</sup> She made clear that the

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1. AMANDA LENHART ET AL., DATA & SOC'Y RESEARCH INST., NONCONSENSUAL IMAGE SHARING: ONE IN 25 AMERICANS HAS BEEN A VICTIM OF "REVENGE PORN" 3 (2016), [https://datasociety.net/pubs/oh/Nonconsensual\\_Image\\_Sharing\\_2016.pdf](https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf) [<https://perma.cc/28QW-28YK>]; Abby Ohlheiser, *Leslie Jones Was the Victim of a Hack, Reportedly Exposing Private Documents and Nude Photos*, WASH. POST (Aug. 24, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/24/leslie-jones-website-goes-offline-after-reportedly-being-hacked/> [<https://perma.cc/VT6J-NXZ9>]; Katie Rogers, *Leslie Jones, Star of 'Ghostbusters,' Becomes a Target of Online Trolls*, N.Y. TIMES (July 19, 2016), <http://www.nytimes.com/2016/07/20/movies/leslie-jones-star-of-ghostbusters-becomes-a-target-of-online-trolls.html> [<https://perma.cc/FQ65-LDN5>].

2. Sandra Laville et al., *The Women Abandoned to Their Online Abusers*, GUARDIAN (Apr. 11, 2016), <https://www.theguardian.com/technology/2016/apr/11/women-online-abuse-threat-racist> [<https://perma.cc/7LZF-KMEL>] (explaining that comments on Black Lives Matter's Facebook pages contain "racism, sexism, and homophobia"); Abby Ohlheiser, *The Leslie Jones Hack Used All the Scariest Tactics of Internet Warfare at Once*, WASH. POST (Aug. 26, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2016/08/26/the-leslie-jones-hack-used-all-the-scariest-tactics-of-internet-warfare-at-once> [<https://perma.cc/6BMT-YRJM>] (explaining how women of color, in particular, are subjected to racism and sexism online).

3. LENHART ET AL., *supra* note 1, at 3; Rogers, *supra* note 1.

4. Maurice Cassidy, *Leslie Jones Reacts to Nude Photos Leak: Devastated by Scandal as Katy Perry Defends Comedienne's Privacy*, INQUISITR (Aug. 25, 2016), <https://www.inquisitr.com/3451796/leslie-jones-reacts-to-nude-photos-leak-devastated-by-scandal-as-katy-perry-defends-comediennes-privacy/> [<https://perma.cc/8TT2-2DBN>].

5. LENHART ET AL., *supra* note 1, at 3; Joseph Serna, *Man Convicted of Hacking Gmail and iCloud Accounts of at Least 30 Celebrities in L.A.*, L.A. TIMES (Sept. 28, 2016), <https://www.latimes.com/local/lanow/la-me-ln-phishing-scam-conviction-20160928-snap-story.html> [<https://perma.cc/26U3-FWPT>].

6. LENHART ET AL., *supra* note 1, at 3; Sam Kashner, *Both Huntress and Prey*, VANITY FAIR (Nov. 2014), <http://www.vanityfair.com/hollywood/2014/10/jennifer-lawrence-photo-hacking-privacy> [<https://perma.cc/F64F-W32M>].

publication of her nude photos without consent amounted to a “sexual violation.”<sup>7</sup>

These attacks exemplify the online abuse that victims face. Such attacks usually amount to cyberharassment or cyberstalking—the persistent targeting of an individual with threats, defamation, and privacy invasions that causes severe emotional distress or the fear of physical harm.<sup>8</sup> Rape and death threats are common.<sup>9</sup> Defamation typically involves allegations that victims are prostitutes or have sexually transmitted infections.<sup>10</sup> Privacy invasions typically implicate sexual privacy<sup>11</sup> and involve “doxxing.”<sup>12</sup>

Online abuse has a “totalizing and devastating impact” upon victims.<sup>13</sup> As one of us (Penney) has empirically proven, online abuse has a profound “chilling effect.”<sup>14</sup> The central aim of online abuse is often to silence victims, to punish them for speaking out, and to drive them from public life.<sup>15</sup> And, as this Article will explore, it works.

Because online abuse disproportionately impacts women and marginalized communities, so does the silencing that it produces.<sup>16</sup> As online abuse

7. LENHART ET AL., *supra* note 1, at 3; Kashner, *supra* note 6.

8. DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 6–8 (2014); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657–58 (2012). See generally PEW RESEARCH CTR., ONLINE HARASSMENT (2014), [http://assets.pewresearch.org/wp-content/uploads/sites/14/2014/10/PI\\_OnlineHarassment\\_72815.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/14/2014/10/PI_OnlineHarassment_72815.pdf) [<https://perma.cc/SQLU-67TD>].

9. CITRON, *supra* note 8, at 5–6.

10. *Id.* at 24, 27, 46.

11. See generally Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. (forthcoming May 2019).

12. Svana M. Calabro, Note, *From the Message Board to the Front Door: Addressing the Offline Consequences of Race- and Gender-Based Doxxing and Swatting*, 51 SUFFOLK U. L. REV. 55, 58 (2018).

13. CITRON, *supra* note 8, at 29; see also Citron, *supra* note 11 (manuscript at 43–44) (detailing examples of the impact and chilling effects of online abuse).

14. The term “chilling effects” describes the idea that certain actions, by public or private actors, may “chill or deter people from exercising their freedoms or engaging in legal activities.” Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 125–26 (2016) [hereinafter Penney, *Chilling Effects*]; see also Jonathon Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study*, 6 INTERNET POL’Y REV., May 26, 2017, at 1, 3 [hereinafter Penney, *Internet Surveillance*]. For other important scholarly work on chilling effects, see NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 107, 179–80, 185 (2015); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1657 (2013); Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 730–31 (1978).

15. CITRON, *supra* note 8, at 196 (speaking about the need for law to play a role where “one group of voices consciously exploits the Internet to silence others”); EMMA A. JANE, *MISOGYNY ONLINE: A SHORT (AND BRUTISH) HISTORY* 68–69 (2017) (discussing how “cyberhate” is used to silence women); Caitlin E. Lawson, *Platform Vulnerabilities: Harassment and Misogynoir in the Digital Attack on Leslie Jones*, 21 INFO. COMM. & SOC’Y 818, 821 (2018) (noting how online harassment and abuse, including the Leslie Jones case, are deployed to silence women).

16. See CITRON, *supra* note 8, at 13–19; Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 385 (2014) (“[T]he nonconsensual disclosure of a person’s sexually explicit images chills private expression . . . .”); Citron, *supra* note 11 (manuscript at 19); Mary Anne Franks, *Beyond ‘Free*

continues apace, women and marginalized groups are forced offline.<sup>17</sup> This endangers deliberative democracy, which depends upon contributions from diverse voices and perspectives—particularly groups historically excluded from the “marketplace of ideas.”<sup>18</sup>

These “chilling effects” are not inevitable. As a start, we note that law has a crucial expressive function in combating online abuse.<sup>19</sup> As one of us (Citron) has argued, law can teach us that cyberharassment is harmful, wrong, and illegal.<sup>20</sup> Through its lessons, law can change the behavior of everyone involved in the legal process—the perpetrators themselves, law enforcers, judges, and victims.<sup>21</sup>

In this Article, we shed light on a neglected dimension of law’s expressive role—its encouragement of victims to stay engaged online rather than retreating into silence. We make both a theoretical and empirical case for these potential expressive effects, including new empirical research to support this claim. We conclude by extending our analysis to laws combating invasions of sexual privacy.<sup>22</sup> Our work aims to enrich expressive law theory and scholarship with empirical and theoretical work supporting law’s expressive role.<sup>23</sup>

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*Speech for the White Man’: Feminism and the First Amendment*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Cynthia Bowman & Robin West eds., forthcoming 2019) (manuscript at 29), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3206392](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206392) [<https://perma.cc/UF9V-ZPS7>] (“[E]vidence abounds of the chilling effects of harassment and other forms of abuse.”).

17. CITRON, *supra* note 8, at 1–4, 8–9; Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 374–75, 391 (2009); Ari Ezra Waldman, *Social Safe Spaces*, 96 WASH. L. REV. (forthcoming 2019) (manuscript at 3–4) (“Prominent women and members of other marginalized groups are leaving these spaces. That is not only regrettable; it is dangerous for democracy.”).

18. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 102 (2009); Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won’t Believe #3)*, 95 WASH. U. L. REV. 1353, 1365 (2018) (“[N]ot everyone can freely engage online. This is especially true for women, minorities, and political dissenters who are more often the targets of cyber mobs and individual harassers.”); Citron, *supra* note 17, at 399 (“Society suffers a great loss when it loses women from the online marketplace and discourse.”); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 860 (2018) (“[T]he loss of this deep engagement can have deleterious effects on politics, policy, and democracy.”).

19. *See generally* Citron, *supra* note 17. In this Article, we build on our prior work to develop the way we understand law’s expressive role and its actual impact on the ground.

20. *Id.* at 393, 408. *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

21. *See, e.g.*, Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL’Y 139, 169 (2010); Citron, *supra* note 17, at 377, 411–12 (arguing that law can change how law enforcement sees and responds to online abuse, how judges sentence defendants, and how victims might see themselves as wronged and report online abuse to authorities).

22. *See* Citron, *supra* note 11 (manuscript at 54–60).

23. *See, e.g.*, Yuval Feldman, *The Expressive Function of Trade Secret Law: Legality, Cost, Intrinsic Motivation, and Consensus*, 6 J. EMPIRICAL LEGAL STUD. 177, 178–79 (2009); Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J.C.R. & C.L. 95, 101–02 (2017); Susan Yeh, *Laws and Social Norms: Unintended Consequences of Obesity Laws*, 81 U. CIN. L. REV. 173, 174 (2012).

## I. THEORY AND PRACTICE

Understanding the theory and practice of expressive law begins with asking very basic questions about the law. Those questions include some of the most foundational: Why do people follow the law? What properties command or encourage that compliance?

A. *Situating Expressive Theory*

Conversations about legal compliance have long followed diverging paths.<sup>24</sup> For deterrence theorists, people comply with the law because ignoring it would be costly.<sup>25</sup> Law, in other words, changes behavior by sheer force of coercion. For legitimacy theorists, people obey the law because they view law as worthy of their compliance.<sup>26</sup> Said another way, people comply with law's mandates because they view law as legitimate.

Scholars who emphasize law's expressive role, as we do, have joined this long-running debate.<sup>27</sup> While scholars have long explored law's expressive power,<sup>28</sup> more recent work has illuminated law's impact on human behavior.<sup>29</sup> Expressive theorists argue that law shapes social norms by changing the social meaning of behavior.<sup>30</sup> Law educates us about what is "good" or acceptable behavior and what is "bad" or unacceptable behavior.<sup>31</sup> People who internalize that message change their conduct.<sup>32</sup> For instance,

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24. See Alex C. Geisinger & Michael Ashley Stein, *Expressive Law and the Americans with Disabilities Act*, 114 MICH. L. REV. 1061, 1061–62 (2016).

25. *Id.* at 1061; see, e.g., FREDERICK SCHAUER, *THE FORCE OF LAW* (2015); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 770 (2010).

26. See Geisinger & Stein, *supra* note 24, at 1061; see also TOM TYLER, *WHY PEOPLE OBEY THE LAW* 19–70 (1990); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1402, 1404–10 (2005).

27. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 4 (2015); Geisinger & Stein, *supra* note 24, at 1062.

28. See, e.g., THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1962) (explaining that law is a "reservoir of emotionally important social symbols"); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 993–94 (1989).

29. Geisinger & Stein, *supra* note 24, at 1062.

30. *Id.*; see, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968–72 (1995); Sunstein, *supra* note 20, at 2023. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003); Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002) [hereinafter Geisinger, *A Belief*]; Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN. ST. L. REV. 77 (2007); Alex Geisinger, *Reconceiving the Internal and Social Enforcement Effects of Expressive Regulation*, 58 WM. & MARY L. REV. ONLINE 1 (2016); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) [hereinafter McAdams, *An Attitudinal Theory*].

31. See Geisinger & Stein, *supra* note 24, at 1062; Sunstein, *supra* note 20, at 2022, 2035–36, 2050–52.

32. Geisinger & Stein, *supra* note 24, at 1062; Sunstein, *supra* note 20, at 2022.

antismoking laws changed public perceptions about smoking.<sup>33</sup> With law's help, smoking went from being viewed as sophisticated and exciting to undesirable and dangerous.<sup>34</sup> Law shaped human behavior, reducing smoking rates over time.<sup>35</sup>

Expressive law theory follows different versions and models.<sup>36</sup> Most relevant to our analysis is what Richard McAdams calls the "expressive theory of law's effects."<sup>37</sup> Law shapes attitudes, beliefs, and behavior through its messages and lessons.<sup>38</sup> Various mechanisms operate to achieve this effect, which we will categorize as "informational" or "action-focusing."<sup>39</sup>

Scholarship has mostly focused on law as an informational mechanism.<sup>40</sup> Under this view, law provides information about how people should act.<sup>41</sup> It signals what behavior is valuable and desired and what behavior is destructive and denigrated. As McAdams explains, "democratically produced" laws are "positively correlated with popular attitudes."<sup>42</sup> Law's form (civil or criminal) and penalty show societal intensity around a social value.<sup>43</sup> Law may reflect a preexisting consensus or a shift to a new consensus about certain activity.<sup>44</sup>

Different explanations are offered for how law's expressive value alters behavior. For some, law allows people to infer facts about the social costs of conduct.<sup>45</sup> Matching one's actions to public sentiment enables people to avoid the social costs of behaving in ways that would garner disapproval, or worse.<sup>46</sup> Another explanation is that people gradually internalize information about societal norms.<sup>47</sup> People change their beliefs and attitudes

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33. See Geisinger & Stein, *supra* note 24, at 1062.

34. See *id.*

35. See *id.*

36. *Id.* at 1063–64; see, e.g., Feldman, *supra* note 23, at 179 (describing the various models of expressive law theory and its mechanisms); Ryo, *supra* note 23, at 106–07 (summarizing multiple theories and research).

37. McADAMS, *supra* note 27, at 13–16.

38. Ryo, *supra* note 23, at 106–07; see also Sunstein, *supra* note 20, at 2031.

39. McAdams largely focuses on these mechanisms but refers to the latter as "coordination." We treat this category as a bit broader than coordination, though we owe much of our insights to McAdams's important analysis. See McADAMS, *supra* note 27, at 6. Other work discusses these issues in varying ways. See, e.g., Feldman, *supra* note 23, at 181–86 (describing four mechanisms); Geisinger & Stein, *supra* note 24, at 1068–70 (summarizing various expressive law theories with different mechanisms); Ryo, *supra* note 23, at 106–07 (describing two categories, though slightly differently).

40. Geisinger & Stein, *supra* note 24, at 1067–68.

41. *Id.*

42. McAdams, *An Attitudinal Theory*, *supra* note 30, at 340.

43. Feldman, *supra* note 23, at 184–85.

44. *Id.*

45. Geisinger, *A Belief*, *supra* note 30, at 47 n.77.

46. *Id.* at 39–40, 47 (noting legal sanctions beyond mere societal disapproval); Geisinger & Stein, *supra* note 24, at 1068.

47. Geisinger, *A Belief*, *supra* note 30, at 47.

because they prefer to act in ways that reflect the majority's views. This change may reflect a belief that obeying the law is a moral imperative.<sup>48</sup>

Now, to the law's action-focusing mechanism. In a phenomenon described by McAdams as "coordination," law provides a "focal point" around which individuals organize their behavior.<sup>49</sup> Legally mandated stop lights, for instance, enable people to coordinate their driving and avoid accidents.<sup>50</sup> Moreover, law serves as a focal point for social change.<sup>51</sup> When public sentiment about specific behavior is unclear, law provides expressive clarity, and channels shifts in beliefs, attitudes, and behaviors.<sup>52</sup>

Law's informational and action-focusing mechanisms work together. Take laws that require dog owners to clean up after their animals.<sup>53</sup> On nearly every block in Dublin, one finds "Bin the Poo" signs.<sup>54</sup> Countless cities and towns all over the world have similar warnings. Although such laws are rarely enforced, they achieve substantial compliance.<sup>55</sup> Law generates compliance by signaling societal disapproval for the failure to clean up and by encouraging people to press others to clean up, creating a "focal point" for non-dog owners to coordinate action.<sup>56</sup> The confluence of these mechanisms causes "norm cascades."<sup>57</sup> This embodies a basic premise of social psychology—that when deciding how to act, people consider how the wider group would perceive their actions.<sup>58</sup>

### B. In Operation

Expressive theory has deepened our understanding of shifting social norms around the unequal treatment of women of all races, sexual orientations, national origins, and religions.<sup>59</sup> In the 1970s and 1980s, judicial rulings changed the social meaning of workplace sexual harassment from a triviality to gender discrimination.<sup>60</sup> Class action lawsuits brought by advocates in the battered women's movement changed law enforcement's view of domestic

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48. *Id.* at 64–65.

49. MCADAMS, *supra* note 27, at 5; *see also* Ryo, *supra* note 23, at 106.

50. MCADAMS, *supra* note 27, at 5.

51. Geisinger, *A Belief*, *supra* note 30, at 46–47.

52. *See id.* at 64–65.

53. MCADAMS, *supra* note 27, at 197; Sunstein, *supra* note 20, at 2032.

54. On a trip to Dublin, one of us (Citron) took countless photos of the "Bin the Poo" signs—the signs were far more interesting than the ones in the United States, especially to her then-teenage daughters.

55. *See* MCADAMS, *supra* note 27, at 197; Sunstein, *supra* note 20, at 2032.

56. *See* MCADAMS, *supra* note 27, at 197; Sunstein, *supra* note 20, at 2032.

57. Sunstein, *supra* note 20, at 2033.

58. *See* Geisinger, *A Belief*, *supra* note 30, at 47; McAdams, *An Attitudinal Theory*, *supra* note 30, at 340.

59. One of us (Citron) has used expressive theory to explain how law has the potential to shift social norms around online abuse, just as it has in the past regarding domestic violence and workplace sexual harassment. *See* CITRON, *supra* note 8, at 126–27; Citron, *supra* note 17, at 377.

60. Citron, *supra* note 17, at 407–08.



violence from a “private family matter” to a criminal act warranting arrest and prosecution.<sup>61</sup>

Law has helped change social attitudes toward cyberharassment of women and marginalized communities. As with workplace sexual harassment and domestic violence, a “cyber civil rights” approach altered the social meaning of cyberharassment from “no big deal” to grave social problem.<sup>62</sup> Changes in the law galvanized public sentiment, anti-harassment organizations,<sup>63</sup> privacy groups,<sup>64</sup> and social media companies<sup>65</sup> to coordinate efforts for broader social change.<sup>66</sup>

The work of the Cyber Civil Rights Initiative (CCRI);<sup>67</sup> its founder Holly Jacobs, a victim of nonconsensual pornography; and its legislative adviser and now-president Mary Anne Franks was crucial in this effort. Franks wrote the first model nonconsensual pornography law.<sup>68</sup> At that time, only three

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61. *Id.* at 409; see also Avlana K. Eisenberg, *Criminal Inflictions of Emotional Distress*, 113 MICH. L. REV. 607, 609 (2015) (using expressive theory, among other theories, to help explain various criminal law reforms aimed at empowering victims); Ari Ezra Waldman, *A Breach of Trust: Fighting Nonconsensual Pornography*, 102 IOWA L. REV. 709, 719–20, 730–31 (2017).

62. In 2008, one of us (Citron) was the first to argue that cyberharassment constituted a civil rights problem and to offer a civil rights framework to address it. See generally Citron, *supra* note 18. For further discussion, see also Citron, *supra* note 17, at 377; and Danielle Citron, *Yale ISP—Reputation Economies in Cyberspace*, YOUTUBE (Jan. 8, 2008), <https://www.youtube.com/watch?v=XVEL4RfN3uQ> [<https://perma.cc/KG8P-WKFE>]. Mary Anne Franks has been an exemplary thinker and contributor in this effort. See generally Franks, *supra* note 8; Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011). For years, online commenters and free speech absolutists dismissed that work as an overreaction to a small problem. Citron, *supra* note 17, at 410–11. See generally Danielle Keats Citron, *Online Engagement on Equal Terms*, 95 B.U. L. REV. ANNEX 97 (2015). As the problem of online abuse became more widespread, as it became clear that women and marginalized communities were the majority of victims, and as victims suffered serious consequences to their ability to work, speak, engage, and socialize, lawmakers and law enforcers began to pay attention. CITRON, *supra* note 8, at 95–120.

63. See CITRON, *supra* note 8, at 106, 252 (describing the advocacy work of the Cyber Civil Rights Initiative (CCRI), Jacobs, and Franks, and the role that Franks and CCRI played in changing the law regarding nonconsensual pornography).

64. For instance, the Electronic Privacy Information Center (EPIC), the oldest privacy advocacy group in the United States, has strongly supported the work of CCRI and advocates fighting nonconsensual pornography. Carrie Goldberg, who has served on CCRI’s board of directors for years and whose legal practice is devoted to victims of online abuse, received EPIC’s Champion of Freedom Award in 2016. Press Release, Elec. Privacy Info. Ctr., EPIC Gives Freedom Awards to Goldberg, Kasparov, Rivest, and Wald (June 5, 2017), <http://epic.org/2017/06/epic-gives-freedom-awards-to-g.html> [<http://perma.cc/LZQ3-GB8R>].

65. One of us (Citron) sits on Twitter’s Trust and Safety Council and serves on Facebook’s Nonconsensual Intimate Imagery Task Force. Citron does not receive compensation for that work. *The Twitter Trust and Safety Council*, TWITTER, [https://about.twitter.com/en\\_us/safety/safety-partners.html](https://about.twitter.com/en_us/safety/safety-partners.html) [<https://perma.cc/7KRV-S5B8>] (last visited Apr. 10, 2019); see also Madeline Buxton, *Facebook Wants to Stop Revenge Porn Before It Begins, but the Process Is Tricky*, REFINERY29 (May 22, 2018, 11:00 AM), <https://www.refinery29.com/en-us/2018/05/199800/facbook-fights-revenge-porn> [<https://perma.cc/3MPS-ADXV>].

66. Citron, *supra* note 17, at 410–11.

67. CYBER C.R. INITIATIVE, <https://www.cybercivilrights.org/> [<https://perma.cc/5JB8-WJEW>] (last visited Apr. 10, 2019).

68. Citron, *supra* note 11 (manuscript at 57 n.412).

states criminalized the practice.<sup>69</sup> Thanks to Franks's thoughtful scholarship and tireless work with lawmakers, forty-one states and the District of Columbia now criminalize the posting of nude images without consent.<sup>70</sup>

Given changes in the law brought about by the hard work of advocates, law enforcement began to tackle online abuse. An important step was education. In 2014, one of us (Citron) worked with U.S. Senator Kamala Harris, then the California attorney general (AG), to establish the Cyber Exploitation Task Force.<sup>71</sup> The Task Force was made up of victim advocates, fifty major technology companies, law enforcement representatives, and experts. Under Harris's leadership, California created an online hub providing resources for law enforcement officers investigating invasions of sexual privacy, harassment, and stalking.<sup>72</sup>

There has been an increase in the enforcement of criminal law and civil actions related to online abuse. The California AG's office prosecuted operators of revenge porn websites for engaging in extortion and other crimes. Site operators were convicted of, or pleaded guilty to, encouraging users to post nude photos of their ex-partners and charging hundreds of dollars for the photos to be removed.<sup>73</sup> The Department of Justice's Computer Crimes and Intellectual Property Section has prosecutors like Mona Sedky with an expertise in cyberstalking, cyberharassment, and sextortion.<sup>74</sup> The Federal Trade Commission (FTC) followed California's lead by bringing an enforcement action against revenge porn site operators for exploiting nude images shared in confidence for commercial gain.<sup>75</sup>

There has been a significant shift in the response to online abuse; in ten years, cyberharassment went from a triviality to a crime.<sup>76</sup> Attorneys general like Harris devoted resources to training personnel to conduct investigations of online abuse.<sup>77</sup> Social media companies banned nonconsensual

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69. Mary Anne Franks, "Revenge Porn" Reform: A View from the Front Lines, 69 FLA. L. REV. 1251, 1280 (2017).

70. Citron, *supra* note 11 (manuscript at 57).

71. See Press Release, State of Cal. Dep't of Justice, Attorney General Kamala D. Harris, Tech Leaders and Advocates Launch Offensive in Fight Against Cyber Exploitation (Oct. 14, 2015), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-tech-leaders-and-advocates-launch-offensive> [<https://perma.cc/N4DP-KNCQ>].

72. See *id.*

73. For instance, the operator of UGotPosted, Kevin Bollaert, faced charges of extortion, conspiracy, and identity theft for allegedly urging users to post their ex-lovers' nude photos and then demanding large fees for the removal of each photo. Citron, *supra* note 62, at 98 n.6. Bollaert's conviction signaled that extorting money from individuals whose confidential nude images were posted without permission is an illegal enterprise. Danielle Citron & Woodrow Hartzog, *The Decision That Could Finally Kill the Revenge-Porn Business*, ATLANTIC (Feb. 3, 2015), <https://www.theatlantic.com/technology/archive/2015/02/the-decision-that-could-finally-kill-the-revenge-porn-business/385113/> [<https://perma.cc/JH87-GH4L>].

74. See Citron, *supra* note 11 (manuscript at 55 n.396).

75. Citron, *supra* note 62, at 98.

76. Citron, *supra* note 17, at 410–11.

77. *Id.* at 411–12.

pornography, threats, and other forms of cyberharassment.<sup>78</sup> Victims, slowly but surely, felt emboldened to report online abuse to law enforcement.

In January 2015, the esteemed civil liberties group, the Electronic Frontier Foundation (EFF), put its reputation behind efforts to combat cyberharassment. The EFF wrote an article highlighting online harassment as a pressing “digital rights issue.”<sup>79</sup> It was a big deal for a civil liberties group to recognize that speech can silence speech.<sup>80</sup> In our experience, most civil liberties groups resist that argument. The EFF said to the public that cyberharassment was not a small problem that could be ignored.<sup>81</sup> Instead, the EFF made clear that cyberharassment was “profoundly damaging to the free speech and privacy rights of the people targeted.”<sup>82</sup> It was crucial for the public’s understanding of online abuse for a civil liberties organization to contend that online abuse silences people, especially women and minorities, who enjoy “less political or social power.”<sup>83</sup> Such progress has been slow but sure.

### *C. Little-Noticed Expressive Effect: Victim Engagement*

There is another, little-studied impact that law has in the arena of online abuse: the empowerment of victims to speak and engage online. Though largely neglected in expressive law scholarship,<sup>84</sup> the idea that law has the potential to empower the speech of victims is not new. This has been a core objective of the victim’s rights movement. Since the 1970s, advocates have sought to give victims a greater “voice” in the criminal justice system.<sup>85</sup> As we have both argued, law’s expressive value includes its encouragement of cyberharassment victims to report abuse to law enforcement.<sup>86</sup>

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78. One of us (Citron) has worked closely with social media companies on their terms-of-service policies related to online abuse. *See supra* note 65 and accompanying text.

79. Danny O’Brien & Dia Kiyyali, *Facing the Challenge of Online Harassment*, ELECTRONIC FRONTIER FOUND. (Jan. 8, 2015), <http://www.eff.org/deeplinks/2015/01/facing-challenge-online-harassment> [<https://perma.cc/24TU-EBAK>].

80. Citron, *supra* note 62, at 99.

81. *See* O’Brien & Kiyyali, *supra* note 79.

82. *Id.*

83. *See id.*

84. We have raised this issue previously. *See* Jonathon W. Penney, *Can Cyber Harassment Laws Encourage Online Speech?*, in PERSPECTIVES ON HARMFUL SPEECH ONLINE 10, 10 (Urs Gasser et al. eds., 2017), [http://dash.harvard.edu/bitstream/handle/1/33746096/2017-08\\_harmfulspeech.pdf](http://dash.harvard.edu/bitstream/handle/1/33746096/2017-08_harmfulspeech.pdf) [<https://perma.cc/9NPZ-KFG8>]; *see also* Citron, *supra* note 17, at 412 (“[T]argeted individuals would be more likely to come forward since reporting such incidents would not seem fruitless. This would have a salutary psychic effect on women: they would no longer view themselves as defenseless.”).

85. Different legal reforms initiated in response to the victim’s rights movement, like victim impact statements, have been justified as having important expressive meaning for victims—that they matter in the criminal justice system and need a stronger voice. Eisenberg, *supra* note 61, at 620; *see also* Aiken & Goldwasser, *supra* note 21, at 147 (discussing criminal law reforms aimed at giving victims back their “voice”).

86. *See* JoAnne Sweeny & John Slack, *Sexting as ‘Sexual Behavior’ Under Rape Shield Laws*, 11 INT’L J. CYBER CRIMINOLOGY 246, 247 (2017) (noting that to address the “trend” of cyberbullying and cyberharassment, legislatures across the country “began adopting legislation to encourage victims to report these kinds of crimes”).

There has been good reason to be skeptical of this argument. Until recently, expressive law scholarship has been rich in theory, but light on empirical studies substantiating and exploring its varied dimensions.<sup>87</sup> Studies showing how law's expressive effects happen, how often, and the scope of the change are crucial. The next Part helps fill that void by substantiating our theoretical arguments with original empirical research.

## II. LAW'S EMPOWERMENT OF SPEECH

Cyberharassment laws are often criticized for chilling speech.<sup>88</sup> In this Part, we make the theoretical and empirical case that law does the opposite: cyberharassment law is more likely to encourage speech than to chill it.

This Part first discusses the theoretical implications of law's expressive potential to empower speech. Then, it presents the results of original empirical research conducted by one of us (Penney).

### A. Expressive Theory

As we show below, the law's expressive value extends to victims. It makes clear that the democratic majority disapproves of efforts to silence and intimidate victims. It says that the public values victims' online contributions. And it signals that behavior intending to drive victims offline is unacceptable. Victims infer from the law that their online engagement is valued and that their suffering matters to the public. They internalize these messages, leading them to engage more online over time. They feel emboldened to come forward and tell their stories.

We have seen this happen. In 2012, Holly Jacobs stopped using a pseudonym to speak to the press about her experience with nonconsensual pornography.<sup>89</sup> She reclaimed her online life and started a nonprofit

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87. See Feldman, *supra* note 23, at 181–86; Ryo, *supra* note 23, at 101; Yeh, *supra* note 23, at 174.

88. See, e.g., Eugene Volokh, *Challenge to Maryland Law Banning Speech That Intentionally Seriously Distresses Minors*, WASH. POST: VOLOKH CONSPIRACY (June 29, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/29/challenge-to-maryland-law-banning-speech-that-intentionally-seriously-distresses-minors/> [<https://perma.cc/XD5E-HNYA>]. See generally Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667 (2015). One of us (Citron) and Mary Anne Franks have argued together and separately that this argument fails to recognize how online abuse silences speech. See CITRON, *supra* note 8, at 27; Citron, *supra* note 18, at 102; Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 420 n.135 (2017); Citron, *supra* note 62, at 100; Franks, *supra* note 69, at 1295, 1311, 1321–22 (noting that First Amendment fundamentalists often critique laws and ordinances that regulate speech as having a chilling effect on protected speech); Franks, *supra* note 8, at 697; Franks, *supra* note 62, at 243. Mary Anne Franks's new book is a tour de force on First Amendment fundamentalism, with a focus on online abuse. See generally MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* (forthcoming 2019).

89. CITRON, *supra* note 8, at 105.

organization, the Cyber Civil Rights Initiative, devoted to combating online abuse.<sup>90</sup>

When Holly Jacobs founded CCRI along with Mary Anne Franks, the only other anti-harassment advocacy groups were Without My Consent (WMC) and National Network to End Domestic Violence (NNEDV), which had long fought against the abuse of digital technologies.<sup>91</sup> In the past two years, CCRI, WMC, and NNEDV have been joined by other activists and groups, such as Women Against Revenge Porn, the Badass Army, and the March Against Revenge Porn.<sup>92</sup>

Law serves to coordinate action that increases victims' inclination to engage online. It provides a "focal point" for victims to connect with others interested in organizing to shift social norms. It helps individuals organize action to fight abuse online. For the past six years, advocacy groups have coordinated their efforts to combat online abuse.<sup>93</sup> CCRI and WMC have drafted joint comments to the FTC.<sup>94</sup> They have also engaged in online campaigns.<sup>95</sup> In addition, advocates actively participate in email listservs devoted to combating online harassment.<sup>96</sup> Elisa D'Amico and David Bateman have contributed to these efforts by spearheading a pro bono project, the Cyber Civil Rights Legal Project, at their firm K&L Gates.<sup>97</sup>

In short, law signals a tipping point for social norms that disapprove of online abuse. As we demonstrate below, law has the potential to lead to more speech and engagement online, contributing to even more profound shifts in social norms. This could mean more contributions and engagement by

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90. Jacobs has been celebrated for her brave and tireless work, and rightly so. In 2018, she was named one of ten "Women of Worth" by L'Oréal. Press Release, L'Oréal Paris, L'Oréal Paris Honors Extraordinary Women of Worth at 13th Annual Celebration; Christy Silva of Aidan's Heart Foundation Named National Honoree and Jaha Dukureh of Safe Hands for Girls Honored as 2018 Karen T. Fondu Impact Award Winner (Dec. 6, 2018), <https://www.prnewswire.com/news-releases/loreal-paris-honors-extraordinary-women-of-worth-at-13th-annual-celebration-christy-silva-of-aidans-heart-foundation-named-national-honoree-and-jaha-dukureh-of-safe-hands-for-girls-honored-as-2018-karen-t-fondu-impact-award-wi-300760168.html> [<https://perma.cc/KV5H-LM9W>].

91. See CITRON, *supra* note 8, at 95–119.

92. See, e.g., Joseph Cox, *The 'Badass Army' Is Training Revenge Porn Victims to Fight Back*, VICE: MOTHERBOARD (Mar. 14, 2018, 8:00 AM), [https://motherboard.vice.com/en\\_us/article/59k7qx/revenge-porn-what-to-do-badass-army-anon-ib](https://motherboard.vice.com/en_us/article/59k7qx/revenge-porn-what-to-do-badass-army-anon-ib) [<https://perma.cc/82KB-Q8KL>]. CCRI has also coordinated with anti-online-abuse groups outside the United States, including in South Korea and the United Kingdom.

93. One of us (Citron) served as one of the original board members of CCRI and remains on the board to this day. Citron also serves as an adviser to WMC. For a history of the development of CCRI and WMC, see generally CITRON, *supra* note 8, at 95–119.

94. Comments of the Cyber Civil Rights Initiative, Inc. and Without My Consent, Inc. to the Federal Trade Commission, Craig Brittain, FTC File No. 132 3120 (Feb. 23, 2015), [https://www.ftc.gov/system/files/documents/public\\_comments/2015/02/00007-93359.pdf](https://www.ftc.gov/system/files/documents/public_comments/2015/02/00007-93359.pdf) [<http://perma.cc/QL53-9GLG>].

95. See *id.* at 1–2.

96. One of us (Citron) is a member of an online harassment email listserv, which brings together activists from various advocacy groups, victims, and journalists. The listserv has been in operation for the past five years.

97. CYBER C.R. LEGAL PROJECT, <https://www.cyberrightsproject.com/> [<https://perma.cc/P8HK-6Y5N>] (last visited Apr. 10, 2019).

victims online. The next section provides empirical evidence to support this proposition.

### B. Empirical Support

Here we offer important empirical support for our theoretical propositions. For this analysis and the empirical study discussed below, we assume the existence of a cyberharassment law imposing tough civil and criminal penalties for online conduct intended to terrorize or harass another person. As explored above, such a law would signal that cyberharassment is sufficiently harmful to warrant criminal and civil penalties.

One of us (Penney) has done significant empirical work on the chilling effect in different related contexts.<sup>98</sup> For this Article, Penney conducted an original study that supports the supposition that cyberharassment law can encourage victims to speak and engage online. The study involved an online survey of over 1200 American internet users.<sup>99</sup> It examined participants' responses to various hypothetical "regulatory" scenarios, including one where the participant learns that the government has enacted a new law introducing tough civil and criminal penalties for posting information or other content online with the intent to harass or intimidate another person.<sup>100</sup>

As noted in Part I, one of the primary critiques of cyberharassment laws is that they have a chilling effect on speech. The survey attempted to explore any possible chilling effect on the participants' online activities (or lack thereof) across a range of categories, including time spent online, online speech, sharing of personally created content, online searches, and social

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98. See generally JONATHON W. PENNEY, CHILLING EFFECTS: UNDERSTANDING THE IMPACT OF SURVEILLANCE AND OTHER DIGITAL THREATS (forthcoming 2020); Penney, *Chilling Effects*, *supra* note 14 (documenting chilling effects associated with the awareness of online government surveillance); Jonathon W. Penney, *Copyright's Media Theory and the Internet: The Case of the Chilling Effects Doctrine*, in INTELLECTUAL PROPERTY FOR THE 21ST CENTURY: INTERDISCIPLINARY APPROACHES 481 (B. Courtney Doagoo et al. eds., 2014); Jonathon W. Penney, *The Cycles of Global Telecommunication Censorship and Surveillance*, 36 U. PA. J. INT'L L. 693 (2015) (not explicitly examining the idea of "chilling effects," but using historical case studies to explore similar impacts, including how international censorship and surveillance chilled or deterred certain state practices and the development of telecommunications technologies, such as how cable surveillance changed how states and businesses communicated via the global telegraph system); Penney, *Internet Surveillance*, *supra* note 14 (describing the chilling effects associated with a range of regulatory activities, including state and corporate surveillance, and exploring differential impacts among different groups); Jonathon W. Penney, *Privacy, Chilling Effects, and Personalized Legal Automation: The DMCA as an Empirical Case Study*, 22 STAN. TECH. L. REV. (forthcoming 2019) (discussing an empirical case study documenting and exploring chilling effects associated with algorithmic legal enforcement online); Jonathon W. Penney, *Three Chilling Effects Paradigms and Transatlantic Privacy*, 25 EUR. L.J. (forthcoming 2019) (documenting chilling effects theory, research, and understanding through three research paradigms).

99. The 1296 total survey responses were collected in March 2015, with sixty-four survey responses excluded for being substantially incomplete (defined by ten or more questions left unanswered—many of these were likely false starts by respondents), another eighteen excluded for being completed too quickly, and two more screened because the respondents had completed a version of the survey previously (in a field test).

100. For more extensive information on research design and methodology, see generally Penney, *Internet Surveillance*, *supra* note 14.

network site engagement, as well as privacy concerns. The study also tested whether awareness of the cyberharassment law would work to encourage participants to speak, share, contribute, and engage more online.

Survey respondents were recruited using an online platform, which has yielded samples relatively representative of the U.S. internet-using population.<sup>101</sup> Responses were compiled and statistically analyzed in relation to a range of demographic factors and reported traits, including age, gender, education and income level, amount of time spent online, level of online sharing, level of social network engagement, and privacy concerns in response to the law.<sup>102</sup>

The results offered a number of insights. First, contrary to what many civil libertarians argue, cyberharassment laws would have more salutary than chilling effects for online engagement. For instance, 87 percent of respondents indicated that a cyberharassment law would have “no impact” or render them “somewhat more likely” or “much more likely” to “spend time on the internet,” 62 percent indicated that such a law would have “no impact” or render them “more likely” to “speak or write about certain topics online.” Sixty-seven percent indicated that the law would have “no impact” or would render them “somewhat more likely” or “much more likely” to share personally created content online, and 56 percent indicated that the law would either have “no impact” or would render them “more likely” to contribute to social networks online.

In short, there was little evidence to support claims that the law would have substantial or significant chilling effects for online activities. Respondents did largely agree (69 percent) with a statement that the law would make them “more careful” about what they said in certain contexts online, though more carefulness and thoughtfulness in online speech and sharing is arguably not an undesirable outcome given present issues with polarization, extreme rhetoric, and disinformation.<sup>103</sup>

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101. Amazon’s Mechanical Turk provides an open crowdsourcing platform for task creation, recruitment, compensation, and data collection. It has been used and validated as a tool for a broad range of empirical, experimental, and behavioral studies. Gabriele Paolacci & Jesse Chandler, *Inside the Turk: Understanding Mechanical Turk as a Participant Pool*, 23 CURRENT DIRECTIONS PSYCHOL. SCI. 184, 186 (2014); Gabriele Paolacci, Jesse Chandler & Panagiotis G. Ipeirotis, *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411, 411–12 (2010); Panos G. Ipeirotis, *Turker Demographics vs Internet Demographics*, COMPUTER SCIENTIST BUS. SCH. (Mar. 16, 2009), <http://www.behind-the-enemy-lines.com/2009/03/turker-demographics-vs-internet.html> [http://perma.cc/ALZ9-GGLS].

102. In the survey case study, ordinary least squares (OLS) regression, a common statistical method for analyzing survey data, was used to statistically analyze findings, as it allowed for all relevant variables to be controlled in order to isolate relationships. STEVEN G. HEERINGA, BRADY T. WEST & PATRICIA A. BERGLUND, APPLIED SURVEY DATA ANALYSIS 195, 235 (2d ed. 2017). Cohen’s  $f^2$  was also used to test the effect size of findings, using the conventional interpretation of small (0.02), medium (0.15), and large (0.35) values. JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 413–14 (2d ed. 1988); TIMOTHY Z. KEITH, MULTIPLE REGRESSION AND BEYOND: AN INTRODUCTION TO MULTIPLE REGRESSION AND STRUCTURAL EQUATION MODELING 62–63 (3d ed. 2019).

103. See, e.g., Daniel J. Coffey, Michael Kohler & Douglas M. Granger, *Sparking Debate: Campaigns, Social Media, and Political Incivility*, in CONTROLLING THE MESSAGE: NEW

Second, the law had a clear salutary impact on women's online contributions, sharing, and engagement. Female participants in the survey—the predominant targets or victims of cyberharassment—said that they were more likely to engage online in response to the cyberharassment law.<sup>104</sup> There was a statistically significant gender effect in response to the proposed law, as seen in the findings set out in Table 1 below.

*Table 1: Ordinary Least Squares (OLS) Regression Results Predicting Respondents Being More Likely to Spend Time, Discuss, Share Personally Created Content, or Engage with Social Networks Online in Response to New Cyberharassment Law (Regression Coefficient with Standard Errors in Parenthesis)<sup>105</sup>*

Predictor	More Likely to Spend Time Online	More Likely to Speak About Certain Topics Online	More Likely to Share Online	More Likely to Contribute to Social Networks
Age	<b>0.08(0.03)***</b>	0.01(0.04)	0.00(0.03)	0.00(0.04)
Gender	<b>0.15(0.04)***</b>	0.07(0.05)	<b>0.12(0.05)**</b>	<b>0.15(0.06)**</b>
Education Level	0.00(0.03)	0.00(0.04)	0.03(0.04)	-0.04(0.04)
Income Level	-0.10(0.02)	0.00(0.02)	-0.01(0.02)	-0.00(0.02)
Internet Usage Level	0.03(0.03)	0.00(0.04)	0.04(0.04)	-0.07(0.04)
Online Sharing	-0.03(0.02)	-0.01(0.03)	-0.03(0.03)	-0.03(0.03)
Social Network Engagement	0.00(0.02)	0.02(0.02)	0.01(0.02)	0.06(0.02)
Privacy Concerns	<b>-0.11(0.02)***</b>	<b>-0.19(0.02)***</b>	<b>-0.24(0.02)***</b>	<b>-0.29(0.02)***</b>

MEDIA IN AMERICAN POLITICAL CAMPAIGNS 245 (Victoria A. Farrar-Myers & Justin S. Vaughn eds., 2015); Eric C. Miller, 51 ARGUMENTATION & ADVOC. 132, 132 (2014) (reviewing JOSEPH ZOMPETTI, DIVISIVE DISCOURSE: THE EXTREME RHETORIC OF CONTEMPORARY AMERICAN POLITICS (2015)); Mark Richens, *Want the Internet to Be Less Mean? Think Before You Share*, WIS. PUB. RADIO (Dec. 22, 2018, 10:30 AM), <http://www.wpr.org/want-internet-be-less-mean-think-you-share> [<http://perma.cc/BZ7Y-XZAR>]; Nick Robins-Early, *How to Recognize a Fake News Story*, HUFFINGTON POST (Nov. 27, 2016, 11:58 AM), [https://www.huffingtonpost.ca/entry/fake-news-guide-facebook\\_us\\_5831c6aae4b058ce7aaba169](https://www.huffingtonpost.ca/entry/fake-news-guide-facebook_us_5831c6aae4b058ce7aaba169) [<https://perma.cc/S2JA-ETB3>].

104. The study included 608 female participants and 600 male participants. Four respondents skipped this specific question.

105. \* $p < 0.10$ , \*\* $p < 0.05$ , \*\*\* $p < 0.01$ . All models significant (Prob > F = 0.00) with medium and near medium effect sizes (Cohen's  $f^2$ ). All statistically significant results are highlighted in bold.



Given the way the gender variable was coded, these findings show that women were statistically more likely to increase online engagement in light of the law by three of the four engagement measures. They were more likely to spend time online, more likely to share personally created or authored content online, and more likely to contribute to social network sites online. Though there was no gender effect for the “speech” engagement measure (more or less likely to “speak or write online about certain topics” in response to the law), this may be due to the fact that the hypothetical law in the scenario facilitated the speech of both women *and* men. It might also be a product of some women in the survey, especially those who have experienced online harassment in the past, interpreting the question in slightly different ways given its open-ended nature.<sup>106</sup> Speaking more “about certain topics” online could include a variety of subject matters, including those that may intimidate or harass.

Nevertheless, the potential salutary effect on women’s expression is clear from the gender effects for the other online engagement measures. The results suggest a tough cyberharassment law would encourage women to share personally authored or created content online. Such a law would thus encourage women’s contributions to social network sites. All of this suggests that women are more likely to speak, engage, and express themselves online in light of a cyberharassment law.

An additional takeaway from these findings is that those respondents with privacy concerns about the hypothetical law were more negatively impacted; they were statistically less likely to spend time online, speak, share, and contribute on social networks. This suggests that women—who were statistically more likely to engage in these measures—did not predominantly indicate privacy concerns about the hypothetical law. This is not surprising. Given that women are disproportionately targeted by online harassment,<sup>107</sup> which often includes serious privacy invasions, it makes sense that if they had any privacy concerns it would be about the harassment itself, not a law enacted to deter or prevent it. These findings indicate that drafters of cyberharassment laws should take steps to allay privacy concerns—such as transparency about detection and enforcement—to minimize or limit any incidental negative impacts or chilling effects, however modest.

### III. IMPLICATIONS: SEXUAL PRIVACY AND BEYOND

Our argument that a cyberharassment law would have a salutary impact on victims’ speech is consistent with expressive law theory and supported by original empirical research. Although a comprehensive discussion of the implications of expressive law impacts would take us beyond the scope of this Article, here we discuss a few likely benefits.

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106. Participants were asked, “Would this new law make you more likely or less likely to speak or write about certain topics online?”

107. CITRON, *supra* note 8, at 14–17.

*A. Expressive Empowerment*

A law with the effect of empowering and facilitating victim speech and engagement would have a positive psychological effect on victims. Victims would be more likely to speak out about their experiences and to report them to law enforcement. These efforts would help legitimize past and future reform efforts and generate additional media attention to impact public sentiment, creating “norm cascades” that shift behavior in new directions.<sup>108</sup>

The more victims speak out, the more victims who have retreated from online engagement might return. A law that facilitates victim speech and engagement can help empower victims and, in the long term, prevent, mitigate, and reverse the negative impacts of online abuse and chilled speech. Public discourse and broader democratic deliberation would be enriched, with a wider array of voices, contributions, and perspectives, especially those from women and members of marginalized groups, who are most often targeted by online abuse.<sup>109</sup>

Victims could speak out against online abuse, giving them a sense of empowerment that they have taken matters into their own hands.<sup>110</sup> They could dispel myths and misinformation about the abuse they face.<sup>111</sup> Rather than speaking back to perpetrators (a risky proposition), victims’ supporters could generate positive support for targeted individuals.<sup>112</sup> For example, as one of us (Citron) documented in *Hate Crimes in Cyberspace*, supporters of a feminist writer who was under assault online engaged in a counter “Google bomb” that successfully raised the prominence of her writings when searching for her name.<sup>113</sup>

As law encourages victims to reengage online or to continue speaking, and as supporters speak out against online abuse, there will be enhanced online dialogue.<sup>114</sup> Victims can encourage counterspeech from third parties using their resources and various forms of leverage. For example, counterspeech by influential or high-profile people, or powerful private sector intermediaries—like social media platforms—are far better situated to affect and counter abusive activities.<sup>115</sup>

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108. Citron, *supra* note 17, at 410–11; Sunstein, *supra* note 20, at 2033.

109. Citron, *supra* note 17, at 399; Waldman, *supra* note 17, at 3–4.

110. CITRON, *supra* note 8, at 108–10; Citron, *supra* note 17, at 399–400.

111. CITRON, *supra* note 8, at 108–10. But there are real risks; retaliation may be ineffective at “naming and shaming” perpetrators and, worse, may lead to a serious escalation in abuse. *Id.* at 110–11; Citron, *supra* note 17, at 400; Scott R. Stroud & William Cox, *The Varieties of Feminist Counterspeech in the Misogynistic Online World*, in *MEDIATING MISOGYNY: GENDER, TECHNOLOGY, AND HARASSMENT* 293, 303–08 (Jacqueline Ryan Vickery & Tracy Everbach eds., 2018) (discussing the ethical dimensions of counterspeech).

112. See Stroud & Cox, *supra* note 111, at 301–02 (“This strategy is also *positive* in that it seeks to rebuild or increase the self-esteem and emotional valuing of the victim, thereby keeping her online.”).

113. CITRON, *supra* note 8, at 70–71 (discussing the experience of feminist author Jill Filipovic).

114. Citron, *supra* note 17, at 400; Stroud & Cox, *supra* note 111, at 303–05.

115. CITRON, *supra* note 8, at 241–42; Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1471–76 (2011). For a discussion of the impact of influential individuals,

### B. Implications for Sexual Privacy

Laws tackling other forms of online abuse—such as invasions of sexual privacy—might have similar salutary effects on victims’ online engagement.<sup>116</sup> Invasions of sexual privacy include different ways that people’s naked bodies and intimate activities are surveilled, recorded, exposed, disclosed, and manipulated without permission.<sup>117</sup> For instance, in a practice known as digital voyeurism, perpetrators secretly photograph or videotape people as they undress or engage in sexually explicit activities.<sup>118</sup> Digital voyeurs further invade victims’ sexual privacy by distributing their sexually graphic images without consent.<sup>119</sup> Yet another sexual-privacy invasion is sextortion—extortion or blackmail carried out online involving a threat to release sexually explicit images of the victim if the victim does not engage in further sexual activity.<sup>120</sup>

Invasions of sexual privacy have a profound impact on victims who are denied agency over their intimate lives. They suffer crushing anxiety and fear.<sup>121</sup> They retreat from all aspects of on- and off-line life, including online expression.<sup>122</sup> As one of us (Citron) argued with Mary Anne Franks, “[T]he nonconsensual disclosure of a person’s sexually explicit images chills private expression based on the fear that the images would be shared with the public at large. Without any expectation of privacy and confidentiality, victims would not share their naked images.”<sup>123</sup> Victims often hide the abuse from those who could help them.<sup>124</sup> Victims of sextortion are explicitly told not to talk about the abuse or their attackers will release their nude images.<sup>125</sup>

A Connecticut woman’s experience captures the way that sexual-privacy invasions undermine victims’ freedom. After a woman discovered that her ex-boyfriend’s gifts contained recording devices, she had “recurrent and intrusive thoughts of being exposed and violated, [fear of] interference with

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see Susan Benesch, *Countering Dangerous Speech: New Ideas for Genocide Prevention* 14 (U.S. Holocaust Memorial Museum, Working Paper, 2014), <https://www.ushmm.org/m/pdfs/20140212-benesch-countering-dangerous-speech.pdf> [<https://perma.cc/9M3L-VUGZ>].

116. Citron, *supra* note 11 (manuscript at 4). Sexual-privacy concerns the visibility of the naked body and parts of the body closely associated with sex and gender. It involves the solitude afforded intimate activities. It concerns the ability to decide whether to reveal one’s sexual preferences or transgender status to others. *See id.* (manuscript at 10).

117. *Id.* (manuscript at 4).

118. Todd Magel, *Man’s Arrest Prompts Hidden Camera Concerns in Central Iowa*, KCCI (Apr. 6, 2018, 5:24 PM), <https://www.kcci.com/article/mans-arrest-prompts-hidden-camera-concerns-in-central-iowa/19706016> [<https://perma.cc/T2QS-SR3T>].

119. Citron & Franks, *supra* note 16, at 346.

120. *See* BENJAMIN WITTES ET AL., CTR. FOR TECH. INNOVATION, BROOKINGS INSTITUTION, *SEXTORTION: CYBERSECURITY, TEENAGERS, AND REMOTE SEXUAL ASSAULT* 11 (2016), <http://www.brookings.edu/wp-content/uploads/2016/05/sextortion1-1.pdf> [<http://perma.cc/DNB2-UFLK>]; Quinta Jurecic, *Sextortion, Online Harassment, and Violence Against Women*, LAWFARE (May 17, 2016, 11:46 AM), <https://www.lawfareblog.com/sextortion-online-harassment-and-violence-against-women> [<https://perma.cc/8D6S-W6Y8>].

121. BENJAMIN WITTES ET AL., *supra* note 120, at 23.

122. Citron & Franks, *supra* note 16, at 385.

123. *Id.*

124. CITRON, *supra* note 8, at 29–30; Citron, *supra* note 11 (manuscript at 50).

125. CITRON, *supra* note 8, at 175–76.

her personal relationships, [and] feelings of vulnerability and mistrust.”<sup>126</sup> She explained that she “lives in a perpetual state of fear that someone is watching or spying on her and she does not feel safe anywhere.”<sup>127</sup>

Given the profound harm of sexual-privacy invasions and their corrosive chilling effects on victims’ expression and freedom,<sup>128</sup> sexual-privacy laws would have salutary effects on victim speech and engagement: they would serve important speech-enhancing functions. Comprehensive sexual-privacy legislation would signal broader public support for sexual-privacy victims and the value of their online speech, contributions, and engagement. Individuals and groups that have previously experienced sexual-privacy violations or abuses—most likely women and minorities—could infer that the majority values their online contributions, which would lead them to greater engagement. They would thus be more likely to engage not only in online expression, but sexual expression with intimate partners as well.

Though, as with expressive law scholarship more generally, further empirical and theoretical work needs to be done to substantiate and support these claims and hypotheses. Such a law would be invaluable not only to our understanding of how law impacts behavior but also to better protect sexual privacy and the dignity of victims.<sup>129</sup>

#### CONCLUSION

This Article aims to reframe the debate about laws addressing online abuse. We debunk the notion that online-harassment laws will do more damage than good to online expression. As our study and arguments show, law is more likely to enhance speech than to chill it.

Our argument strikes at the core of the themes of the *Fordham Law Review’s* Symposium, *Gender Equality and the First Amendment*, for which we wrote and presented this piece. Symposium participants raised concerns about how the internet’s freedom-enhancing potential was not being realized, especially for women and marginalized communities. We offer this study as a sign of hope—both for what lawmakers, advocates, and law enforcers have accomplished and for what is possible in the future.

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126. *Welsh v. Martinez*, 114 A.3d 1231, 1244 (Conn. App. Ct. 2015).

127. *Id.* at 1242.

128. See CITRON, *supra* note 8, at 5–6.

129. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205–06, 211 (1890) (describing the “right to an inviolate personality, [which] affords alone that broad basis upon which the protection which the individual demands can be rested”).