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A NEW TAXONOMY FOR ONLINE HARMS

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*Sections of this essay borrow from and reference my forthcoming work *Re-Shaming the Debate: Social Norms, Shame, and Regulation in an Internet Age*, in the *Maryland Law Review*.*

At the outset of her ground-breaking book *Hate Crimes in Cyberspace*, Danielle Citron crucially defines the relatively novel harm of “cyber harassment.” As Citron writes, cyber harassment “involves threats of violence, privacy invasions, reputation-harming lies, calls for strangers to physically harm victims, and technological attacks” (3). Though all of these elements would also simply fall under a simple legal definition of harassment or abuse, Citron brilliantly explains why online harms are different. “The *cyber* label adds something important . . . it captures the different way the Internet exacerbates the injuries suffered . . . by extend[ing] the life of destructive posts” (4) (emphasis author’s).

The Internet’s powerful amplifying effects on this type of harmful behavior are also seen with cyber bullying.

Bullying is generally understood among academics and educators as having to meet three criteria: (1) it must be verbal or physical aggression; (2) it must be repeated over time; and (3) it must involve a power differential.¹ When talking about cyber bullying, the aggression is mostly verbal, using “threats, blackmail. . . gossip and rumors” and online personas or messages can be more cruel, vindictive and mean.² Though cyber bullying typically describes acts between children, the same acts by adults could also be considered cyber harassment. Unlike harassment, however, bullying does not have a history of criminal liability—though all 50 states have now passed anti-bullying legislation, such laws did not exist before 1999.

But what about online harms that don’t fall into the definitions of cyber harassment or cyber bullying? How do you characterize the story of Walter Palmer, the mid-Western dentist vilified on- and offline for killing a lion on a hunting trip to Africa? Or Justine Sacco, the young woman whose racist Tweet

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¹ EMILY BAZELON, *STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY* 28 (2013) (citing DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* 142-52 (1993)).

² BAZELON, *supra* note 1, at 33-34 (citing Patricia A. Snell and Elizabeth K. Englander, *Cyberbullying Victimization and Behaviors Among Girls: Applying Research Findings in the Field*, 6 J. SOC. SCI. 510. 510-14 (2010)).

about AIDS triggered viral worldwide outrage? Or Gene Cooley, the man run out of his small town in Georgia by anonymous and untruthful postings on an Internet message board?

Just like cyber bullying or cyber harassment, online shaming often involves repeated verbal aggression over time, but it has another key element: shaming also involves the attempt by a person or persons to enforce either a real, or perceived (as was the case with Cooley), violation of a social norm.

The definition of shaming hinges on social norms, but what is meant by social norms, exactly? Though perhaps differing at the margins, there appears to at least be consensus around the definition and function of a social norm among legal scholars.³ A social norm is a rule without an official source (like the government) enforced without the threat of any kind of official sanction (legal action), yet complied with, nonetheless.⁴ An individual's compliance with the norm can be enforced externally by third-parties, or internally by herself. Norms can be internalized, and self-enforced (through guilt or embarrassment), so that no third-party action is needed for them to be perpetuated. External enforcement for norm violation might be shaming, or ostracizing the violator from the group.

Critically, it is the *loss* of this element—the enforcement of the norm—as part of the nexus for action, that results in the crimes we have defined as cyber bullying and cyber harassment. Thus, the more attenuated the social actions become from the nexus of social norm enforcement, the more clearly shaming becomes harassment or bullying. This explains why, for instance, an essay deriding a young girl for smiling in a selfie at Auschwitz might be considered shaming; but anonymous emails sent to a girl who writes about video games to die, be raped, or kill herself, would be better considered cyber harassment.

The differences between these various forms of harm might seem trivial, but developing a coherent and consistent framework for defining these harms will help ensure that any laws written to protect people from them will be narrowly tailored and nuanced enough to allow for an ever-changing online society.

And even without the law, these definitions are critical to helping platforms and content hosts give teeth and real-meaning to their Terms of Service and stated policies against cyber harassment and bullying. As Citron states in assessing possible solutions to online harassment, “[t]he more clearly and specifically companies explain those terms and the harms that they want to prevent, the better their users will understand what is expected of them” (231). Clear definitions will also make it more difficult for perpetrators of online harassment and bullying to hide behind an ill-defined delineation between normative shaming and illegal harassment or bullying. Thus, both in prevention

³ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991).

⁴ Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 82 AM. ECON. REV. 365, 365 (1997). Put in another, more active way, social norms are rules “governing an individual’s behavior that third parties other than state agents diffusely enforce by means of social sanctions.” *Id.*

and enforcement, a new taxonomy for online harms can only move the Internet closer to a Web we want.