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## Taming the Wild West: Online Excesses, Reactions and Overreactions

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## TAMING THE WILD WEST: ONLINE EXCESSES, REACTIONS AND OVERREACTIONS

Catherine J. Ross\*

DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (HARVARD UNIVERSITY PRESS 2014). PP. 343. HARDCOVER \$ 29.95.

AMY ADELE HASINOFF, *SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY AND CONSENT* (UNIVERSITY OF ILLINOIS PRESS 2015). PP. 222. HARDCOVER \$ 95.00. PAPERBACK \$ 26.00.

In 1968, Andy Warhol famously predicted that in the future everyone would have fifteen minutes of fame—a prediction he regarded as full of fun. Warhol did not imagine that the meteor flash of attention would follow provocative photos texted to a trusted recipient who would share them with others, or that the “fame” would result from being the target of cyber harassment at the hands of a mob or obsessed individuals stalking both online and in the tangible world.

Recently, many observers—including the two authors whose important and provocative books are reviewed here—have referred to the world of online communications as a “Wild West.” But the Wild West, like the Internet, means different things to different observers. The Wild West that Danielle Citron and Amy Adele Hasinoff point to is not the Technicolor stuff of John Ford westerns featuring handsome, fearless Marshalls. It is the bleaker, “primal,” and lawless west of *Deadwood*, waiting for the Earp brothers to impose order.<sup>1</sup>

At first glance, the two books I am reviewing here seem to come at loosely related problems from very different vantage points. In *Hate Crimes in Cyberspace*,<sup>2</sup> Citron, a legal scholar at the University of Maryland, argues that the harms in cyberspace are more real and widespread than many realize. In *Sexting Panic*,<sup>3</sup> Hasinoff, a communications professor at the University of Colorado-Denver, argues that sexting plays a positive role

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1. Alessandra Stanley, *Harking to TV's Call of the Wild*, N.Y. TIMES, July 22, 2015, at C1.

2. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 4 (2014).

3. AMY ADELE HASINOFF, *SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY AND CONSENT* 161 (2015).

for teenagers who elect to engage in it, and that betrayals through nonconsensual circulation are much less common than is widely assumed. One might paraphrase Citron's overarching theme as "take notice!" and Hasinoff's as "calm down." But common themes and some similar proposals emerge.

I will discuss each of the books and then turn to some commonalities in the authors' analyses of the cultural sources of the problems they explore and the reforms they suggest.

### I. CITRON

Danielle Citron's *Hate Crimes in Cyberspace* has three primary goals, all of which the author accomplishes persuasively. First, she shows the pervasiveness of digital hate and why it matters so much. Second, she cogently captures the existing federal and state legal regimes and demonstrates their shortcomings in responding to a growing social problem. And then, third, she moves on to propose realistic fixes that respect the constitutional rights of speakers and the limitations of law to transform societal ills.<sup>4</sup>

It is a testimony to Citron's powerful marshaling of evidence that even observers inclined to believe that online speech is not so different from speech in traditional venues, and that the stories one hears about cyber-stalking are based on unusual occurrences, will leave this book persuaded. Citron garners evidence from social science data that, although incomplete, offers consistent findings. The data gain ballast from the emotional pull of her interviews with victims (she had in-depth information about twenty informants, three of whose stories run through the book). The reader wants to know how their stories turned out.

Citron captures what is special about online speech: "it exacerbates the injuries suffered."<sup>5</sup> It extends the life of the words in perpetuity (at least in the U.S., which lacks laws requiring removal of certain data). It "exponentially expand[s] the audience" for harassment and other malicious communications.<sup>6</sup> It can "recruit strangers" to join in, forming cyber-mobs in a competition over who can be most abusive.<sup>7</sup> And, Citron demonstrates, online words can bleed into real world acts of stalking, rape, and other forms of violence, sometimes inducing strangers to commit such crimes, as in several cases involving false allegations that women sought sexual humiliation and abuse.<sup>8</sup>

Despite the real world risks and the burdens experienced by the targets of cyber-hate, Citron establishes that law enforcement officials, campus authorities, and employers, among others, too often trivialize the harm done by cyber-hate and blame the victims: the victims, they say, are hypersensitive, overreacting, and should pull themselves together.<sup>9</sup> Some of this may flow from the fact that most of the victims are women. Police officers and prosecutors are unresponsive even when a statute appears applicable to the offense (which is not always the case), and they often do not even know

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4. CITRON, *supra* note 2, at 224.

5. *Id.* at 4.

6. *Id.* at 5.

7. *Id.*

8. *Id.* at 5-6.

9. *E.g.*, CITRON, *supra* note 2, at 20-21, 29, 84-85.

the law.

Citron describes one revenge porn victim who sought help at two different police stations and from the FBI after materials were posted on public sites and sent to her university and employer. All of the law enforcement bureaus to which the victim turned rejected her pleas, giving ludicrous, erroneous legal explanations of why they could not help her (she was an adult, her boyfriend owned the photos, they had no jurisdiction over online attacks despite a state criminal statute that expressly applied to online harassment). The FBI, ignoring federal statutes governing cyber-stalking and the like, “urged her to get a lawyer to sue her harassers and to buy a gun for protection.”<sup>10</sup>

The lack of responsiveness is part of a pattern of victim-blaming that resembles the traditional criminal justice response to rape and domestic violence. Citron reports that victims are told not to blog, to stay off the Internet, or that their “own poor judgment” in sharing naked photos within an intimate relationship destroyed any expectation of privacy.<sup>11</sup>

And, as with rape and domestic violence, the unwillingness of law enforcement agencies to take cyber-hate seriously sets up a vicious cycle: victims do not report cyber-harassment because they do not believe anyone will help them and because they fear that if they press charges, the attacks will only intensify. This under-reporting, in turn, reinforces skepticism that the problem of hate in cyberspace is as widespread or as serious as Citron has shown it to be.

The hate speech on which Citron focuses is largely aimed at individuals rather than taking the form of noxious group disparagement (racist or sexist rants about groups of people), but it is often based at least in part on gender, race, or sexual orientation. The personal nature of the postings (often including the target’s real name and identifying information) can lead to the denial of job offers, loss of work for those who are employed, withdrawal from social media essential to success in many endeavors in the modern world, and loss of identity (as in the case of a woman who had to abandon a successful blogging career, a feminist speaker who could no longer use her real name when traveling or publicizing her talks, and several women who felt they had to masquerade as men in order to participate safely in online forums).<sup>12</sup>

Citron takes particular note of the gender patterns and implications of cyberspace hate: studies in the U.S., the U.K., and other countries show that women are disproportionately the subjects of cyber-harassment. Contemporary speech in cyberspace is full of “sexual attacks on women,”<sup>13</sup> as Citron’s book demonstrates in disturbing detail. She builds on this pattern by calling cyberspace “the civil rights movement’s new frontier.”<sup>14</sup>

Chapter 4 develops this theme by comparing the current disinclination to take seriously the claims made by victims of cyber-attacks to the struggle to convince lawmakers, law enforcement officials, and judges that domestic violence was real

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10. *Id.* at 47.

11. *Id.* at 77.

12. *E.g., id.* at 18, 35-39.

13. *Id.* at 107 (quoting Robert Scoble, *Taking the Week Off*, SCOBLEIZER BLOG (Mar. 26, 2007), <http://scobleizer.com/2007/03/26>).

14. CITRON, *supra* note 2, at 23.

violence and that sexual harassment should not be treated as business as usual. As with those social problems, a collaborative effort is needed involving both legal change and public education. Social movements, Citron argues, can promote social change by condemning and delegitimizing social practices that are taken for granted today, discrediting them to the point where even lawmakers and judges notice.<sup>15</sup>

So too, she notes approvingly, Wikipedia's co-founder Jimmy Wales and other tech industry leaders have called on members of the cyber community to "change what is acceptable on-line" by moderating discussions and promoting "norms of respect" in cyberspace.<sup>16</sup> This concept resembles recent efforts to teach young people who observe bullying conduct to stand up to the bullies. But, as Citron observes, many bloggers misunderstand the bloggers' code of conduct Wales has proposed and refuse to subscribe to it, at least in part, because they do not comprehend that a community's voluntary/self-initiated moral disapprobation of noxious expression does not violate anyone's right to free speech.<sup>17</sup>

Citron urges us not to abandon hope of constraining noxious expression on the web: the six chapters in Part Two of *Hate Crimes in Cyberspace* are devoted to "Moving Forward." This brings us to "the legal agenda at the heart" of Citron's project, which builds on the analogy to the civil rights movement for victims of domestic violence and sexual harassment described above.<sup>18</sup> As part of this endeavor, she analyzes the current state of the civil and criminal law and shows how it can be used to hold speakers accountable. She also examines the shortcomings of the existing legal framework, the role private parties can play, and responds to free speech concerns, proposing changes along the way.

Citron's discussion of the interplay between potential regulation of hateful speech in cyberspace and the First Amendment merits close attention. In Chapter 8, Citron anticipates, outlines, and responds to assorted free speech arguments against governmental regulation (in the forms of new statutes and enforcement efforts) of the cyber hate crimes that are her focus. She positions herself carefully, respecting free speech dictates and seeking to push cyber hate speech outside the elusive boundary that marks expression to which the First Amendment offers no safe haven.

Citron has set out to "work within the framework of existing First Amendment doctrine," using recognized categories of unprotected speech like defamation, true threats, and intentional infliction of emotional distress.<sup>19</sup> She hopes to preserve and promote the positive use of the Internet for the public dialogue essential to active citizenship and self-governance while reining in cyber harassment and cyber stalking.

First, however, she addresses the so-called First Amendment absolutists within the online community who oppose *any* regulation and those who argue that speech on the Internet is so special that it ought to be exempted even from "legal norms" that allow some speech to be regulated. The latter argue that cyber speech performs multiple and

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15. *Id.* at 99.

16. *Id.* at 106-07.

17. *Id.* at 107.

18. CITRON, *supra* note 2, at 224.

19. *Id.* at 190-91.

incomparable critical roles in promoting “work, play, and expression.”<sup>20</sup> Citron takes the reasonable position that “public conversation is not the only thing happening online” and that many other “zones of conversation” that are not public fora (e.g., workplaces, cafes and places of employment) are not “exempt[ ] from legal norms.”<sup>21</sup> As is well known, the EU has gone further: EU law holds that the pervasive power of cyberspace requires more stringent regulation than other forms of communication.<sup>22</sup>

Now Citron needs to deal with the legal norms governing speech. She is at her most powerful in identifying and clarifying the scope of the hazards in cyberspace, and the limitations of contemporary legal structures in dealing with them. But I am not sure that she fully recognizes the obstacles the First Amendment may pose to some of her proposed solutions, despite the care with which she has crafted them.

Citron acknowledges that there are two (often overlapping) views of why free speech matters—its role in democracy and its role in promoting personal autonomy—but she largely focuses on rationales of self-governance to the exclusion of cultural and personal development. She is right that the “cruel harassment of private individuals does not advance public discussion,” that it is what courts call “low-value speech,” and that it may drive its victims out of the public discourse.<sup>23</sup> She may, however, be too cavalier in asserting that it is okay as a matter of First Amendment jurisprudence to silence low value speakers<sup>24</sup> in order to protect the “expressive autonomy” of their victims.<sup>25</sup>

In its most recent consideration of what was certainly low value speech, the Supreme Court, in *Elonis v. United States* (decided after Citron’s book was published), reiterated the classic doctrine: if hateful or threatening speech does not rise to the level of a “true threat,” a category of speech which lies outside the First Amendment’s protection, the speaker cannot be held criminally accountable.<sup>26</sup> Ruling on statutory rather than constitutional grounds, the Court held that Anthony Elonis could not be convicted of issuing true threats through Internet postings that appeared to threaten his ex-wife based on a showing of negligence that would be sufficient in a civil case. More was required: proof of *mens rea*.<sup>27</sup>

*Elonis* will make it more difficult to convict speakers accused of making true threats—and, as a matter of constitutional law, that is as it should be. Like the speakers in many of the iconic First Amendment cases, Anthony Elonis presents as an angry, vicious man. When such people—cross-burners and other racists, Nazis, anti-abortion zealots, misogynists, and, yes, cyber-haters too—fight for their personal freedom to express constitutionally protected thought we hate, everyone’s freedom of expression

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20. *Id.* at 192.

21. *Id.* at 191-92.

22. *E.g.*, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Case C-131/12, 13 May 2014, unreported.

23. CITRON, *supra* note 2, at 195, 196.

24. *Id.* at 196. To be sure, Citron cites some important constitutional scholars, including Jack Balkin, Stephen Heymann, and Cass Sunstein, for the proposition that speech that denies the full expression or participation of others should be amenable to being silenced, but that is not the current state of the law.

25. *Id.* at 197.

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

27. *Id.* at 2009-10.

rides on the correct legal resolution of their claims.<sup>28</sup>

I am not unsympathetic to Citron's efforts to control speech that I agree is heinous, vicious, and harmful. But I am less sanguine that statutes can be written in a way that is clear enough to give notice, and that does not allow the government to suppress or prosecute speech that the Constitution requires us to allow regardless of how repulsive we find it. It is not enough to say, as Citron does, that "[p]reventing harassers from driving people offline [or, as she has shown, out of their homes, schools, and workplaces] would 'advance the reasons why we protect free speech in the first place,' even though it would inevitably chill some speech of cyber harassers."<sup>29</sup> First Amendment doctrine is clear that the government cannot prefer one kind of speaker or speech over another, or choose to protect the preferred speaker or subject of speech at the cost of silencing the unpopular (even hated or hateful) speaker.

Other laws already on the books, on which Citron hopes to rely in taming cyber hate, are fraught with peril. Harassment statutes, for example, have proven notoriously difficult to craft with precision so that they provide clear notice of what expression is barred, and do not reach too much expression that the Constitution protects. Harassment codes are intentionally designed to be notoriously vague, in part, as Aaron Caplan has explained, because it is impossible to anticipate every noxious act (or form of harassing expression), leading legislators to a "value judgment—that it is better to enact a broader, vaguer law than to allow unforeseen bad actions to go unremedied."<sup>30</sup> This tendency encourages adoption of statutes that bar "annoying" behavior, which are susceptible to being overturned by courts.<sup>31</sup> In the first case involving a criminal cyberbullying statute to reach the courts, New York's highest court overturned the new law in 2014.<sup>32</sup> The court held that the statute as written could not "coexist comfortably with the right to free speech" because it reached too much annoying, embarrassing speech that the First Amendment protects.<sup>33</sup>

Similar obstacles may stand in the way of regulating the admittedly "worthless" speech that Citron hopes to control, despite her sensitivity to First Amendment concerns. The task she has set for herself, and for legislators and society at large, is challenging to say the least.

Citron offers a laudable model statute designed to regulate revenge porn, which may well withstand scrutiny because it rests on privacy, consent, and conduct (publishing without consent). When the book was published, statutes along these lines had already been adopted in several jurisdictions and they have proliferated since then.<sup>34</sup> Much will likely turn on how precise the definitions in such laws prove upon usage, and on whether restraint or abandon characterize their enforcement.

28. See Catherine J. Ross, True Threat to Free Speech Averted in *Elonis v. United States*: Response, *Elonis v. United States*, GEO. WASH. L. REV. DOCKET (June 7, 2015), <http://www.gwlr.org/elonis-v-united-states>.

29. CITRON, *supra* note 2, at 197 (quoting DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 129 (2007)).

30. Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 792 (2013).

31. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 162-63, 327 n.6 (2015).

32. *People v. Marquan M.*, 19 N.E.3d. 480 (N.Y. 2014).

33. *Id.* at 485.

34. CITRON, *supra* note 2, at 145-49, 209-12.

Citron is on strong ground when she urges that private (non-governmental) groups, including service providers and individuals (like parents and members of the online community), push back against online offenses. These participants are not bound by the First Amendment. Moreover, the Speech Clause always prefers more and better speech as a way of driving or drowning out the worthless speech in the marketplace of ideas. Beyond efforts to promote norms of responsibility in cyberspace, Citron urges that host entities monitor their sites more vigorously, that users unite to protest noxious speech, and that greater transparency in how cyberspace is governed would help. And she advises parents to educate and monitor their children.<sup>35</sup> None of these proposals raise any constitutional concerns, and all hold the potential to transform cultural norms.

## II. HASINOFF

Sexting is such a new phenomenon we didn't even have a word for it until 2008—at least that is when the word first appeared in the press. News media in Europe first wrote of “sex-texting” in 2004 and in 2005 the same word appears in Australian newspapers in articles about a cricket star's indiscretions.<sup>36</sup> Mass media in the U.S. focused heavily on the phenomenon starting in 2008, calling it “sexting,” and associating it with teenagers and phones.<sup>37</sup>

I first heard rumors about the phenomenon society would later label sexting in around 2001. A fourteen-year-old girl in a New York City private school was said to have used a computer to transmit a photo of herself mimicking sex acts with a broom to an older boy at the same school who she was either dating or wanted to date. The boy forwarded the photo to his friends. None of the adults I knew who talked about these events had a way of contextualizing the girl's initial action (how would such a young person come up with this idea?), but their conversations were ahead of their time in holding the (unknown) boy responsible for the shame that many heaped on the girl. I have no idea what discipline if any the school meted out to either teenager. In the face of gossip and scandal, the girl and her family reportedly not only left the school, but also moved to another state (a pattern among both students who get in trouble for their speech and those targeted by the speech of others, as my own research and Citron's show).<sup>38</sup>

This early episode of sexting emanated from self-expression, not from a desire to emulate famous or infamous persons whose circulation of intimate pictures had not yet hit the newsstands. To engage in counterfactual impossibility, if I had read Amy Adele Hasinoff's book in 2000, I would have had a welcome, much-needed context for interpreting these events and conversations.

Feminist media studies provide Hasinoff's lens.<sup>39</sup> She uses a cultural studies approach—the main sources for her research are nonfiction mass media portrayals of sexting and deep qualitative analysis of what those portrayals say and how they say it.

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35. *Id.* at 242-48.

36. HASINOFF, *supra* note 3, at 161.

37. *Id.* at 163.

38. ROSS, *supra* note 31, at 175, 228.

39. Hasinoff's is the second volume in a Feminist Media Studies series from the University of Illinois Press.



While she is embedded in Foucault and other postmodernist thinkers, Hasinoff's goal does not lie in the realm of grand theory. Rather, she seeks to bring "common sense" to a social issue that is rife with exaggeration and overreaction. And she succeeds.

The problem of sexting could be seen as a phenomenon with a narrow scope, even though it is increasingly common. As Hasinoff points out, mainstream culture panics when young people sext, but it largely ignores voluntary sexting by adults unless they are famous politicians. In Hasinoff's hands, however, the topic of sexting is an opportunity to explore sexuality, gender, agency, misleading data, and the marketing of crises.

Hasinoff argues that adults are deeply distrusting of, and fearful about, adolescent girls who embrace and control their emerging sexuality. She urges us to recognize and accept girls' agency: the steps they take and choices they make "to negotiate with social norms, institutions, and structures they did not create."<sup>40</sup> Instead, too many institutions from mass media to schools to lawmakers assume "girls—not men and boys—need to be controlled and managed" and promote "the pretext that girls with sexual agency will make the choice to avoid sexual activity outside committed long-term relationships."<sup>41</sup> What girls need from adults, this line of thinking insists, is help in learning how to "voluntarily refuse and consent to sex."<sup>42</sup> This approach escapes the common misapprehension of Victorian sexuality only by contemplating that consent could be a plausible response. Consent, as Hasinoff posits, is crucial to our understanding of sexting.

The first half of the book explains what is wrong with the currently dominant approach. Right at the beginning, Hasinoff explains how her view of agency differs from that of many other scholars who argue that we should listen to girls' voices. Some studies "idealize resistance," telling girls to "just say no," rather than accepting girls as informed and willing actors.<sup>43</sup> This viewpoint informs the first two chapters of the book in which Hasinoff argues, among other things, that consensual teen sexting should be decriminalized (at least for the voluntary initiator and the first, intended, recipient).

Hasinoff charges that almost no one (including the American Civil Liberties Union) is willing to challenge the viewpoint that "teenagers should not be sexting and should have no right to do so," witnessed in attempts to prosecute teenage sexters.<sup>44</sup> But Hasinoff's own examples undermine that claim. One of her major illustrations involves the outpouring of objections to a Vermont proposal that "originally proposed to decriminalize some forms of sexting."<sup>45</sup> The sponsors of that bill were not averse to giving teenagers a "right to sext." The final statute is not as bad as Hasinoff would have it. It gives teenagers a free pass for the first offense. And she acknowledges that unlike jurisdictions that would treat sending a sexualized selfie as a violation of child pornography laws, Vermont enacted a statute that treats sexting as a misdemeanor that will not expose sexters to the risk of being placed on a sexual offender registry. In contrast, other states enacted statutes that appear to threaten sexters with the possibility

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40. HASINOFF, *supra* note 3, at 14.

41. *Id.* at 13.

42. *Id.*

43. *Id.* at 14.

44. *Id.* at 25.

45. HASINOFF, *supra* note 3, at 26.

of being placed on a sexual offender registry, though no court appears to have directly addressed the constitutionality of such provisions to date.<sup>46</sup>

Hasinoff's Chapter 2 takes on the "homogenization" and essentialism that plague much popular and scholarly discussion of adolescents: the notions that biology determines how teenagers think and act, and that raging hormones and emerging brain structures legitimize "infantilizing" teenagers.<sup>47</sup> Hasinoff is not alone in making these arguments, but she makes the case powerfully.

Addressing lawyers, she criticizes attorneys advocating for youth (including the American Bar Association which has urged that underage offenders receive rehabilitation instead of "punitive criminal sentences") for "inadvertently" providing fodder for withholding rights from teenagers: "if teens are incapable of making rational decisions and understanding the consequences of their actions, then there is no basis to grant them free speech or due process rights."<sup>48</sup>

Advocates of children's rights, however, have urged that civil rights and liberties need not be premised on competency, just as adults who are not competent retain constitutional rights. And still others who work in the juvenile justice realm have explained that policies intended to protect children from their own vulnerabilities are not in fact inconsistent with acknowledging and preserving rights. We can, for example, insist that children have a right to an attorney, as required by *In re Gault*,<sup>49</sup> but that, unlike adults, minors should not be able to waive that right because they might not understand the implications of that waiver.

Hasinoff focuses on a familiar story—blaming the victim—in Chapter 3, but here, with a slight twist. She "identifies a shift in online safety advice from a focus on predators and technology as the main culprits to an explicit strategy of encouraging girls to be autonomous, independent, and responsible online."<sup>50</sup> Analyzing advice given to girls (and parents), Hasinoff concludes that the "autonomy" promoted by public service announcements and other safety campaigns has much in common with the current woefully inadequate sex education programs offered in public schools: both identify the problem as girls' lack of self-esteem, even though no "conclusive evidence" supports this approach.<sup>51</sup> The assumption is that girls who lack self-esteem will use sex to "seek validation" while more confident girls would be able to say "no" and avoid risks.

Hasinoff convincingly argues that a focus on the girls who sext deflects from the real social problem: the people who abuse the trust of those who send pictures of themselves, who Hasinoff correctly labels "harassers and privacy violators."<sup>52</sup> NGOs

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46. *In re J.P.*, No. 2011-G-3023, 2012 WL 1106670 (Ohio Ct. App. 2012) (upholding the delinquency conviction of a thirteen-year-old girl who sent a text to another minor, but treating the question of whether such an adjudication might expose her to the risk of being placed on the sex offender registry as "speculative" because the trial court did not label her act as a sexual offense); *In re J.B.*, 107 A.3d 1 (Pa. 2014) (overturning a statute that imposed an irrebutable presumption that a juvenile who committed a sexual offense posed a high risk of recidivism, and must be placed on the sexual offenders registry, but not discussing the treatment of sexting by juveniles).

47. HASINOFF, *supra* note 3, at 52.

48. *Id.* at 54.

49. 387 U.S. 1 (1967).

50. HASINOFF, *supra* note 3, at 71.

51. *Id.* at 72.

52. *Id.*

echo mass media and legal definitions that criminalize all forms of sexting—including voluntary and provocative but not nude pictures—by labeling “the practice as inherently . . . abusive” and calling it “digital dating violence.”<sup>53</sup> Hasinoff sums up her findings: “All of the PSAs I examine . . . inadvertently blame victims and assert that adolescent sexual expression always leads to victimization.”<sup>54</sup>

The second half of the book proposes “alternative ways to think about sexting.”<sup>55</sup> To begin with, Hasinoff urges us to think of voluntary sexting as a potentially healthy choice in the right context, rather than a non-normative, even transgressive, act that places the actor in harm’s way. The choice to sext and the choice not to sext, she asserts, are both “about sexual embodiment, with various risks and benefits, which may be reasonably and authentically chosen in some contexts.”<sup>56</sup>

In a culture rife with sexualized images of girls and women, it is, she argues, too easy to fall into the trap of pointing to the “bad choices” girls who sext make, and holding girls accountable for their “failure to resist” sexualization, just as victims of rape are too often blamed for their manner of dress or being out alone late at night.<sup>57</sup> She is onto something. And even more so when she turns to the “politics of respectability” in which nice upper middle class girls walk the fine line between being feminine and innocent while lower class girls appear as “excessively sexual” in appearance or manner, a phenomenon long witnessed in fiction and film (though the maidservant or hooker may turn out to be highly virtuous like Richardson’s *Pamela* or Julia Roberts’ *Pretty Woman*).<sup>58</sup>

Hasinoff’s solution is that law and norms should distinguish carefully between private communications shared voluntarily and invasions of privacy perpetrated through non-consensual transmission. This involves transforming social norms and rewriting laws. Like Citron, Hasinoff advocates for an explicit consent model that would require websites as well as individuals to obtain consent before sharing explicit photos. Legal changes could prove necessary, she concedes, “but,” Hasinoff maintains, “the idea of adding consent to media is most powerful as a new social norm that can help transfer existing ideas about offline privacy to an online context.”<sup>59</sup>

Hasinoff correctly points out that observers, from school officials and prosecutors to media pundits and even legal scholars, too often conflate voluntary sexting by the person whose picture is being transmitted, or being an intended recipient, with maliciously distributing the pictures beyond their intended audience without the creator’s consent.<sup>60</sup> She argues convincingly that the person who transmits the sext without the creator’s consent is invading the creator’s digital and personal privacy, which can often have serious repercussions. Consent, she insists, must be explicit.

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53. *Id.* at 87 (quoting Stephanie Clifford, *Teaching Teenagers About Harassment*, N.Y. TIMES, Jan. 27, 2009, at B1).

54. *Id.*

55. HASINOFF, *supra* note 3, at 99.

56. *Id.* at 109.

57. *Id.*

58. *Id.* at 111.

59. *Id.* at 143.

60. HASINOFF, *supra* note 3, at 140.

Here, Hasinoff expressly builds on what she acknowledges is a controversial model: codes and laws requiring affirmative consent for sexual contact. New York State became the first jurisdiction to adopt a law requiring express consent to sexual contact on college campuses in 2015.<sup>61</sup>

Whatever the drawbacks to romance and nature in such codes for sexual relationships, the lines are clearer when we talk about sharing pictures. Can I share your picture, yes or no? Maybe one step further, can I share it with Joe and Bob but no one else? This places the responsibility for obtaining consent squarely on the person who received a sext and now wants to transmit it, and sends a clear and manageable message and instruction. It also places responsibility squarely where it belongs.

I have made a similar argument in the context of student speech rights about the tendency of school officials to conflate senders, recipients, and those who widely distribute sexts.<sup>62</sup> Schools become frontline enforcers of adult moral standards when they discover sexts on students' phones or websites, and, as Hasinoff notes, they tend to punish the girls who sexted but not the students who received or shared the messages and pictures. And schools sometimes send the evidence to law enforcement officials who initiate the dependency, delinquency, or criminal proceedings that Hasinoff correctly tackles.

Hasinoff usefully distinguishes between sexts intentionally and voluntarily created by the person featured in them, and those "egregious" cases in which the subject never consented to the activity or to having it captured in digital images, as when sexual assaults and rapes are recorded and uploaded.<sup>63</sup> Hasinoff does not discuss the most famous incident in the latter category—the Steubenville rape, which finally led to an inquiry and begrudging penalties. Instead, she uses an example of shame and humiliation in which law enforcement officials refused to act until the victim was "reportedly driven" to suicide.<sup>64</sup> Hasinoff is wise to choose her words carefully, because, as Emily Bazelon has demonstrated, on closer examination teenage suicides attributed to bullying always require a more nuanced evaluation of factors: "The causes of suicide are almost always complex, and preventing it requires much more than preventing bullying."<sup>65</sup> The "red flag," Bazelon reminds us, "is almost always depression."<sup>66</sup>

Hasinoff never asks another important question: does the school have any authority to investigate—much less punish—expression created and largely kept off campus? Generally, I have argued the school does not have such jurisdiction unless the photos are widely shared on campus and threaten to cause substantial disruption of the educational process.<sup>67</sup>

*Sexting Panic* urges that legal bright lines for determining capacity to consent are inappropriate and that "relativistic models of agency" determined on a case-by-case basis

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61. Ch. 76, 2015 N.Y. Sess. Laws 589 (McKinney).

62. ROSS, *supra* note 31, at 239-41.

63. HASINOFF, *supra* note 3, at 141.

64. *Id.*

65. EMILY BAZELON, STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY 109 (2013).

66. *Id.*

67. ROSS, *supra* note 31, at 239-42.

are more suited to this terrain.<sup>68</sup> She joins a growing group of legal scholars who are pointing to a disconnect between generally applicable principles (such as that many fifteen-year-olds are not developmentally mature enough to form a particular intent or choose a particular course of action) and the application of a given principle to a specific case or controversy (this fifteen-year-old, however, is mature enough to understand the thing that is at stake).<sup>69</sup> I agree so far as that goes.

But Hasinoff also argues that enabling (and requiring) teenage sexters to give consent before others transmit their photos will change the balance of power between the young and their parents—and that this transformation would be a positive development. She is, of course, correct that some sexters (and intended recipients) end up in court when parents discover photos and turn them over to the police, sometimes because they are outraged by their child's choice of sexual partners.<sup>70</sup> This line of argument furthers her discussion of what she calls hetero-normative control over adolescents.

In the process, Hasinoff overlooks the crucial distinction between parents and state actors. Parents have constitutionally recognized liberty interests in inculcating their children with their own values and may discipline their offspring until the age of majority or emancipation, as long as they do not cross the legal line to child abuse. Most of us would prefer that parents would use their own means of discipline—even if we disagree with the ends or the means—rather than turn their children over to the state's coercive power, but some parents do just that in family and juvenile court every day over all sorts of disciplinary issues, including staying out too late, disrespecting authority, and acting out.

Hasinoff's primary sources are drawn from mass culture, but she displays an impressive command of the legal literature on privacy and the handful of litigated cases involving sexting. Because her aims are practical, she discusses the inadequacy of existing legal regimes to respond appropriately to sexting by teenagers (or adults), and, like Citron, proposes realistic reforms. The book should be of interest to lawyers, legal academics, and those engaged with young people and public policy.

### III. COMMONALITIES

Hasinoff and Citron each refute the notion that the Internet must remain an untamable Wild West—immune to both law and civilized social norms. As feminist scholars who support agency for women and girls, both authors argue that women have a right to sexual expression without fear of moral or legal repercussions (such as revenge porn or slut shaming), much less prosecution for violating laws aimed at exploitative pornography. While both authors argue for and propose legal changes more adequate to these modern harms, ultimately both rely even more on proposals for cultural transformation.

Both authors look to greater self-policing by the technology industry. Hasinoff, for

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68. HASINOFF, *supra* note 3, at 144.

69. David L. Faigman, *The Supreme Court's Confused Empirical Jurisprudence*, 15 EXPERT EVIDENCE REP. (BNA) NO. 13, at 303 (July 6, 2015); David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014).

70. HASINOFF, *supra* note 3, at 150.

example, urges a “carefully designed notice-and-takedown system for privacy violations,”<sup>71</sup> so long as it respects constitutional norms that aim to prevent the same non-consensual proliferation of personal, intimate images and detail that Citron’s revenge porn statutes target. And, in the spring of 2015, a spate of host services banned non-consensual posting of nude pictures.<sup>72</sup>

As for legal change, both authors look to statutory reform and underscore that law enforcement officials (including police officers, prosecutors, and even judges) need to use their considerable discretion more appropriately and to develop more nuanced understanding of the behaviors presented to them. In Citron’s case, this would militate toward treating cyber offenses more seriously, while in Hasinoff’s, it would diminish the risk that teenagers would be prosecuted for voluntary sexting.

So too, both Citron and Hasinoff recognize the limits of law and technological fixes. They believe that as a society we could do a much better job of teaching and informally enforcing more cautious behavior through social disapproval. Both argue that legal change must be accompanied by social change, and vice versa. Hasinoff notes that legal and technological solutions can only do so much: “they can be truly effective only as part of larger efforts and cultural shifts.”<sup>73</sup> Citron, similarly, argues that “legal reform won’t come to fruition immediately and because law is a blunt instrument, changing social norms requires the help of online users, Internet companies, parents, and schools.”<sup>74</sup> “We must,” she continues, “finish this work together.”<sup>75</sup>

There is something in the air—a confluence of concern about the online expression that sets anonymous mobs against women and turns even the willing girl who sexts into a victim, and about real world sexual assaults on college campuses. Perhaps both domains (physical and online) could join in combatting cultural norms that permit or encourage such hostility to women and to expressions of sexuality. To this end we might draw from developments in the public health approach to preventing sexual violence.

Several principles emerged from a controlled study recently reported in *The New England Journal of Medicine* that are consistent with the approaches manifest in the work of Citron and Hasinoff. First, neither the blame nor the onus for prevention should be placed on the victim. Second, primary prevention focused on “potential perpetrators” (of sexual violence, online hate, indiscriminate circulation of private pictures) must be part of a “comprehensive, multilevel approach.”<sup>76</sup> Third, comprehensive education must start at a younger age than when students first arrive at college. Fourth, a “social-ecologic model” suggests that we must look at (and presumably transform) not just the individuals who may become perpetrators, but “the context of relationships, communities, and the larger society.”<sup>77</sup> This last approach requires active participation of bystanders in rejecting violations of positive norms (as with the online citizens who

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71. *Id.* at 152.

72. ROSS, *supra* note 31, at 242, 339 n.104 (Google and Reddit).

73. *Id.*

74. CITRON, *supra* note 2, at 254.

75. *Id.* at 255.

76. Kathleen C. Basile, *A Comprehensive Approach to Sexual Violence Prevention*, 372 NEW ENG. J. MED. 2350, 2351 (2015).

77. *Id.*

shout down antisocial posts) and models of respect and healthy interaction. Even with all of these in place, the author cautions, “[t]here are no easy solutions.”<sup>78</sup>

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78. *Id.*