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Jonathon W. Penney
Osgoode Hall Law School of York University, jpenney@osgoode.yorku.ca

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CHAPTER 11

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Jonathon W. Penney

Abstract

Online harassment, cyberbullying, hate, and other forms of online abuse pose a significant threat to human rights in Canada. Now, the country is at a crossroads: it will face American pressure to adopt a broad immunity model similar to Section 230 of the *Communications Decency Act* (CDA) or, at long last, take more robust action to address cyberharassment and other online abuse, beyond the piecemeal approach used today. Central to this regulatory debate are concerns and claims about "chilling effects"—that is, the idea that certain regulatory actions may "chill" or deter people from exercising their rights online and in other digital contexts. Such claims, and in particular claims about speech chill, have long been raised to oppose measures addressing online abuse. In this chapter, I argue that such chilling-effect claims, which are advanced to oppose measures taken to curb online harassment and abuse, neglect other kinds of chilling effects. I argue that such abuse chills the rights of victims. And, drawing on new empirical research on this point, I argue that such legal interventions—like cyberharassment laws—rather than having a chilling effect, can also have a salutary impact on the speech and engagement of victims whose voices have been typically marginalized. I will also discuss the important implications these findings have for Canadian law and policy.

Online harassment, cyberbullying, hate, and other forms of online abuse pose a significant threat to human rights in Canada. A 2016 survey, for example, found almost half of young Canadians have experienced online harassment (Global News, 2016). A poll last year found a third of parents knew a cyberbullying victim (Abedi, 2018). Such harassment has a range of harmful and negative impacts. For example, researchers tracking online hate and disinformation in the 2019 Canadian election suggested such abuse may be harming Canadian democracy (Fionda, 2019). Indeed, with women and minorities disproportionately targeted by such online abuse, it threatens deliberative and participatory democracy, which requires diverse perspectives and voices (Citron & Penney, 2019).[1] Not surprisingly, a 2016 poll found that Canadians wanted more to be done to "curb online abuse" (BBC, 2016). This has led to calls to regulate social media platforms (e.g., Farber & Balgord, 2018; Elghawaby, 2018), including by the House of Commons Standing Committee on Access to Information, Privacy and Ethics (Solomon, 2018).

Yet, other than a few limited exceptions—such as Quebec's *Act to Establish a Legal Framework for Information Technology* (AELFIT)—governments in Canada have been "wary" to regulate social media companies to address these challenges (Elghawaby, 2018). Moreover, Canada faces pressure to adopt a permissive regulatory framework that shields online service providers (OSPs) from doing more to address online abuse. The new *Agreement between Canada, the United States of America, and the United Mexican States* (CUSMA), signed in 2018, includes provisions that may require Canada to adopt an even more permissive regulatory framework for OSPs similar to Section 230 of the CDA, which provides OSPs with broad immunity, shielding them from liability for user-generated content and from lawsuits relating to how they moderate content (Laidlaw, 2020, p. 3).

Though Section 230 is treated as a "sacred cow" with "near constitutional status" in the United States, especially in the technology industry (Citron & Wittes, 2017, pp. 409–410), it has also been controversial. The most powerful OSPs today are popular US-based social media platforms like Facebook, Google, Twitter, among others, which all enjoy sweeping protection from tort liability for most forms of user-generated content, thanks to Section 230. This, critics argue, has given these companies far too much unchecked power over digital rights (Klonick, 2017, pp. 1613–1614). These broad legal

protections, for instance, mean these platforms have little incentive to address online abuse (Citron & Wittes, 2017, p. 411, pp. 413–414).

Canada is thus at a crossroads. It will face American pressure to adopt a "broad immunity" model similar to Section 230 or finally take stronger action to address cyberharassment, hate, and other online abuse. Central to this regulatory debate are concerns and claims about "chilling effects"—that is, the idea that certain laws or state or corporate activities may "chill" or deter people from exercising their rights, particularly online and in other digital contexts. Such claims have long been raised to oppose legislative measures addressing online abuse (Franks, 2018, pp. 339–340). In fact, concerns about chilling effects on speech and innovation was a central justification for enacting Section 230, and in early decisions like *Zeran v. AOL* (Ciolli, 2008, pp. 147–148; Klonick, 2017, pp. 1607–1608).

Yet, there has been strikingly little systematic study of such "chilling effect" claims in various areas of law over the years. Part of the problem is that chilling effects are often subtle, difficult to measure, and require interdisciplinary research and methods going beyond traditional legal analysis. After an extensive literature review, Leslie Kendrick found in 2013 that empirical support for such chilling effect claims was "flimsy" and required additional study (p. 1536).

Today there is a growing body of literature investigating, exploring, and documenting "chilling effects" in a range of contexts (see Townend, 2014; Stoycheff, 2016; Stoycheff et al., 2017; Stoycheff et al., 2019; Stoycheff et al., 2020; Penney, 2016, 2017; Marthews & Tucker, 2017; Wahl-Jorgensen et al., 2017; Dencik & Cable, 2017; Citron & Penney, 2019). Drawing on this research, I argue that chilling effect claims advanced to oppose measures taken to curb online harassment and abuse neglect other kinds of chilling effects—how such abuse chills the rights of victims. And, drawing on new empirical research, I argue that contrary to critics, such legal interventions—like cyberharassment laws—rather than having a chilling effect, actually may encourage more online speech and engagement, particularly for women—the usual targets of such abuse. These findings have important implications for Canadian law and policy, which I will also discuss.

Chilling Effects and Platform Responsibilities

Canadian governments have, as noted, been reticent to regulate social media platforms to address cyberharassment and similar online abuse. And the few measures that *have* been taken are quite narrow with limited success. The federal government enacted a "revenge porn" criminal offence in 2015, but it is unclear if this provision might also be applied to platforms or businesses, and so far none have been charged (Slane & Langlois, 2018, p. 50). Nova Scotia, for its part, enacted a *Cyber-Safety Act* in 2013 to tackle cyberbullying, but it was struck down as unconstitutionally broad two years later by the Nova Scotia Supreme Court. The Nova Scotia government has no plans to re-legislate (Slane & Langlois, 2018, p. 61). Quebec enacted the AELFIT in 2001—which provides for liability for intermediaries once made aware of "illicit activities"—but it has not been effectively enforced (Slane & Langlois, 2018, pp. 50–51). The result has been that platforms and other OSPs are "mostly left alone" in Canada, with online abuse, sexual exploitation, and harassment able to persist (Slane & Langlois, 2018, p. 51, p. 46). Not surprisingly, many experts believe far more can be done (Elghawaby, 2018).

Chilling effect claims have been a key challenge in this context. Such claims and concerns have often been raised to criticize, oppose, or challenge laws and other measures taken to address cyberharassment and similar forms of online abuse. The first type of chilling effect claim is the more general form: that, no matter what is being addressed—online harassment, defamation, etc.—any regulatory measures at all that impose liability on OSPs would lead to chilling effects on digital speech.

This was, essentially, the conclusion of the US Fourth Circuit Court of Appeal's famous 1997 decision *Zeran v. America Online* (*Zeran v. AOL*), which first found OSPs had broad immunity from tort liability under Section 230 of the CDA. The facts involved a case of online harassment whereby an unidentified person posted on AOL's message board false and defamatory messages about the plaintiff, Kenneth Zeran, who sued AOL for failing to remove the postings promptly once notified. In dismissing Zeran's lawsuit, the Fourth Circuit found that imposing liability on AOL for how it dealt with user-generated content would have "chilling effects" on online speech. In fact, a primary reason Section 230 was enacted in the first place was to guard against such chilling effects, after the New York

Supreme Court found Prodigy liable in its 1995 decision *Stratton Oakmont v. Prodigy Services* (1995; Ciolli, 2008, pp. 147–148; Klonick, 2017, pp. 1607–1608).

The second type of chilling effects claim is that raised specifically about laws and other measures pursued to address online harassment and abuse. That is, such laws typically target or seek to deter certain kinds of online harassment, hate, and abuse, and would thus have a "chilling effect" on the people's online speech and expression (Citron & Penney, 2019, p. 2327). In the United States, courts have struck down such laws on "numerous occasions" for possible chilling effects on speech protected by the First Amendment (Diaz, 2016). These arguments have also been successfully raised in Canada. Critics of Nova Scotia's *Cyber-Safety Act* argued it could "dramatically chill constitutionally protected speech" (Fraser, 2014). The statute was later struck down as unreasonably limiting freedom of expression under the *Canadian Charter of Rights and Freedoms* (Slane & Langlois, 2018, p. 61). And efforts to expand Canada's "revenge porn" laws have been criticized as having a "chilling effect" on journalism (Pearson, 2016).

The Chilling Effects of Online Abuse

Chilling effect claims have been a key legal, normative, and public policy challenge to bettering measures to tackle online harassment, bullying, and other online abuse, including in Canada. But there are important problems with these claims.

First, they largely neglect other chilling effects; that is, the chill or silencing effect that online harassment and abuse has on the speech and engagement of victims. Scholars such as Danielle Citron and Mary Ann Franks have long documented these corrosive impacts on victims of online abuse (see Citron, 2014, pp. 196–198). Online harassment, bullying, hate, "doxxing," and revenge porn all have a silencing effect on victims (Franks, 2018, p. 307; Citron, 2014, pp. 196–197). Such abuse has a "totalizing and devastating impact" upon victims (Citron, 2014, p. 29). In fact, silencing victims is often the primary motivation for such abuse (Citron, 2014, p. 196). Moreover, these chilling effects have a disproportionate impact on the speech and engagement of certain people, such as minority populations, already marginalized due to systematic and overt barriers (Franks, 2018, p. 307).

Second, while a cyberharassment law—or other measures taken to address online abuse—likely will chill at least some speech, empirical evidence suggests that this chill pales in comparison to the impact on victims. As Franks points out, there is "ample evidence" for "how harassment chills freedom of expression, mobility, and association" (2018, p. 307). However, she goes further, noting that these impacts have "a greater chilling effect than any governmental action," (p. 307) and current research supports this claim. Studies have shown how, for example, street harassment inflicts great costs on women, including a loss of freedom of speech and mobility (Franks, 2018, p. 307). There are, furthermore, countless cases where online hate speech or "cyber mobs" threaten victims into silence, forcing them to change how they live and act (Franks, 2018, p. 307; Citron, 2014, pp. 196–197). Moreover, my own previous research work (Penney, 2017), found in a comparative study of different hypothetical "chilling effect" scenarios (that is, scenarios where state or corporate action might chill people's online activities), the scenario involving personally received and targeted threats had the greatest chilling effect across a range of different activities and contexts, more so than even scenarios involving government or corporate surveillance.

Such silencing effects of online abuse are often ignored by policy-makers, by critics of such anti-abuse laws, and by courts evaluating them (Franks, 2018, p. 340). However, new empirical evidence suggests such laws may not only deter or limit online abuse but also help encourage greater online speech and engagement by victims. This salutary effect is the result of the law's expressive function.

The Expressive Impact of Online Abuse Laws

Most literature on legal compliance holds that people comply with the law either because of its coercive force—to avoid legal punishments or penalties—or because they believe the law is legitimate. That is, they believe the law is worthy of compliance (Geisinger & Stein, 2016, pp. 1061–1062). However, a growing body of work focuses on the "expressive" function of law—that is, on how legal frameworks can shape behavioural norms by changing the social meaning of behaviour (Geisinger & Stein, 2016, p. 1062; McAdams, 2015).

There are different theories as to how the law's expressive function impacts behaviour, but most scholarship focuses on what

Richard McAdams (2015) calls the "informational" and "coordinating" mechanisms of law's expressive effects (p. 6). On the former, a law provides information about how people should act, providing a signal about societal consensus or wider popular attitudes about social behaviour. Through this message to the broader population about what is considered acceptable and unacceptable behaviour, a law has its expressive impact—people internalize that message and alter their behaviour accordingly (Geisinger & Stein, 2016, p. 1062). The coordination mechanism of a law speaks to its function in providing a focal point for people to coordinate and organize their activities, leading to wider societal mobilization or social movements, and ultimately shifts in social behaviour (McAdams, 2015, p. 5). These mechanisms work together in a law's expressive impact. A good example of this is how, over time, anti-smoking laws changed public attitudes about smoking, leading fewer people to smoke (Geisinger & Stein, 2016, p. 1062). These laws provided information to the wider public by signalling that a new anti-smoking consensus was forming, and were also a focal point for citizens to coordinate their action to advocate for additional law reforms or more effective enforcement.

Can cyberharassment laws also have such expressive impacts? And if so, what are they? A new article that I co-authored with Citron, a leading privacy and online abuse expert (Citron & Penney, 2019), discusses new empirical evidence that such laws can have a salutary impact on people's online speech and engagement, particularly for women. The notion that law can empower the speech of victims is not new. For instance, the idea that law reforms could better give victims a voice was a core of the victim's rights movement, starting in the 1970s and continuing today (Eisenberg, 2015, p. 620). Citron (2009) has previously discussed law's expressive function in combating online harassment. As with chilling effects, however, there has been little systematic empirical research done on law's expressive function, including its salutary impact in this context.

Drawing on expressive law theory by McAdams (2015) and others, it is possible see how law's expressive function could have this impact. By enacting a cyberharassment law, a democratic society provides important information to educate the public—that online harassment and abuse are unacceptable behaviours. It also sends a message to online-abuse victims that their speech and engagement in online contexts are important and worthy of

protection. These would all be informational mechanisms of the law's expression function. A new cyberharassment law could also provide a focal point for broader reforms or additional enactments addressing other forms of online abuse, such as hate or intimate-privacy violations. These would be consistent with coordinating mechanisms.

Beyond a theoretical case like this, however, our article provides an empirical foundation for these claims. We analyzed findings from an original online survey, administered to 1296 US-based adult Internet users, which described to participants a series of hypothetical scenario involving different government or corporate activities. Questions sought to elicit behavioural responses to these different scenarios, in order to compare and statistically analyze responses, including in relation to a range of demographic variables, such as age, gender, education and income levels, as well as other variables relating to online behaviour and concerns, such as the amount of time spent online, level of online sharing, level of social network engagement, and privacy concerns in response to the law. One scenario involved participants being made aware that the government had "enacted a new law that introduced tough civil and criminal penalties for posting information or other content online, with the intent to harass or intimidate another person" (Citron & Penney, 2019, p. 2329)—in other words, a law that might be described as a cyberharassment law.

Responses offered a range of insights. First, contrary to what many critics argue, responses suggested the cyberharassment law would have few chilling effects. Of the participants, 87 percent indicated that the cyberharassment law would have "no impact" or render them "somewhat more likely" or "much more likely" to "spend time on the Internet" (Citron & Penney, 2019, p. 2330). Similarly, 62 percent indicated such a law would have "no impact" or render them "more likely" to "speak or write about certain topics online" (p. 2330). Additionally, 67 percent responded that the law would have "no impact" or would render them "somewhat more likely" or "much more likely" to share personally created content online, while 56 percent indicated that the law would either have "no impact" or would render them "more likely" to contribute to social networks online (p. 2330). The findings thus did not provide compelling evidence that a cyberharassment law would have substantial or pervasive chilling effects on online speech and engagement.

Second, the findings suggested cyberharassment laws, rather than chilling speech and engagement, may actually *encourage* these activities, particularly for women. Analysis of the findings revealed a gender effect in response to this law—female participants in the survey were statistically more likely to engage online in response to the cyberharassment law on a range of different counts (Citron & Penney, 2019, pp. 2331–2332). Specifically, women reported being 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, in response to the government enacting the cyberharassment law. The findings reveal a salutary effect on women's online expression, engagement, and participation—a greater likeliness to speak, engage, and express themselves online in light of a cyberharassment law.

These findings are not necessarily surprising; as women are disproportionately targeted by online harassment and abuse, it makes perfect sense that may also report being more positively impacted by a cyberharassment law and its expressive effects. Of course, there are also important limitations. The survey sample could be more representative and was obtained through an online recruitment service; it thus may be biased by self-selecting respondents. And self-reported responses in online surveys do not always accurately reflect people's actual behaviour. Beliefs do not always match actions.

Indeed, far more research needs to be done to document both the silencing effects of online abuse as well as the expressive law effects in different Canadian contexts—such as different types of online-abuse laws. Complexities should also be investigated: How important is the enforcement of a cyberharassment law to ensuring its expressive impacts? Do these expressive impacts hold for different minority groups and cultural communities in Canada? Both nuanced qualitative and quantitative research is required to answer these difficult questions. That said, our study, and the survey therein, does reflect participants' perspectives and beliefs about how the cyberharassment law would impact their behaviour. Given that the focus here is the law's expressive function—the message it sends to people more generally and victims of online harassment more specifically—then these self-reports are direct evidence of that expressive impact.

Implications

These theoretical and empirical insights have important implications for Canadian law and policy. First, Canadian judges and lawyers need to better take into account the chilling effects of online abuse; that is, how such activities often aim to silence victims and drive them from online spaces and social networks. A good example of this is the Nova Scotia Supreme Court's decision in *Crouch v. Snell* (2015), which struck down the *Cyber-Safety Act* for unconstitutionally limiting rights to expression under Sections 2(b) and 7 of the *Charter of Rights*. The court found the act sought to protect people from "undue harm" to their "reputation" and "well being" due to cyberbullying (para. 147). As well, the court found that the act aimed to "balance" an "individual's right to free speech against society's interests in providing greater access to justice to victims of cyberbullying" (para. 172).

However, the court never acknowledges the speech interests of victims of cyberbullying. As already noted, the main aim of such abuse is typically to silence victims (Citron, 2014, p. 196), often with a "totalizing and devastating impact" (p. 29). Had the court also taken into account the speech and expression rights of victims, then the court's analysis under Section 1 of the *Charter of Rights*—as to whether the law's limitations on the free expression of cyberbullies were reasonable—may have come to a different conclusion.

Second, courts and lawyers should also take into account potential salutary impacts of these laws on victims' online speech and engagement. This is important as the silencing effects of online abuse disproportionately impact the speech and engagement of groups and communities, such as women and visible minorities, already marginalized due to discrimination, racism, and other societal barriers (Franks, 2018, p. 307). If the court in *Crouch v. Snell* (2015) had understood how the *Cyber-Safety Act* may have salutary expressive impacts on victims of cyberbullying—encouraging their online speech and engagement—then its analysis and conclusion may have been different. These points were neither raised nor discussed by the court in its decision.

Third, law- and policy-makers, at a very basic level, must acknowledge the corrosive impact that online abuse has both on victims and on democratic societies more broadly. Such abuse silences victims, weakening public discussion and democratic deliberation. Having acknowledged this, law- and policy-makers then must act.

Furthermore, any response to cyberharassment and other forms of online abuse should take into account the law's expressive impact and function. For example, a new cyberharassment law could include an official preamble clearly describing the government's objectives and aims, and other informational dimensions to strengthen the expressive impact of the law for the public in general and victims in particular. The findings in Citron and Penney (2019) also provide empirical support for important government outreach to affected communities to provide information and education about new laws or initiatives concerning online abuse. Again, this can strengthen the new law's expressive function through better informational mechanisms.

Fourth, any general regulatory framework for platforms and other OSPs should include measures to address cyberharassment and other forms of online abuse. As noted earlier, CUSMA may require Canada to adopt a new regulatory framework for OSPs. If so, it should not adopt one comparable to Section 230 of the CDA. Though acclaimed in the United States as essential to the development of the modern Internet (Citron & Wittes, 2017, pp. 409–410), there is also greater recognition that some of the most harmful chilling effects on human rights online do not concern the activities of OSPs or statutes regulating them, but stem from forms of online harassment, abuse, and privacy violations (Citron, 2014). Naturally, those concerned with addressing these challenges have been increasingly critical of Section 230 (Klonick, 2017, p. 1614). Consistent with those criticisms, and with the insights in this chapter, any new Canadian regulatory framework or scheme must take online abuse seriously. A framework, which includes safe harbours and general or specific legal immunities or protections for OSPs, must include express mandates, provisions, exceptions, and incentives to address cyberharassment and other forms of online abuse. What those provisions may be goes beyond the limited scope of this chapter, but mitigating the chilling effects of online abuse and encouraging the speech and engagement of victims online through expressive laws and other measures should be essential objectives for policy-makers going forward.

Conclusion

Concerns about chilling effects have long been central to debates about the responsibilities of platforms and OSPs in dealing with

user activities, particularly concerning user-generated and shared content. For example, the famous 1997 decision in *Zeran v. AOL*, which interpreted Section 230 of the CDA broadly to grant online platforms publishers immunity, was premised on a concern about how content liability would chill speech and innovation. Drawing on new empirical research, this chapter argued that such chilling effect concerns, typically raised to criticize and oppose measures to address cyberharassment and other forms of online abuse, neglect other forms of chilling effects—the silencing impact of online abuse—as well as the expressive impact of such laws to encourage and empower the speech and engagement of victims. In particular, this chapter argues for the following: (1) more qualitative and quantitative research needs to be done to document the silencing effects of online abuse in Canada as well as the expressive effects of laws that seek to address such online abuse; (2) courts and lawyers must better take into account the silencing effects of online abuse when reasoning about laws and legislation tackling online abuse, as well as about the salutary impacts of such laws; and that (3) Canada should reject a broad immunity model for OSPs and platforms in Canada and act now to better address cyberharassment and other forms of online abuse.

Notes

1. Data repositories for the study discussed in Citron and Penney (2019) can be found at https://github.com/jwpenney/Cyberharassment_Law_Impact_2019_Study.

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