

# A Call of Duty to Counterstrike: Cyberharassment and the Toxic Gaming Culture Plaguing Female Gamers and Developers

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## Repository Citation

Natasha N. Phidd, *A Call of Duty to Counterstrike: Cyberharassment and the Toxic Gaming Culture Plaguing Female Gamers and Developers*, 25 Wm. & Mary J. Women & L. 461 (2019), <https://scholarship.law.wm.edu/wmjowl/vol25/iss2/8>

A CALL OF DUTY TO COUNTERSTRIKE:  
CYBERHARASSMENT AND THE TOXIC GAMING CULTURE  
PLAGUING FEMALE GAMERS AND DEVELOPERS

ABSTRACT

The frequency with which female gamers and game developers experience sexual harassment and threats of violence online is significant enough to warrant concern about a section of our society—female gamers and game developers—having their sexuality and gender identity used against them, both as weapons and as barriers blocking them from access to a lucrative economic venture. An examination of the 2014 Gamergate controversy and various other instances of cyberharassment against female gamers and developers, as well as a look into the realm of eSports and an analysis of cyberharassment and the concept of true threats, indicate that this particular class of citizens deserve a form of legal redress to address the uncouth and deplorable acts that are deeply embedded within the male-dominated gaming and eSports industry. This Note suggests that the current statutes in existence are simply not doing enough, and therefore, there must be adjustments made in order to properly remedy this issue.

Moreover, while First Amendment concerns abound regarding even the most minor and necessary of government restrictions on speech, this Note submits that federal legislation may be the most effective way to squash the growth of cyberharassment against this class of citizens (and women more generally). Additionally, nationally enforced social media and internet communication education classes should be provided for (and required of) law enforcement officials. Further, the implementation of a system of increased monitoring by moderators for online social media and gaming platforms may also help facilitate an effective remedy to the vast harassment experienced by female gamers and developers. The Introduction will discuss the contextual background of the Gamergate controversy and its role as a window into cyberharassment against female gamers and developers in the industry. Part I will examine cyberharassment and the federal statutes in effect, as well as examples of state statutes attempting to address this issue. Part I further discusses how First Amendment implications, as they relate to the gaming and eSports industry, may negatively affect female gamers and developers. Part II proposes methods this country could adopt to help remedy

the plight facing this class of American citizens. Parts III and IV delve into the economic salience of adopting the measures proposed in Part II, and examine the morality prong to the ideas proposed in this Note, respectively. The Conclusion presents thoughts and insights into the viability of instilling these proposed measures to remedy the gaming industry and the toxic culture in which the industry sits.

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INTRODUCTION: GAMERGATE AND AN OPEN WINDOW FOR THREATS  
AGAINST FEMALE GAMERS AND DEVELOPERS

*We have to rape Zoe Quinn and take everything  
from her. We have to ruin her life.*<sup>1</sup>

After ending a romantic relationship with a fellow gamer, Eron Gjoni, gamer and game developer, Zoe Quinn became the target of a blitzkrieg of severe sexual harassment online following a blog post Gjoni wrote and subsequently published on the Internet.<sup>2</sup> On the night that Gjoni published the post in August of 2014, Quinn received a bombardment of emails and tweets calling her a “slut,” sending Photoshopped images of her, and threatening her life.<sup>3</sup> Quinn’s personal information (such as her social security number) was published online; her family received threats as a result of the “Zoe Post”; and Quinn’s boyfriend at the time had a job offer rescinded because of threats the employer received from the same internet mob.<sup>4</sup> This hoard of internet users, all hiding behind the anonymity shield provided by the #Gamergate label, pushed an effort “to destroy Quinn personally and professionally.”<sup>5</sup> Gjoni continued to egg on the Gamergate mob to continue its harassment against Quinn, leading Quinn to file a police report and obtain a restraining order against him as her first steps towards pursuing legal redress.<sup>6</sup> Quinn had taken Gjoni to court the following month, where she tried to explain to the judge the grave nature of the online threats and the faceless mob behind them; she even told the court that, in regards to Gjoni, she was sincerely afraid of him.<sup>7</sup> To the detriment

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1. Zachary Jason, *Game of Fear*, BOSTON MAG. (Apr. 28, 2015, 5:45 AM), <https://www.bostonmagazine.com/news/blog/2015/04/28/gamergate/print> [<https://perma.cc/R97Q-WF7G>].

2. *Id.* (explaining that Gjoni posted “The Zoe Post” online, specifically to video-game sites with well-known reputations for harassing female gamers, where it was immediately removed by moderators; he subsequently posted it on a blog site, where it was open to public view).

3. *Id.*

4. *Id.*

5. Susan Kelleher, *This Has Got to Change: Women Game Developers Fight Sexism in Industry*, SEATTLE TIMES (Aug. 14, 2015, 6:25 PM), <https://www.seattletimes.com/pacific-nw-magazine/game-on-women-are-developing-new-video-games-and-a-new-culture> [<https://perma.cc/XP79-GPHL>]; see also Jason, *supra* note 1 (discussing an example of a death threat Quinn received a day after “The Zoe Post” went online: “[i]f I ever see you are doing a pannel [sic] at an event I am going to, I will literally kill you. You are lower than shit and deserve to be hurt, maimed, killed, and finally, graced with my piss on your rotting corpse a thousand times over.”).

6. Jason, *supra* note 1.

7. See *id.*

of Quinn's case, the court lacked fundamental understanding about both the internet hate mob acting against Quinn and how to deal with this problem.<sup>8</sup>

After months of Gjoni continuously violating the restraining order (which called for him to refrain from divulging more details about Quinn's personal life online), and the hate mob continuously harassing her, Quinn ultimately stopped pursuing criminal harassment charges against Gjoni, feeling her efforts were effectively to no avail.<sup>9</sup> When she had initially gone to the police to report the innumerable instances of harassment, they did not understand the nature of the harassment, and they did not accept the USB drive full of threats and vitriol she had collected.<sup>10</sup> To add to the ostensible futility of the matter, the sheer vastness of the invisible internet hate mob was too large to determine specific liability, essentially precluding Quinn from achieving the peace of mind and legal remedy she had actively sought.<sup>11</sup> With the argument that the hands of the justice system are tied regarding what could feasibly be done to address this problem (provided the actors within the justice system elicit an actual interest in it), comes a suggested self-removal of the victim from the space where the harmful agent caused its damage.<sup>12</sup> It is an argument that is logically akin to "if you don't like it here in America, then go back to where you came from," as if to suggest that the solution to the victim's pain relies purely on a change in location, not on the underlying causes of the pain. This overlooks one of the reasons why people engage with the gaming community to begin with: it is a way to escape from the real world.<sup>13</sup>

Quinn's Gamergate experience in this respect is unfortunately not one that is exclusively unique to her. Within a week of Gjoni's blogpost being posted online, other women in the gaming industry began to receive death threats from these Gamergate crusaders.<sup>14</sup>

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8. *Id.*

9. *Id.*; Noreen Malone, *Zoë and the Trolls*, N.Y. MAG. (July 24, 2017), <http://nymag.com/selectall/2017/07/zoe-quinn-surviving-gamergate.html> [<https://perma.cc/Q2J7-867L>].

10. Malone, *supra* note 9.

11. *See generally id.*

12. *Id.* ("During one of the hearings for the legal action against Gjoni, a judge who saw no grounds for criminal harassment charges suggested that Quinn get a job that didn't involve the internet, if the internet had been so bad to her. She told him that there was no offline version of what she did. 'You're a smart kid,' he replied. 'Find a different career.'").

13. Latoya Peterson, *In 'Crash Override,' Zoe Quinn Shares Her Boss Battle Against Online Harassment*, NPR (Sept. 8, 2017, 1:00 PM), <https://www.npr.org/2017/09/08/548661962/in-crash-override-zoe-quinn-shares-her-boss-battle-against-online-harassment> [<https://perma.cc/UL6J-GZ9L>].

14. Jason, *supra* note 1 (discussing that Briana Wu, a founder of a game studio in Boston, was a target of unyielding attacks since "The Zoe Post" went live, and was forced to leave her home as a result of her home address being leaked online. Wu explained that

A contention by law enforcement regarding this sort of harassment is that there are simply not enough resources to effectively prosecute the perpetrators, and that even if it were feasible to do so, the anonymity provided by these online platforms inhibits the progress of possible investigation.<sup>15</sup> However, even in instances where perpetrators were caught or confessed to facilitating harassing behavior (i.e., making threatening phone calls or sending death threats online), prosecutors still tended to drop the charges, finding that the perpetrators were merely making the threats in jest.<sup>16</sup> While law enforcement agencies like the FBI claim that nothing can be done (or that nothing should be done because of the apparent obviousness of how fake the threats are), female gamers and developers, who are victims to this abuse, feel as though they are being cast aside for lack of importance.<sup>17</sup> According to an investigation into the handling of Gamergate cases, some victims who contacted the FBI felt that they were “sending emails into the void” when reporting their claims to law enforcement.<sup>18</sup> While the FBI files provided in the article written by Jim Edwards are significantly redacted, making it difficult to discern exactly why prosecutors dropped these cases, the fact that the victims on the receiving end of this issue are without an effective legal solution for their suffering indicates how problematic this result is.<sup>19</sup> Moreover, it indicates how little consideration is given to the victims’ desire to lead their lives without undue fear of unknown strangers imbued with a deleterious desire to cause harm.<sup>20</sup>

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she has been stuck with the burden of “explaining the Internet” to law enforcement, and she even had to remove her game studio from a conference after police refrained from increasing security after she had shown them the various death threats she had received. Anita Sarkeesian, a feminist critic of the way that women are portrayed in video games, received rape threats and death threats after speaking out about popular games falling into misogynistic troughs. After she had received an email from an anonymous sender threatening “the deadliest school shooting in American history” if she spoke at a college event, Sarkeesian canceled her public appearance).

15. *See id.*

16. Jim Edwards, *FBI’s ‘Gamergate’ File Says Prosecutors Didn’t Charge Men Who Sent Death Threats to Female Video Game Fans—Even When Suspects Confessed*, BUS. INSIDER (Feb. 16, 2017, 5:12 AM), <https://www.businessinsider.com/gamergate-fbi-file-2017-2/#october-15-2014-another-of-the-usu-threats-no-amount-of-extra-security-or-bag-checks-is-going-to-stop-us-from-killing-dozens-of-people-at-redacted-if-you-choose-to-allow-it-89> [<https://perma.cc/4FS6-2NLY>] (discussing one instance where a perpetrator confessed to the FBI to making numerous online rape and death threats against women in the gaming community; he confessed that he knew it was a crime to send threatening communications and that he would never do so again. The FBI subsequently let him go without punishment.).

17. *Id.*

18. *Id.* (explaining that even after getting a Gamergate suspect to confess on video to calling a woman “40–50 times with threats,” the FBI let him off the hook after he simply apologized to them).

19. *Id.*

20. ZOË QUINN, *CRASH OVERRIDE 50* (2017) (discussing the harassment issued against victims of online abuse generally: “[t]his kind of behavior is not just about terrorizing



This mob collective, hiding behind the Gamergate hashtag, catalyzed an avalanche of harassment against female gamers and game developers.<sup>21</sup> This harassment against female gamers and developers was not something that was necessarily new.<sup>22</sup> However, Gamergate shed more light on an industry in which it seems that many participants function within the penumbras of moral darkness. The examination of Gamergate and other instances of cyberharassment against female gamers and game developers shows that some sort of legal redress is owed to this group of American citizens, as the current options available to them are not sufficient.

### I. THE UMBRELLA OF CYBERHARASSMENT AND WHERE FEMALE GAMERS AND DEVELOPERS STAND IN A STORM OF INTERNET HARASSMENT

The broad umbrella of cyberharassment as a proscription should provide substantial coverage to female gamers and developers weathering a torrential internet hate storm. And yet, this class of Americans still is not fully protected in this targeted tempest.<sup>23</sup> Cyberharassment, also referred to as cyberstalking, is federally defined under 18 U.S.C. § 2261A, as a person intentionally placing another person in reasonable fear for the life of that person, his or her immediate family, or his or her significant other, or causing significant emotional distress, through electronic communication.<sup>24</sup> This speaks directly to the plight suffered by many female gamers and developers.<sup>25</sup>

On one end of the spectrum, an understandable—albeit frustrating—concern that enacting measures to quell the frequency of cyberstalking will elicit some sort of chilling effect on the speech of male

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you; it's about control. It's about making you want to disappear, instilling fear, and limiting your possibilities. It's about punishing you for stepping out of line. It's about isolating and hurting you in specific ways to provoke a reaction. . . . [v]iolence is just one way that people control their victims. Instilling fear, breaking down their sense of safety and self-worth, and silencing are others.”)

21. Jason, *supra* note 1.

22. See, e.g., Kelleher, *supra* note 5.

23. See Jason, *supra* note 1.

24. 18 U.S.C.S. § 2261A(1)(A)–(B) (LexisNexis 2013).

25. For example, Hafu Chan, a well-known female eSports figure, discussed in an interview the harassment she experienced as a 17-year-old gamer. She shared that “at 17, it was really hard for me to deal with it. There was actually a team name on [a] tournament realm called ‘Gonna Rape Hafu At Regionals.’ I was 17 at the time, but I got turned off from competing, because harassment sucks. And, there’s nothing you can do about it, though. People aren’t going to change.” FUSION, *Real Future: A Female eSports Champion Speaks Out About Harassment (Episode 7)*, YOUTUBE (Feb. 17, 2016), <https://www.youtube.com/watch?v=y0WIE-ySC7c>.

gamers and developers will likely arise. Naturally, the concern would be that as a result of enacting protective measures and restraints, a gaming environment would form with little, if any, interaction between gamers and developers, which could be detrimental to the overall engagement in the industry. However, limiting the breadth of the interaction to just gaming by assuming a juvenile mentality held by some members of the gaming community, is probably not an entirely fair judgment on those gamers. With that in mind, presented here with such an issue, there are clear First Amendment concerns about what can legitimately be done as a remedy within its constitutional scope.

#### *A. Federal Statutes in Play—Is Enough Being Done?*

There are certain existing federal statutes passed with the purpose of addressing and regulating harassment as an issue generally, both on and off the Internet. Thus, these statutes are relevant to how female gamers and developers could legally defend themselves against the online harassment they receive in the gaming industry. An example of such a statute is the Interstate Communication Act (hereinafter “The Act”).<sup>26</sup> The Act serves to prevent extortion conducted through interstate communication.<sup>27</sup> At the time of the statute’s creation, the Internet as it is known today was not yet born into existence;<sup>28</sup> that being said, the statute also included provisions proscribing threats issued through interstate communication.<sup>29</sup> Considering its proscription of certain speech, Section (c) of this statute led courts to apply an objective test to determine whether a particular communication contained a true threat, assessing whether a reasonable person “who is familiar with context would interpret [the] statement as threat of injury.”<sup>30</sup> This section does not require the person making the threat to have a “discernible purpose for communicating such intention.”<sup>31</sup> Under Section 875(c),

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26. Interstate Communication Act, 18 U.S.C.S. § 875 (LexisNexis 1994).

27. *Id.*

28. Evan Andrews, *History Stories: Who Invented the Internet?*, HISTORY (Dec. 18, 2013), <https://www.history.com/news/who-invented-the-internet> [<https://perma.cc/V8XF-Y7VK>] (discussing how the early stages of the Internet came about in the late 1960s through ARPANET, while, the online world as it is more commonly known today came about in 1990 as the World Wide Web); *see also* 18 U.S.C.S. § 875 (showing that the statute came about in 1948 and was last amended in 1994).

29. 18 U.S.C.S. § 875(c).

30. *Id.* § 875 n.5 (citing *United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012)).

31. *Id.* (citing *United States v. Jongewaard*, 567 F.3d 336, 340 (8th Cir. 2009)).



courts have held that while it is necessary to show either proof of an intent to threaten or an intent to communicate a threat in order to violate the statute, it is not necessary to show proof of an intent or capability to actually carry out the threat in order to violate the statute.<sup>32</sup>

Section 875(c), though not explicitly referencing the Internet, can also be applied to internet communications (such as posts made online through social media platforms to other users).<sup>33</sup> This section of the statute reads as follows: “Whoever transmits in *interstate* or foreign commerce any *communication* containing any threat to kidnap any person or *any threat to injure* the person of another, shall be fined under this title or imprisoned not more than five years, or both.”<sup>34</sup> The Internet can be said to be interstate in nature considering the ease with which it can connect people to information and goods, as well as other people across states (and, undoubtedly, worldwide).<sup>35</sup> It follows, then, that harassing language and threats communicated online to female gamers and game developers in the industry fit squarely under the “interstate” classification.<sup>36</sup> It might seem trivial and oversensitive for some harassment disseminated online to be categorized as threats. However, the point of communicating that threatening language would arguably be to elicit a specific reaction (i.e., getting the person receiving the communication to stop doing or refrain from doing something).<sup>37</sup> If a reasonable

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32. MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 133 (The MIT Press 2003) (“Most of the federal courts of appeals have held that Section 875(c) is a ‘general-intent crime,’ which means the government needs only to prove beyond a reasonable doubt that the defendant intended to *communicate* the words in question. They don’t need to prove that the defendant intended the words to be *understood as a threat.*”); see also Romualdo P. Eclavea, Annotation, *Validity, Construction, and Application of 18 U.S.C.A. § 875(c), prohibiting transmission in interstate commerce of any communication containing any threat to kidnap any person or any threat to injure the person of another*, 34 A.L.R. Fed. 785, \*2 (2017).

33. See *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015).

34. 18 U.S.C.S. § 875(c) (emphasis added).

35. Valeria G. Luster, *Let’s Reinvent the Wheel: The Internet as a Means of Interstate Commerce* in *United States v. Kieffer*, 67 OKLA. L. REV. 589, 590–91, 597 (2015) (discussing that technically, the interstate aspect of the internet as it pertains to interstate commerce has not been fully addressed by the Supreme Court. The Tenth Circuit handled a case, *United States v. Kieffer*, wherein it had to determine whether use of the Internet satisfied the Interstate Nexus under the federal wire fraud statute. The court held that the government had to prove that the Internet connection actually traveled across state lines. Ultimately, however, federal courts are still uncertain about the application of criminal statutes to Internet use).

36. See U.S. DEPT. OF JUST. CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999), [https://cyber.harvard.edu/vaw00/cyberstalking\\_laws.html](https://cyber.harvard.edu/vaw00/cyberstalking_laws.html) [<https://perma.cc/M8GR-YXU8>].

37. Along this vein of thought, it can be argued that trolls and other participants in the gaming industry communicating harassing language are doing so to get female gamers

person would feel as though he or she were put in fear of some sort of harm by way of the communication, then the communication has met the requirements of a threat.<sup>38</sup>

As far as the 2014 Gamergate controversy is concerned, the communications of Gjoni and the invisible mob collective behind Gamergate toward Zoe Quinn were made intentionally and with the aim of putting Quinn, and other female gamers and developers in the industry speaking out against harassment, in fear of potential violence.<sup>39</sup> Even in consideration of the foregoing, the Interstate Communication Act is not sufficient as it currently stands to address this issue.<sup>40</sup> The statute is not specific enough; while it can be applied to include harassment against female gamers because it is broad in scope, the purpose behind the statute was not originally made to address the particular issue of online harassment.<sup>41</sup> Additionally, the statute does not address the issue of the anonymity of internet users, which is an important component to the complexity of dealing with Gamergate and other instances of cyberharassment against female gamers and developers.<sup>42</sup> Thus, an amendment to the statute—or the creation of another subsection or statute—may be helpful to provide guidance for this area of harassment.

Another federal statute in effect that is relevant to this examination is 18 U.S.C.S. § 2261A (Stalking).<sup>43</sup> This statute provides that whoever uses a “computer service or electronic communication service or electronic communication system of interstate commerce” with an “intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person,” that puts another person in “reasonable fear” of death or injury or causes significant emotional distress, shall be culpable and punished under 18 U.S.C.S. § 2261(b).<sup>44</sup> This is a step up from § 875(c) in that its language is more specifically targeted at communications made online. The weakness that this statute shares with § 875(c) is its failure to address the anonymity affecting the communications, and the relationship of such anonymity to the First Amendment’s scope of protection.

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and game developers to stop speaking out against harassers or to leave the industry altogether. See Jason, *supra* note 1.

38. See *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012).

39. Jason, *supra* note 1.

40. See *generally* 18 U.S.C.S. § 875.

41. See *id.*

42. See *id.*

43. See 18 U.S.C.S. § 2261A (LexisNexis 2013).

44. *Id.*

*B. How Various States in the United States Attempt to Address Cyberharassment—Is Variance the Way to Go?*

Forty-nine out of the fifty states in the United States have laws tackling cyberharassment or cyberstalking.<sup>45</sup> However, even with ninety-eight percent of the nation implementing these statutes, the country still lacks a precise explanation of what qualifies as cyberstalking or cyberharassment.<sup>46</sup> Legislators of some states have amended their current statutes, proscribing general harassment and stalking, to include provisions that reference harassment and stalking taking place over the internet or via another electronic device.<sup>47</sup> Meanwhile, legislators of other states have decided to enact new legislation wherein they explicitly distinguish statutes pertaining to the traditional forms of harassment and stalking from cyberharassment and cyberstalking.<sup>48</sup> Owing to the fairly new additions of cyberharassment and cyberstalking legislation and to the differing strategies undertaken by the states to deal with these issues, there is no consensus on a concrete, collective definition of cyberharassment or cyberstalking.<sup>49</sup>

As it pertains to the gaming industry, the variance of how states address these crimes is of particular import, as certain states are considered to be more of a gaming hub in comparison to other states, indicating that the cyberharassment and cyberstalking statutes in those gaming hub states would likely be considerably relied upon by female gamers and game developers in those areas.<sup>50</sup> States such as New York, Washington, and Texas are notable for their video game development scenes.<sup>51</sup> Each of these states, however, differ in their

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45. Steven D. Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis*, 7 INT'L J. CYBER CRIMINOLOGY 155, 159 (2013) (noting that the one state missing is Nebraska, which maintains a traditional stalking and harassment statute that does not mention electronic communication).

46. *Id.* at 156.

47. *Id.* (discussing that such extant statutes are not named specifically for cyberstalking or cyberharassment, but are named for stalking or harassment generally).

48. *Id.* at 156.

49. *Id.* at 157 (noting that while there is no consensus, there are general themes that are fairly consistent across the states. In regards to cyberharassment, the legal understanding is that this crime usually includes “engaging in an act or behavior that torments, annoys, terrorizes, offends, or threatens an individual via email, instant messages, or other means with the intention of harming that person.”).

50. For example, Seattle, Washington, is home to some of the largest video companies, and women game developers have also “enjoyed leading roles in developing some of the most popular video game titles, including the Halo, Half-Life, Left 4 Dead and Portal franchises.” Kelleher, *supra* note 5.

51. John Gaudiosi, *The 10 Most Successful States for Video Game Development*, FORTUNE (Feb. 24, 2015), <http://fortune.com/2015/02/24/10-successful-states-video-game-development> [<https://perma.cc/HVL5-X7W5>].

respective statutes in place to address the crimes of cyberharassment and cyberstalking.

New York, a gaming hub that is the home of thirty-nine development studios and is responsible for contributing \$378.5 million to the gaming sector of the economy as of 2015,<sup>52</sup> has two general harassment statutes in place that focus on the repetitive nature of harassing behavior against a victim.<sup>53</sup> New York also has a cyberharassment statute that is concerned with a student's well-being in a school environment.<sup>54</sup>

Washington, which serves as the main headquarters for Nintendo USA and Microsoft,<sup>55</sup> and which is the location for eighty-six video-game development studios,<sup>56</sup> has a general harassment statute<sup>57</sup> under which cyberharassment could technically fit, as there is a mention of "words or conduct" that "[p]lace a] person threatened in reasonable fear that the threat will be carried out" that includes "electronic communication."<sup>58</sup> However, Washington also has in place a particular cyberstalking statute that outlines provisions that distinguish between cyberstalking as a misdemeanor and cyberstalking as a felony.<sup>59</sup>

Texas, the location of 118 development studios and responsible for an economic contribution of \$764.9 million,<sup>60</sup> is the only state of the three discussed here that has a very explicit harassment statute that particularly defines "electronic communication[]" in the context of harassment,<sup>61</sup> though the statute does not specifically reference "cyberstalking" or "cyberharassment" in its terms.<sup>62</sup>

For most of the forty-nine states that have these statutes, the existence of fear in a victim constitutes evidence of harassment or stalking activity.<sup>63</sup> Additionally, each of the states that have extant cyberharassment or cyberstalking statutes mention the state of fear brought out of the victim.<sup>64</sup> Underlying these statutes is a "reasonable person standard" through which a victim's response to a harasser's behavior can be analyzed.<sup>65</sup> If a reasonable person would feel a sense

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52. *Id.*

53. *See* NY PENAL LAW § 240.25 (Consol. 2018); *see also* NY PENAL LAW § 240.26 (Consol. 2018).

54. *See* NY EDUC. LAW § 11 (Consol. 2013).

55. Gaudiosi, *supra* note 51.

56. *Id.*

57. *See* WASH. REV. CODE ANN. § 9A.46.020 (LexisNexis 2018).

58. *See id.* § 9A.46.020(1)(b).

59. *See* WASH. REV. CODE ANN. § 9.61.260 (LexisNexis 2018).

60. Gaudiosi, *supra* note 51.

61. *See* TEX. PENAL CODE ANN. § 42.07(b) (LexisNexis 2017).

62. *See id.*

63. Hazelwood & Koon-Magnin, *supra* note 45, at 164.

64. *See id.*

65. *Id.*

of fear as a consequence of the harasser's behavior, then such fear-inducing behavior would fall under the classifications of cyberharassment or cyberstalking.<sup>66</sup>

*C. How the First Amendment Is Implicated in the Plight of Female Gamers and Developers*

*What value could they possibly be adding to your platform that justifies allowing them to harass other people off it?*

—Zoe Quinn in response to a tech platform.<sup>67</sup>

On the one hand, it seems the obvious solution to restrict harassing speech that is causing harm to a segment of the American populace. However, there also exists a potent fear of encroaching on the rights of the American citizen because of the existence of First Amendment protections.<sup>68</sup> The First Amendment free speech protection is not absolute in its power.<sup>69</sup> The key point of the free speech clause of the amendment is to allow the latitude for citizens to publicly criticize the government.<sup>70</sup> The protection is from the government performing acts that serve to deprive citizens of their speech, but it is not protection from anybody else other than the government.<sup>71</sup>

The critical issue to consider is how far this country is willing to push the boundary line that divides protected speech from unprotected speech,<sup>72</sup> as there is ambiguity in how the First Amendment

66. *Id.*

67. QUINN, *supra* note 20, at 133.

68. See THOMAS LUNDMARK, *POWER & RIGHTS IN US CONSTITUTIONAL LAW* 128 (2d ed., Oxford University Press 2008).

69. William M. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction*, 71 A.L.R. 6th 471, \*2 (2012) (“Free speech protection is not absolute; even protected speech is not equally permissible in all places and at all times, and does not give absolute protection to every individual to speak whenever or wherever he or she pleases or to use any form of address in any circumstances that he or she chooses.”).

70. See *id.* at \*3.

71. See *id.* at \*2.

72. In consideration of how far the line dividing protected speech from unprotected speech extends, consider the very recent ‘deepfakes’ video editing trend, wherein “pornographic videos [are] manipulated so that the original actress’s face is replaced with somebody else’s” through AI machine-learning technology. Dave Lee, *Deepfakes Porn Has Serious Consequences*, BBC (Feb. 3, 2018), <https://www.bbc.com/news/technology-42912529> [<http://perma.cc/38BZ-WWL3>]. The tools that allow for this media phenomenon have become significantly easier to use over time; the high-quality editing of sexually graphic video images for deepfakes have most commonly used celebrity images, but can easily use *anyone’s* image so long as clear photos of the target person are used (and given the current social media age, finding pictures of someone online is unfortunately easy to do). *Id.* Arguably, the slight possibility of the use of deepfakes to harass and threaten women in the gaming industry would only serve to further complicate the fight against cyberharassment, as the validity of the created videos would continuously come into question.



applies in this context.<sup>73</sup> As alluded to earlier, there is a concern about a chilling effect arising from restrictions on free speech.<sup>74</sup> However, as it pertains to harassment speech made against female gamers and developers, such harassment speech would not necessarily be restricted through possible sweeping federal legislation—only where and to whom the speech is made would be restricted. A government pursuit to address this issue would not be driven by the government’s disagreement with the political opinions or beliefs of the American people:

neither the federal government, nor (after the First Amendment was extended to the states) any state government, may suppress speech, writings, or organizations simply because the government disapproves of the message communicated or espoused by the communication or organization; and concomitantly, the government may not, ever, require citizens to express or adhere to any ideas or values simply because the government supports them.<sup>75</sup>

The American government would not have the power to infringe upon the freedom of expression of its citizens simply because it is offended by particular viewpoints.<sup>76</sup> The American system of democracy has been said to require “uninhibited debate”<sup>77</sup> in order to function appropriately, and that such “debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks.”<sup>78</sup>

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73. LUNDMARK, *supra* note 68, at 142 (“Questions of whether something is or is not protected speech generally arise in the context of government regulation.”).

74. See Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1579 (2007).

75. ASHUTOSH BHAGWAT, *THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS* 83–84 (Oxford University Press 2010).

76. FRED H. CATE, *THE INTERNET AND THE FIRST AMENDMENT: SCHOOLS AND SEXUALLY EXPLICIT EXPRESSIONS* 37, 37 (1998) (“Congress, prosecutors, and courts are forbidden from sanctioning expression merely because it conveys an idea, advocates an action, or reflects a vision of society that they find reprehensible. Instead, under the marketplace principle, expression may be regulated only because of the tangible harm it causes and, even then, only with the greatest care and restraint.”).

77. There should be a pervasive understanding that the absolutist approach to free speech does not constitute an appropriate or accurate reading of what is provided by the First Amendment. It is one thing to foster uninhibited debate in order to challenge differing views in the marketplace of ideas, but it is a whole other thing to employ speech for the sake of actively inhibiting other participants from engaging in the marketplace, wherein the focus is not on challenging ideas to arrive at the truth, but instead on a corrosive silencing and preventing people of a different trait (female gamers) from participating in a space that should be open to them.

78. LUNDMARK, *supra* note 68, at 138 (quoting *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Arguably, there is a difference between allowing for uninhibited political debate for the sake of fostering the democratic process and allowing a free-for-all space filled with threats and caustic attacks on a person’s humanity. It is difficult to say that the latter is necessary, at all, to promote political dialogue and civic engagement.



In regards to the hands-off approach to regulating speech, there needs to be a consideration as to where tangible and palpable harm can be distinguished from hypersensitivity; when issues concerning harassment against women arise (as they do in the lives of female gamers and developers), they are simply swept dismissively under the rug of socially acceptable moral depravity.<sup>79</sup> Such a realization should signal that something in the interpretation and practice of these protections is not functioning the way it ought to be for the sake of preserving the rights of all American citizens equally, especially if a class of citizens—female gamers and developers—is being subjected to severe harassment while being active members of a lucrative economic industry.

The First Amendment is fairly broad in the way it was constructed;<sup>80</sup> it has been interpreted by the Supreme Court to constrict the government's reach in a potential power grab and to stop the government from "restricting expression prior to its utterance or publication or merely because the government disagrees with the sentiment expressed."<sup>81</sup> A key factor to consider in understanding the extent of the First Amendment's protections is the government's interest in curbing or criminalizing severely offensive speech as harassment speech. There needs to be a consideration of "whether the government's justification is legitimate and outweighs the individual's constitutional interest in free speech."<sup>82</sup> Cyberharassment virtually prevents female gamers from participating fully in an activity which they have the same right to as everybody else. If the analytical scope of cyberharassment is broadened to consider the economic impact that preventing sweeping legislation could have (for instance, the possible exclusion of a substantial percentage of gamers from a profitable gaming industry that may negatively impact American gaming businesses),<sup>83</sup> then it follows that Congress would have

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79. Edwards, *supra* note 16 (showing that the FBI considered the threats to be a joke and refrained from prosecuting the various cases of cyberharassment against female gamers).

80. See *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844 (1970).

81. CATE, *supra* note 76, at 40.

82. CHRISTOPHER E. SMITH, *CONSTITUTIONAL RIGHTS: MYTHS AND REALITIES* 80 (Thomson Wadsworth 2004).

83. *Distribution of eSports Fans in the United States as of April 2016, by Gender*, STATISTA, <https://www.statista.com/statistics/494877/distribution-of-esports-fans-gender-usa> [<https://perma.cc/P5DQ-DCM7>] (indicating that as of 2016, eSports spectators and gamers collectively are overwhelmingly male, and eighty-one percent of the eSports spectators in the U.S. identify as men); see also *2017 Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS'N, [https://www.theesa.com/wp-content/uploads/2017/04/EF2017\\_FinalDigital.pdf](https://www.theesa.com/wp-content/uploads/2017/04/EF2017_FinalDigital.pdf) (examining just the gamer population, forty-two percent of gamers in the U.S. identify as women).

a compelling government interest—maintaining public order—to step in and do something significant in this area.

1. “*True Threats*”: Does Cyberharassment Against Female Gamers and Developers Rise to This Magnitude?

*What is a threat must be distinguished from what is constitutionally protected speech.*<sup>84</sup>

The concept of “true threats” exists as a bulwark to help regulate harassing speech; the issue, as it pertains to female gamers and developers, is whether the harassing language communicated to that class of citizens rises to the level of a “true threat.”<sup>85</sup> A “true threat” has been defined as a communication where the speaker means to seriously express “an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>86</sup> The person making the communication does not actually need to intend to bring the communicated threat to fruition; the purpose of proscribing true threats at all is to protect people from both the unwelcome fear of potential acts of violence brought against them and the calamitous disorder wrought by that fear.<sup>87</sup> For example, the cross-burning symbolic speech prosecuted in *Virginia v. Black*, which on its face can be considered hate speech, historically has been used with the intention of intimidating a group of individuals; however, it has been argued that sometimes cross-burning is representative of an ideology or group solidarity, meaning that if such symbolic speech were employed at a political rally it would likely maintain First Amendment protection.<sup>88</sup>

Still, a distinction must be drawn between the above-mentioned kind of speech and the speech conveyed through cyber platforms. Cyber threats of violence (including cyber threats of sexual violence) are not made for the sake of generating socially beneficial political debate or contemplation; these threats impart fear as potential steps toward sexual violence and more.<sup>89</sup> For example, in *Elonis v. United States*, an aspiring rap artist wrote and posted explicit and violent song lyrics to a public internet platform (i.e., Facebook) that were directed at his wife, coworkers, and at state and federal law

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84. GODWIN, *supra* note 32, at 134.

85. *Virginia v. Black*, 538 U.S. 343, 343, 345 (2003) (holding by plurality decision that a law stating that cross-burning was prima facie proof of an intent to intimidate a group of people was an unconstitutional restriction on speech).

86. *Id.* at 359.

87. *Id.* at 360.

88. *See id.* at 365–66.

89. Jason, *supra* note 1.

enforcement officers.<sup>90</sup> The posts were reported to the FBI, and Elonis was subsequently arrested and later charged under 18 U.S.C.S. § 875(c).<sup>91</sup> While the Third Circuit affirmed and ruled that only the “intent to communicate words that the defendant understands, and that a reasonable person would view as a threat,” would be necessary under 875(c), the Supreme Court reversed the conviction, finding that a consideration of subjective intent is necessary to determine whether a threat is a true threat.<sup>92</sup>

An issue with the above ruling is that it muddies already contentious waters—it creates a gray area in the law, as it is not entirely clear whether proof of a harasser’s mental state is actually required under the First Amendment.<sup>93</sup> Most federal courts understand 875(c) to require a general intent (i.e., objective intent); however, the Supreme Court muddied the waters here and did not clarify the extent to which subjective intent to threaten mattered under 875(c).<sup>94</sup> With regards to the harassment against female gamers and developers online, the concern that arises from this is that the ability to prosecute harassers<sup>95</sup> is significantly diminished, as proving their subjective intent would be starkly difficult, and the likelihood for no redress for the victims would thus increase.<sup>96</sup>

*2. Anonymity, Threats, and the First Amendment: The Contentious Crossroads Facing Female Gamers and Developers*

*Every woman I know in the industry is terrified she will be next.*

—Brianna Wu, discussing the impact of the Gamergate mob.<sup>97</sup>

90. *Elonis v. United States*, 135 S. Ct. 2001, 2002, 2005–06 (2015).

91. *Id.* at 2002, 2006–07.

92. *Id.* at 2007. “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.” *Id.* at 2012.

93. Ken White, *Lawsplainer: What the Supreme Court Didn’t Decide About True Threats in Elonis*, POPEHAT (June 1, 2015), <https://www.popehat.com/2015/06/01/lawsplainer-what-the-supreme-court-didnt-decide-about-true-threats-in-elonis> [<https://perma.cc/EQY3-QVYF>].

94. *See, e.g., Elonis*, 135 S. Ct. at 2013; Adam Liptak, *Supreme Court Overturns Conviction in Online Threats Case, Citing Intent*, N.Y. TIMES (June 1, 2015), <https://www.nytimes.com/2015/06/02/us/supreme-court-rules-in-anthony-elonis-online-threats-case.html> [<https://perma.cc/BYV2-DCUD>].

95. This is in reference to online harassers whose identities are actually known.

96. *See* GODWIN, *supra* note 32, at 133 (discussing the general intent interpretation of 875(c): “it keeps defendants from threatening to rob banks or hijack planes or kill people and then claiming at trial simply to have been misunderstood. (‘I didn’t mean for you to be threatened—I was just engaging in performance art!’)”).

97. Brianna Wu, *Rape and Death Threats Are Terrorizing Female Gamers. Why Haven’t Men in Tech Spoken Out?*, WASH. POST (Oct. 20, 2014), <https://www.washingtonpost.com>

A critical factor that makes addressing cyberharassment against female gamers difficult is the anonymity aspect of communicating through online platforms.<sup>98</sup> Having the capacity to identify perpetrators online would allow for quicker resolution of cases of cyberharassment; however, the concept of anonymity presents a roadblock here, as it bumps up against the scope of the First Amendment.<sup>99</sup> In recognition of this perceived and assumed First Amendment protection, many online platforms allow their users to participate anonymously via chat, instant messaging, and other communication features.<sup>100</sup> The assumptions in play are that people typically seek out these media features for the purpose of communicating with other people, not for the purpose of causing trouble or harassment, and that they want to attach their identities to the messages they send or post.<sup>101</sup> On the one hand, there is the time-honored view that the freedom of speech is intrinsically wed to the freedom to conduct speech anonymously, as seen, for example, in the pseudonymously penned *Federalist Papers*.<sup>102</sup> In consideration of this view, it may not necessarily be the most effective move to wholly divorce the ability to remain anonymous from the ability to engage with others through online platforms; anonymity understandably allows for online users to consolidate and communicate with a community without the added tinge of judgment usually attached to the prospect of interacting with others offline.<sup>103</sup>

Yet, on the other hand, the societal threat posed by anonymous online communication is irresponsible speech meant to cause harm.<sup>104</sup>

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/posteverything/wp/2014/10/20/rape-and-death-threats-are-terrorizing-female-gamers-why-havent-men-in-tech-spoken-out/?utm\_term=.6464d7dda52e [https://perma.cc/52SS-D3HJ] (discussing the Gamergate movement: “They’ve taken down women I care about one by one. . . . They’ve threatened to rape me. They’ve threatened to make me choke to death on my husband’s severed genitals. They’ve threatened to murder any children I might have.”).

98. GODWIN, *supra* note 32, at 149 (“[A]nonymity is a right guaranteed by the Constitution and the belief that privacy creates better social relations and improves society by enabling sensitive communications. On the flip side is the concern that law enforcement efforts necessary to protect society from criminals . . . will be stymied by law enforcement’s inability to gain access to communications or identities.”).

99. *Id.* at 143 (“The U.S. Supreme Court has held on more than one occasion, for example, that your right to speak anonymously—that is, without any requirement to identify yourself—is an important component of Americans’ speech rights under the First Amendment.”); see *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 334, 357 (1995) (holding that an Ohio law prohibiting the distribution of anonymous political literature was unconstitutional pursuant to the First Amendment).

100. GODWIN, *supra* note 32, at 144–47 (“The very way the Internet is structured creates many opportunities for informed users to speak or act anonymously.”).

101. *Id.* at 145.

102. *Id.* at 150–51.

103. QUINN, *supra* note 20, at 45 (discussing the online platform Reddit and how its “subreddit” discussion model allows for people to find community and solidarity sans stigma).

104. *Id.*

Anonymity presents a double-edged sword in that it props open the door of opportunity for harassment and less-than-savory activity of users against other users, to the detriment of the online community (and particularly the gaming community) overall.<sup>105</sup> Anonymity in this regard provides the latitude for such societal threats to manifest and spread without consequence or accountability.<sup>106</sup> As it relates to the gaming world, online anonymity makes it increasingly difficult, if not altogether impossible, to identify and hold responsible members of the gaming and eSports population who harass and threaten their female-identifying counterparts.<sup>107</sup>

On its face, the prospect of removing online anonymity sounds like a feasible means to curtail abuse, if only to assist in the identification of abusers. However, the concern with such a removal is that it could inadvertently remove protections for persons relying on anonymity to avoid abuse themselves (such as persons enduring mental health issues).<sup>108</sup> Therefore, this presents an obstacle to female gamers and developers finding a solution to the online harassment issued towards them—the concern is whether the loss of anonymity while communicating on platforms is worth the safety of and peace of mind for female gamers and developers. With the above considered, it should be.

## II. PROPOSAL FOR CHANGE

*Right now, the loudest voices for change are the people who have already been hurt by this issue. We have the motivation . . . [b]ut it's not fair for us to continue to do the heavy lifting.*<sup>109</sup>

—Zoe Quinn

In consideration of the foregoing, federal legislation should be drafted and enacted to alleviate this issue against female gamers and developers, as the current cyberharassment laws in existence are simply not sufficient. As well, nationally enforced social media

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105. *Id.* at 47 (“While one 4chaner might gleefully post racial slurs and swastikas in an attempt to be shocking without any intention of hurting anyone, the next user might be sincerely hateful and arguably enabled by the permissive nature of the site. This dynamic means that hate speech and threats issued online are a lot like an ominous shadow in a samurai movie—is it a normal passerby or a ninja coming to kill you? The danger might be real.”).

106. *Id.* at 46.

107. Jason, *supra* note 1.

108. QUINN, *supra* note 20, at 155.

109. *Id.* at 222 (emphasis added).



and internet communication education classes should be provided for, and required of, law enforcement officers and legal professionals in order to more adequately address the harassment against female gamers and developers. Lastly, increased online monitoring by moderators of gaming platforms and associated social media platforms should be implemented so as to ensure that all bases are covered on this issue.<sup>110</sup>

*A. Necessity of Proper Federal Legislation—A Minimum Standard*

As seen with the earlier-mentioned Interstate Communications Act (18 U.S.C.S. § 875)<sup>111</sup> and the Interstate Stalking Punishment Prevention Act (18 U.S.C.S. § 2261A),<sup>112</sup> the current federal statutes concerning harassing communications are not sufficiently structured to provide the appropriate redress to female gamers and developers who have been victims of online harassment. Having a nationally enforced minimum standard with a set definition of the crime and elements pertaining to culpability would make it significantly easier to deal with this issue, especially if the legislation specifically concerns the industry of gaming.

Considering that cyberharassment is such a prevalent issue within the gaming community, it should not be the case that only some gaming platforms in competitions instill measures to stop the harassment. Federal legislation proscribing such behavior should be in place to regulate the industry in this capacity. While the concerns about First Amendment restrictions will likely arise to attempt to refute this, the federal legislation would not actually be a complete restriction on speech by the government, but instead a regulation. The perpetrators would still maintain their individual ability to spew harassing language, but within the boundaries of their own company.

Harassers should not be able to actively target people, which is the sort of activity that such legislation would serve to deter. If this proposed legislation is put into place, it would merely quiet down the harassing cacophony and ultimately allow for a much better gaming experience and a much stronger presence in an economic

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110. If the current federal statutes were to stay in place, there would have to be some provisions added to them in order for there to be any sort of positive effect. These statutes have existed long before the Gamergate controversy took off, and yet these women have not been able to achieve appropriate manners of redress for their plight. If this responsibility is left to the discretion of the states, then that would run the risk of too much variance in enforcement, which could potentially allow for: (a) legal loopholes to form, and (b) offenders to slip through gaps caused by varieties in statutory language.

111. See generally 18 U.S.C.S. § 875 (LexisNexis 1994).

112. See generally 18 U.S.C.S. § 2261A (LexisNexis 2013).



venture, as people would not be dissuaded from participating in the industry. The harassers who believe that such a decrescendo would lead to them being silenced unfairly would still maintain their freedom to utter their harmful and dangerous comments to themselves and to their buddies, but not at the expense of the emotional and mental safety of, and economic opportunity to, female gamers and developers. It should be a compelling interest of the government to restrict this kind of speech. Again, while the concern about free speech protections is certainly valid, there needs to be a consideration that a segment of the population is not able to live their lives fully—which they are assuredly allowed to do under the protection of the Constitution—because another segment of the American population is actively working to infringe upon that right.

### *1. Counterarguments to a Nationally Enforced Minimum Standard*

A possible counterargument to this proposal could be that the proposed legislation would be so broad that essentially anyone who engages at all with the gaming industry would get swept up and would be subject to speech restrictions without a full awareness of whether what they are doing is prohibited behavior (i.e., people *commenting* on videos, streams of gameplay or on a female gamer's online post, as opposed to people communicating more directly with a female gamer or developer). Trash-talking under competitive jest and violent harassing speech should be, debatably, mutually exclusive. A way to address this will be discussed in a later section, referring to actions operators and hosts of gaming competitions can take to better monitor the behavior of the users of their gaming platforms.<sup>113</sup>

Another argument that may arise to counter the above-mentioned proposal is that federal statutes or state statutes that proscribe harassment would be unconstitutional because they would be necessarily discriminating based upon the specific content of the speech by targeting principally only those communicators who promote fear amidst an aura of toxic hostility.<sup>114</sup> However, because the First Amendment does not actually protect threats of violence,<sup>115</sup> that sort of argument proclaiming unconstitutionality would simply not hold up.

As previously suggested, federal legislation seems to be the best way to handle this issue, with the idea being that such legislation

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113. See *infra* Section III.C.

114. See *R.A.V. v. St. Paul*, 505 U.S. 377, 381, 391 (1992).

115. *Id.* at 388 (“[T]hreats of violence are outside the First Amendment.”).

will aid the states in protecting female gamers and developers—realistically, women overall. If people (i.e. gamers, developers, spectators) are going to engage in this industry at all, they would need to adhere to federally binding legislation that dictates how they conduct themselves or else risk being subject to punitive measures.

To connect this back to the Gamergate controversy, it is necessary to consider the nuances of internet communication when addressing problems created by the advent of such interpersonal communication. The federal statutes currently in place, as discussed earlier, had already been in place for a significant length of time by the time the Gamergate collective began launching its attacks against female gamers and developers.<sup>116</sup> This is indicative of an insufficiency in the reach of these statutes. While there should be a collective effort to pass legislation to remedy this issue afflicting female gamers and developers, regardless of the particular gender identity of the legislators, it may be beneficial for female gamers and developers to step into the legislative ring to continue fighting and advocating for change with a gumptious diligence.<sup>117</sup>

Considering that criminal issues are typically left to the states,<sup>118</sup> there is a concern that federalizing state crimes could fill up the federal courts and negatively effect the efficiency with which the federal courts adjudicate.<sup>119</sup> However, the potential for substantial variance in how cyberharassment against female gamers and developers could be prosecuted presents a notable risk that proper redress would not be achievable. Even in considering the federalization concern about applying a one-size-fits-all standard to deal with this issue, rather than leaving it to potential variance by the states, the ability to engage without fear of danger and harassment is something that merits a one-size-fits-all determination.

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116. See Jason, *supra* note 1 (indicating that the Gamergate controversy began in 2014); see also 18 U.S.C.S. § 875 (indicating the Interstate Communications Act, a federal statute, was last amended in 1994); 18 U.S.C.S. § 2261A (indicating the Interstate Stalking Punishment Prevention Act was established in 1996 and last amended in 2013).

117. See Jenavieve Hatch, *How Brianna Wu Went from Gamergate Victim to Congressional Candidate*, HUFFINGTON POST (Mar. 13, 2017, 2:10 PM), [https://www.huffingtonpost.com/entry/how-brianna-wu-went-from-gamergate-victim-to-congressional-candidate\\_us\\_58b5b430e4b060480e0c402c](https://www.huffingtonpost.com/entry/how-brianna-wu-went-from-gamergate-victim-to-congressional-candidate_us_58b5b430e4b060480e0c402c) [<https://perma.cc/L5BN-3BFU>] (discussing how female gamer and developer Brianna Wu, a Gamergate victim, decided to run for Congressional office to push for legislation to stop harassment: “[W]e need women to run for office and to vote with our lived experience. We need women doing that more than we need think-pieces or stories about harassment at this point. . . . Our voices aren’t heard. That’s a huge part of why I’m running.”); Steve Inskeep, *Time For Harassers to Be Held Accountable*, *Female Gamer Says*, NPR (Jan. 9, 2018, 5:06 AM), <https://www.npr.org/templates/transcript/transcript.php?storyId=576669374> [<https://perma.cc/TXC5-BK3M>].

118. See U.S. CONST. art. I § 8; see also U.S. CONST. amend. X.

119. JOSEPH F. ZIMMERMAN, *CONGRESS AND CRIME: THE IMPACT OF FEDERALIZATION OF STATE CRIMINAL LAWS* 108 (Lexington Books 2014).

*B. Nationally Enforced Education Regarding Social Media, Internet and Telecommunications for Law Enforcement Officers and Legal Professionals*

The next prong of the proposal suggests that in addition to the federal legislation, there should be nationally enforced social media/internet/telecommunications education classes for law enforcement officers and professionals in the legal field. As technology continues to advance and social life online becomes more and more mundane, it follows that law enforcement should have to remain up to date on developments pertaining to social media and internet communication trends. A victim of cyberharassment simply should not have to explain what a 'tweet' is to a law enforcement officer when the focus should be on the actual *threat* issued.<sup>120</sup> The SMILE Conference in Miami, Florida, for example, operates to train police officers in social media use and its relation to the public.<sup>121</sup> Putting a nationally enforced education program in place could serve to alleviate, at least partially, the hardships of female gamers and developers seeking a resolution to their harassment experiences.

*C. Increased Monitoring by Moderators of Gaming Platforms and Associated Social Media Platforms*

*As long as what's going on is legal, there's nothing we can do to effectively police it, because these things will always continue to exist on the Internet, because they'll always continue to exist in humanity.*

—Alexis Ohanian, co-founder of Reddit<sup>122</sup>

Lastly, as referred to previously, there should be increased monitoring by operators and hosts of gaming competitions and the associated gaming platforms to ensure that users are not participating in harassing behavior against other users (in this case, against female gamers).<sup>123</sup> Because of the vastness of the Internet, it is difficult to argue that harassment online will cease altogether if the moderators of these platforms act proactively to halt such abuse. It is hard to say that a mass collective of internet harassers would not

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120. See generally Jason, *supra* note 1.

121. SMILE CONFERENCE, <http://smileconference.com> [<https://perma.cc/F9NN-GTAQ>] (indicating that the SMILE Conference has global recognition for its social media training program for police officers).

122. QUINN, *supra* note 20, at 125 (emphasis added).

123. See *infra* Section III.C.

gather elsewhere, on separate platforms, to spew reprehensible bile from over there instead. The silver lining in that scenario is that this would be happening in a place away from the gaming space, meaning that at least within the boundaries of the gaming industry, the trend of female gamers being pushed out of the industry by fear of, or exasperation with harassment, would be meaningfully diminished.

*1. Counterarguments to Increased Monitoring by Moderators of Gaming Platforms and Social Media Platforms*

An issue that immediately arises from this proposed remedy is whether simply “doing the right thing” is incentive enough for owners and moderators of these platforms to endure further monitoring costs to ensure that their users are conducting themselves appropriately.<sup>124</sup> Arguably, looking ahead to long-term economic benefit, it could be worth it to bear such monitoring costs if this would encourage more female gamers and developers to enter and also remain actively involved in the industry.<sup>125</sup> Owners and leaders of gaming platforms and competitions may also argue that not only are there “Terms of Service” guidelines in place to act as a safeguard, but also that the players can employ self-policing mechanisms to ensure they are having an enjoyable experience participating in the gaming community.<sup>126</sup> The issue with this self-police policy is that female gamers should not *have* to self-police to simply participate as a player; they should not *have* to take this extra step and incur this additional burden just to ensure that they can remain active within the industry.

This is not to say that other male players do not experience harassment; on this side of the argument, male players often suggest

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124. QUINN, *supra* note 20, at 131 (discussing the apparent lack of moral incentive for platforms to act with haste against harassment: “[i]t often takes a major platform mere minutes to remove copyrighted material, but it can take years, dozens of victims, and targeting someone powerful enough to cause bad PR for the company for it to move on abusive content.”); see *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> [<https://perma.cc/GN9C-E33Y>] (regarding Facebook’s policies for regulating content); see also *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> [<https://perma.cc/5ARW-Y85P>] (concerning Twitter’s guidelines for its users regarding safety online); *Community Guidelines*, TWITCH, <https://www.twitch.tv/p/legal/community-guidelines> [<https://perma.cc/7SSR-QJAD>] (last modified Feb. 28, 2017) (disclosing the streaming service’s rules for its users).

125. Gregory Schmidt, *Esports Sees Profit in Attracting Female Gamers*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/technology/personaltech/video-game-makers-try-to-get-better-at-luring-women-to-esports.html> [<https://perma.cc/TK8Q-XCYE>].

126. See generally Extra Credits, *Harassment—Why Gaming Struggles to Escape Toxicity—Extra Credits*, YOUTUBE (May 20, 2012), <https://www.youtube.com/watch?v=Dt9GwmOWoqo> [<https://perma.cc/A7LW-3KW8>] [hereinafter Extra Credits]; see also QUINN, *supra* note 20, at 131–40.

that a player being harassed can just mute their audio to shield themselves from the barrage of vitriolic failings of human communication.<sup>127</sup> The critical difference is that it is more often the case that the male gamers do not feel legitimately threatened or concerned for their safety, whereas the female gamers, like Zoe Quinn, do.<sup>128</sup> Female gamers and developers should not have to endure that extra burden just to be able to participate in an industry that is supposed to be available to all citizens who consider themselves gamers and who want to be active participants in the gaming realm. Self-policing is clearly not sufficient; while players can mute their audio as they play, the harassment can still be disseminated through the next available online medium (i.e., a post, or a chat message).<sup>129</sup> If muting the audio is step one, then step two could be that the user will be blocked. However, what's to stop that same user from making a new username to continue spewing out harassment?<sup>130</sup> There needs to be some sort of mechanism in place to prevent the occurrence of these kinds of loopholes.<sup>131</sup> As well, even with strict Terms of Service guidelines in place, there still may not be adequate protection for female gamers, as there may be issues with a platform's particular design that inadvertently hurts, rather than helps, victims of abuse.<sup>132</sup> In cases where a user is frequently violating a platform's Terms of Service through engaging in harassing conduct, typically the platforms merely ask the user to remove the particular content and end the reprimand there.<sup>133</sup> This only hurts the victim of the harassment because the harassing user is still able to maintain an active account on the platform. Ultimately, completely removing the presence of the harassment would be beneficial not only for

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127. Extra Credits, *supra* note 126.

128. See Jason, *supra* note 1.

129. Malone, *supra* note 9.

130. See QUINN, *supra* note 20, at 141 ("Empowering people to moderate their own spaces is a good first step, but it can't be the end of the conversation. It's not easy to keep abusers away from their targets when they're forming mobs.")

131. For example, online harassment oftentimes occurs across online platforms, therefore, even if a victim successfully inhibits abuse on one platform, she is still subject to the mercy of abusers who take to other platforms to continue the onslaught of harassment. See *id.* at 141–42 ("The futility of fighting back on just one platform is like why going offline doesn't stop an abuse campaign—doing so won't stop SWATing, stalking, and all other forms of nastiness; it only forces targets of online abuse into nonparticipation and hiding. Putting the onus of safety solely on the targets allows unchecked abuse and silences important voices.")

132. *Id.* at 143 ("When tech companies remove abusive content, it can hurt victims in unforeseen ways. Is the abusive content stored anywhere? Can it be subpoenaed? Sometimes yes, sometimes no. Twitter's data-retention policy frequently discards reported abuse after the user is removed, and it becomes impossible to retrieve it.")

133. See generally *id.*



female gamers but for male gamers as well, because then an environment is created wherein no gamer would have to put up with the pervasive harassing behavior. It would serve to ensure an overall higher quality gaming experience for participants.

### III. ECONOMIC SALIENCE

Hostile acts of online harassment against female gamers and developers seem to be inimical to the economic interests of the gaming companies, investors, and to gamers overall.<sup>134</sup> The gaming industry is a booming industry.<sup>135</sup> In 2014, Americans had spent \$22.4 billion purchasing games, game consoles, and additional gaming items,<sup>136</sup> and that figure had reached \$30.4 billion by 2016.<sup>137</sup> Furthermore, the game company industry's value in the United States added over \$11.7 billion to the U.S. GDP in 2016.<sup>138</sup> While the gaming industry has been overwhelmingly male-dominated, with the development of, and pervasive spread of smartphones, the number of female gamers has grown exponentially.<sup>139</sup> More than half of gamers, as of 2018, are women.<sup>140</sup>

Allowing this harassment to persist and perpetuate would only hurt the interests of the market, as participants who would have otherwise participated in gaming—whether it be at the amateur level or at the professional eSports level—would remove themselves from the market.<sup>141</sup> Individuals identifying as women comprise a

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134. Yolanda L. Jackson, *Sexism in eSports*, HUFFINGTONPOST (Nov. 14, 2017, 3:46 PM), [https://www.huffingtonpost.com/entry/sexism-in-esports\\_us\\_5a0b55cee4b06d8966cf333e](https://www.huffingtonpost.com/entry/sexism-in-esports_us_5a0b55cee4b06d8966cf333e) [<https://perma.cc/LY8X-3VAE>] (discussing a top U.S. female gamer team, Team Digitas, that became the first U.S. eSports team to ever be backed by a professional sports team when an NBA team, the Philadelphia 76ers, indicated its interest).

135. This Note is focusing on the U.S. market, but to illustrate the economic breadth of this industry, it is necessary to briefly point to the market on the global scale. As of 2016, global revenue for the worldwide eSports market reached \$892.8 million, and by 2018, the market was expected to reach \$1.1 billion with the growth of direct revenue sources like amateur tournament platforms. Tom Grazing, *ESports Market Shows Global Growth in 2016*, PLAYING LEGAL (Jan. 16, 2017), <https://playinglegal.com/news/esports-market-shows-global-growth-2016-3535> [<https://perma.cc/WGY9-253Q>].

136. Kelleher, *supra* note 5.

137. *2017 Sales, Demographic, and Usage Data: Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS'N, [http://www.theesa.com/wp-content/uploads/2017/04/EF2017\\_FinalDigital.pdf](http://www.theesa.com/wp-content/uploads/2017/04/EF2017_FinalDigital.pdf).

138. *Id.*

139. Inskeep, *supra* note 117.

140. *Id.* It seems that Brianna Wu is referencing women gamers on a broader scale here, not just those within the scope of the United States.

141. Hansel V. A., *Asia Leads Global eSport Market in Revenues, SuperData Reported*, ITECH POST (Dec. 25, 2016, 8:39 PM), <http://www.itechpost.com/articles/68341/20161225/asia-leads-global-esport-market-in-revenues-superdata-reported.htm> [<https://perma.cc/PU>]



considerable sector of the gaming population in the United States: forty-one percent of U.S. gamers are women.<sup>142</sup> Women could be dissuaded from entering or remaining active in the gaming and eSports industry owing to the onslaught of harassment from trolls; this thereby potentially precludes these women from an opportunity to both engage in an activity of their interest and gain access to an exponentially growing economic venture.<sup>143</sup>

#### IV. MORALITY AND THE (MARKETPLACE) MORASS OF IDEAS IN THE GAMING CONTEXT

*The catcall is coming from inside the house.*

—Zoe Quinn<sup>144</sup>

As for a solution to address the toxicity enveloping the gaming industry, work needs to be done from the inside out. The environment for gamers has to be hospitable for all players in order for the culture to truly shift from an exclusive boy's club to an inclusive space void of metastasizing toxicity and glass ceilings.<sup>145</sup> While American society is in the midst of a cultural revolution by way of the #MeToo movement,<sup>146</sup> the gaming culture that exists within the boundaries of this cultural shift has more or less remained static and slow to change for the better.<sup>147</sup> In addition to the federal measures and

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K3-ND93] (discussing how online toxicity discourages many top-level female gamers from trying to become professionals. One of the main reasons Maria 'Remilia' Creveling, *League of Legends*' first professional female player, dropped out was due to online harassment).

142. See generally Nick Yee, *Beyond 50/50: Breaking Down the Percentage of Female Gamers by Genre*, QUANTIC FOUNDRY (Jan. 19, 2017), <https://quanticfoundry.com/2017/01/19/female-gamers-by-genre> [<https://perma.cc/4NJA-7TZ9>].

143. Inskip, *supra* note 117 (discussing Brianna Wu's experience with the gaming industry in the wake of Gamergate: "[W]hat ended up happening is women like myself that have been advocating for greater inclusion in our field, we received just an extreme avalanche of death threats and rape threats and really the destruction of our personal lives in a way that was just horrifying for many people to watch.").

144. QUINN, *supra* note 20, at 129.

145. See Ashley Oh, *An Overwatch Women's League Isn't the Answer*, POLYGON (Jan. 18, 2018, 11:18 AM), <https://www.polygon.com/2018/1/18/16896858/overwatch-league-women-esports-sexism-geguri> [<https://perma.cc/793R-82XP>].

146. See ME TOO, <https://metoomvmt.org> [<https://perma.cc/VFW8-RHJQ>] (describing the purpose of the #MeToo movement to bring attention to and an end to sexual assault against women).

147. Inskip, *supra* note 117 (comparing the gaming industry's position in its push for societal change to the #MeToo movement against sexual abuse and harassment: "[W]hen it comes to the game industry itself, we are not having a #MeToo moment at all. I think what a lot of women in the game industry saw with Gamergate is they saw if they came forward, help was not going to come. They saw that they will be out there on the front lines and, you know, you'll certainly have journalists that are happy to capture the spectacle. But as far as change, as far as getting backup from the industry, I think that they

other remedies proposed, it could bode well for operators of platforms within the gaming industry to clearly educate their users about the kinds of behavior that are and are not tolerated and why—this could diminish the frequency of the harassing behavior at issue.<sup>148</sup> The operators of these platforms should also include an advisement of the laws on the books proscribing such behavior with punitive repercussions. At arm's length, this might seem like a lot to ask of operators and owners, but in the long run these measures could ultimately help not only prevent large harassment lawsuits against them, but could also help ensure the overall enjoyment of users' experiences on their gaming platforms while rectifying an inequitable environment.

Looming over this capacity to rectify a morally inequitable environment, however, is the value placed upon the 'marketplace of ideas' when it comes to free speech.<sup>149</sup> The value on this marketplace has been, historically, notably high.<sup>150</sup> A marketplace of ideas that is open for participants to freely exchange ideas for the sake of fostering discourse can arguably be said to represent the ideal state in which free speech thrives and democracy breathes. However, it is a whole other situation wherein participants, aware of the purpose of the marketplace (and of what is freely traded at the marketplace), arrive with metaphorical bags of unfiltered filth to pass off as productive speech. The intention therein, arguably, is not to engage in a trade of ideas for the purpose of facilitating discourse; instead, it is to forcefully promulgate caustic hostility in a marketplace that was meant to aid in the persistence of productive democratic engagement. The marketplace would be a place where popularity dominates,<sup>151</sup>

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are scared to come forward because so many women have had their careers destroyed trying to come forward.”).

148. Jessica Famularo, *How One Twitch Channel is Fighting Abuse in the Gaming Community*, VICE (Aug. 29, 2016, 3:12 AM), [https://www.vice.com/en\\_us/article/wdbnpm/miss-clicks-inclusive-diverse-channel-anna-prosser-robinson](https://www.vice.com/en_us/article/wdbnpm/miss-clicks-inclusive-diverse-channel-anna-prosser-robinson) [<https://perma.cc/FFH4-5L34>].

149. The concept of the marketplace of ideas was brought to light by Justice Oliver Wendell Holmes as a part of his dissent in *Abrams v. United States*, wherein he stated, [b]ut when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

250 U.S. 616, 630 (1919); see also Dan McGee, *The 'Marketplace of Ideas' is a Failed Market*, MEDIUM (Feb. 13, 2017), <https://medium.com/@danmcgee/the-marketplace-of-ideas-is-a-failed-market-5d1a7c106fb8> [<https://perma.cc/86PQ-WNLP>].

150. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (referencing the experiment of the market of ideas: “[w]hile that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

151. McGee, *supra* note 149.

not truth, thus, a concern that logically follows is the possibility of unequivocal filth being forcefully popularized as ‘truth’ against the interests of female gamers and developers.<sup>152</sup>

Further, social power effectively dictates which, and whose, ideas persist in this metaphorical marketplace.<sup>153</sup> This factor “determines who gets a voice in the conversation and whose voice society hears.”<sup>154</sup> Thus, arguably, even a vocal minority<sup>155</sup> of the gaming industry—the vocal minority spewing threats and hurtful language towards female gamers and developers—could withhold enough social power in the ‘marketplace of ideas’ to control the conversation and effect who gets to participate in the marketplace in the first place.<sup>156</sup> This kind of control can inflict damage to those engaging with the marketplace; in particular, it can also dampen the concerns of the female gamers and developers receiving the harmful speech to the rest of the participants in the marketplace.<sup>157</sup> Further, speech geared to eradicate or diminish such social power and to increase another group’s social power produces negative externalities and thus impedes the efficiency of the marketplace.<sup>158</sup> Those creating the harmful speech, as well as those receiving it, will not assume the cost of this ‘bad’ speech, therefore, there is a risk that such speech will be produced in excess amounts in the marketplace; while, speech that yields benefits, such as “scientific research or critical analysis,” will be cultivated to a significantly lesser degree.<sup>159</sup> Thus, it is indeed questionable that American society purports to gain much, if anything, from allowing harassment and threatening speech to persist to the social, economic, physical, and emotional detriment of a class of American citizens.

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152. *Id.*

153. *Id.*

154. *Id.*

155. Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014), [https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm\\_term=.22f8781850f4](https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/?utm_term=.22f8781850f4) [<https://perma.cc/CR2X-8H7B>] (“Both mainstream gaming critics and many Gamergate supporters insist the brutal trolls are just a small, vocal minority. There’s plenty of social science to back that up, too: We know that people are more aggressive, more argumentative and more nasty when they’re permitted to comment on something without using their real name. That said, discomfort about women’s growing presence in culture and industry remains widespread [in real life].”).

156. *See* McGee, *supra* note 149.

157. *Id.* (discussing racist hate speech: “[l]ikewise, ideas can impose harms or create benefits beyond the speaker and listener. Racist speech not only seeks to provide a viewpoint on society, but to delegitimize the targets of the speech to the listeners. Per philosopher Steven P. Lee, ‘These uses [of hate speech] seem to have in common a tendency to create or reinforce social hierarchies, especially, to keep members of groups low on such hierarchies “in their place.”’”).

158. *Id.*

159. *Id.*

The suggestion that in the marketplace of ideas the way to combat hateful speech is to produce more speech fails to consider the following: (a) the critical possibility that the ‘truth’ is not reached in the marketplace, and (b) the possibility that the “rhetoric of common humanity and rights for all” does not materialize in the context of the hate speech saturating the gaming industry.<sup>160</sup> Through the Gamergate controversy and onward, the marketplace of ideas that exists in the gaming industry has allowed for bounties of harassing and threatening comments and messages to punish female gamers and developers for merely participating in the industry and breaking the “boy’s club” mold that has been so notably characteristic of the industry.<sup>161</sup> The potential ramifications of the hate speech and online harassment against female gamers and developers could continue to yield undue harm and negative societal influence.

There is a difference between speech intended to merely offend and insult a person’s sensibilities and speech intended to harm or incite harm against another person. Neither of these options provide respectably productive speech for the marketplace of ideas. However, the latter option is particularly egregious in its nature and purpose, and its dissemination across the marketplace arguably poisons the perspectives of the marketplace’s participants—it promulgates the misconception that such speech is warranted and accepted by all who encounter it. In order for the marketplace of ideas to function as intended, some government interference is arguably necessary to restrict certain speech not conducive to productive democratic discourse.<sup>162</sup> The goals of certain speech vary depending on the particular contexts in which the speech is given.<sup>163</sup> The goal of scientific speech, for example, is most ostensibly to arrive at the truth; therefore, restrictions on scientific speech would be deleterious to the goal of such speech.<sup>164</sup> However, as it pertains to the context of threatening and harassment speech against female gamers and developers, such

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160. See *id.*; David Shih, *Hate Speech and the Misnomer of ‘The Marketplace of Ideas,’* NPR (May 3, 2017, 3:22 PM), <https://www.npr.org/sections/codeswitch/2017/05/03/483264173/hate-speech-and-the-misnomer-of-the-marketplace-of-ideas> [<https://perma.cc/WV2R-YJBN>].

161. See Larry Frum, *Nearly Half of All Video-Gamers Are Women*, CNN (Aug. 11, 2013, 2:11 PM), <https://www.cnn.com/2013/08/08/tech/gaming-gadgets/female-gamers/index.html> [<https://perma.cc/P7NM-ASBG>] (“But despite those cultural shifts, talk to many female gamers and you’ll hear stories about a darker side of the hobby—a persistent ‘boy’s club’ mentality that sometimes manifests itself in ugly ways.”).

162. Steven P. Lee, *Hate Speech in the Marketplace of Ideas*, in 3 AMINTAPHIL: THE PHILOSOPHICAL FOUNDATIONS OF LAW AND JUSTICE 13, 21 (Deirdre Golash ed., 2010) (“We all know that some government interference in [the marketplace of ideas] is justified, if only to include the restriction of shouting ‘fire’ in a crowded theatre.”).

163. *Id.*

164. *Id.* at 21–22 n.32.

speech has not a goal of arriving at the ‘truth’ of a particularly contentious social or political conflict, but has instead unconscionable goals to harm, silence, and ultimately force a group out of an industry without legitimate justification.<sup>165</sup>

#### CONCLUSION

*Her words stuck with me: “You can waste a lifetime trying to close one gigantic wound on the world, or you can fill in a million holes in a million people’s lives and actually see them heal.”*

—A baroness with whom Zoe Quinn spoke at the United Nations in 2015.<sup>166</sup>

In light of the above-given proposal and explorations into the morality and economic salience supporting the use of the law to address the pervasive cyberharassment problem facing female gamers and developers, it still seems unclear whether the law in the United States is fully equipped to handle this issue in the way that this class of citizens needs. In order for the proposed remedies to hold any water for the long haul, there needs to be a significant change in gaming culture regarding the overall visibility and treatment of female gamers and developers. The toxic “boy’s club” needs to level up in its inclusion and acceptance of women in the industry.

As previously discussed, a drastic change in the culture surrounding the gaming industry would be, and should be, necessary to address this problem. Such a change is not something that can be achieved overnight. A change in the culture, in conjunction with appropriate legal remedies (such as those proposed in this Note), may be enough to fix this ostensibly abhorrent social ill, but legal remedy alone may not be enough. Harmful language may be euphemized in more creative language to circumvent any prohibition, effectively perpetuating the problem that a set of legislation would be set to address. The problem ultimately may be cyclical in nature: a feedback loop of hostility. Accepting that this will just be the social cost of participating in a technologically innovated industry cannot be the solution.

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165. *Id.* at 23 (discussing racial hate speech that is arguably analogous to the speech disseminated towards female gamers and developers: “racial, ethnic, or religious epithets used in public communication normally express the view that members of the target group are in some sense inferior to members of other groups, less than full and equal participants in public life. Such an effect, counting against the goal of political speech, would be a negative externality, the avoidance of which might justify government interference in political speech.”).

166. QUINN, *supra* note 20, at 223.



The First Amendment, as earlier discussed, concerns the restriction on the American government's capacity to restrict the speech of its citizens, not the restriction on the capacity of private actors.<sup>167</sup> Ostensibly, this presents a wrench in addressing the problem of quelling harassment and threatening speech against female gamers and developers. If this prevalent problem is not handled with haste and substantial support, the repercussions of leaving open the window of cyberharassment against this class of citizens, in particular, may invite further complications that gaming platforms, social media, and American society at large, are simply not ready to handle.<sup>168</sup>

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167. See Howard, *supra* note 69, at \*1.

168. Lee, *supra* note 72 (referring to the current 'deepfakes' pornographic video editing trend sweeping across online platforms worldwide). Regarding female gamers and developers like Zoe Quinn who have been victims of rape and death threats, one concern could be that leniency in how cyberharassment speech is dealt with could leave open a window for 'deepfake' supporters to promulgate more egregiously graphic harassing content: pornographic speech. Considering the ardent fervor with which the Gamergate mob carried out its blitzkrieg against Zoe Quinn, Brianna Wu, and other women in the industry, it is dubious to assume that this same invisible mob would refrain from switching up its strategy to incorporating the use of deepfakes to advance a harm-saturated agenda. Plans on how to deal with deepfakes as they continue to populate online platforms could reasonably invoke concerns about the potential to impact the gaming industry as far as cyberharassment is concerned. With that being said, a prophylactic measure to prevent possible incorporation of deepfakes into harassment and threatening speech against female gamers and developers may be difficult to develop if the toxic culture associated with the gaming industry remains as it is currently.

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