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Welcome to Media at Risk, a podcast from the Center for Media at Risk at the Annenberg School for Communication at the University of Pennsylvania. My name is Sophie Maddocks and I'm an Annenberg doctoral student. In this podcast, I'm joined by legal scholar and cyber civil rights advocate Mary Anne Franks.

Mary Ann is professor of law at the University of Miami and president of the Cyber Civil Rights Initiative. Today we'll be discussing her 2019 book, The Cult of the Constitution, our deadly devotion to Guns and Free Speech. In this book, Franks makes the case that fundamentalist interpretations of the Constitution are elevating certain rights above others.

Using a range of case studies, Franks asserts that our selective devotion to some parts of the Constitution is normalizing deeply harmful conduct both on and offline. Hi, Mary Anne. I want to begin by asking you to briefly introduce the book and maybe explain a little bit about how it fits into your scholarship and your advocacy work more broadly.

Sure, so the title of the book is The Cult of the Constitution, and I'm looking specifically at how often the kinds of things that people do to each other that are harmful and reckless, how often they're defended either in a very individual sense or in a more broad sense as being constitutionally protected.

Whether that is engaging in speech that causes extraordinary amounts of harm, or whether that is engaging in risky activities such as carrying firearms into public places, and speaking to how this isn't just a question of people having debates over what is good and bad behavior, but that it is kicked up into this special register because the people defending harmful acts are oftentimes invoking the Constitution and saying, It's not just that I have an opinion I want to share or an activity I want to engage in, but I am right in a more meaningful and deeper sense because I have the Constitution on my side.

So very much the the point of the book was to try to untangle some of the reasons why people invoke the Constitution in this way. The first thing I noticed about the book was the way that you divided it into these four specific areas, the cult of the Constitution, the cult of the gun, the cult of free speech, and the cult of the internet.

And I'd love to know a little bit about why you selected these areas, how they connected. I think it has a lot to do with it being the most pressing. Those are the areas where I felt that you could see that invocation of the Constitution so dramatically in those cases, and also there was so much potential for harm in that kind of invocation.

And, you know, to speak of them all in terms of the cult, if you think about in, in the more common sense understanding of the cult, the idea that people are indoctrinated into a certain way of thinking, and usually they're indoctrinated into that way of thinking by an elite group within that.

Cult itself. In other words, the dynamic of the cult is to confuse and to exploit a lot of people for the purposes of advancing some elite interests. And that's what I really wanted to show that that seems to be coming up in each one of those categories that you just mentioned, that it's not just a matter of fixating on a certain type of right, but it's also a matter of maintaining a certain kind of hierarchy.

And that that is what cults do, and that's the reason why I chose those terms was to show that around each one of those areas, whether it is the Constitution itself, the concept of the Second Amendment, the concept of the 1st Amendment, the techno libertarianism of the internet, all of it is replicating that same power structure which is to protect the interests of the most privileged and the most powerful.

Something that really stood out to me as well as your addition of the cult of the internet. For example, you explain in the book how distributing sexual content without consent could be seen in the United States as an exercise of constitutional freedom rather than an invasion of privacy. And you refer to this throughout the book as constitutional fundamentalism.

I wondered if you could explain this concept and how it connects to these tangible issues like sexual harassment. Yes, so the, the term that I chose to use here, constitutional fundamentalism was very much meant to and to evoke in some ways the concept of religious fundamentalism. A lot of this framework that I'm using to think about these issues comes from uh looking back on my own upbringing in a um religious fundamentalist household.

I was raised as a Southern Baptist. And a lot of what the sort of hallmarks of being raised in that tradition were had to do with a very selective reading of a sacred text, right? So you take the Bible and you don't take it as a whole.

What you do is you pick out certain passages, and you emphasize a very narrow interpretation of those passages, and you ignore everything that doesn't really seem to fit. In a pre-established worldview, and it comes with that, this kind of ferocity that when you say, I am reading this text in this faithful way, because I am one of the faithful, you are, at least by implication and sometimes explicitly saying that anyone who disagrees with you is a heretic.

And what that means is that you create a kind of sense around the idea of whatever happens to be the First Amendment in this case when we're talking about nonconsensual pornography, to say that this is some sort of persecuted right that needs to be defended at all costs, so that when people who are for whatever reason, deeply invested in the unauthorized distribution of other people's images, they want.

Admit that the reason why they might be invested is for prurient reasons or for sexually objectifying reasons. What they want to say instead is, no, no, this is about freedom of speech, and that way they can preserve not only their sense of their own ego ideal if you want to call it that, but also to defend that principle against attack by saying, no, no, no, it's not because I like this sort of material, it's because the First Amendment demands it.

And you've had really firsthand experience of trying to battle this constitutional fundamentalism in relation to the non-consensual distribution of images, and I know that, you know, for several years now you've been really at the forefront in trying to criminalize non-consensual pornography and you've experienced this constitutional fundamentalism as a block, and I'd love to hear a little bit about how you've tried to maneuver around that through your own writing of model legislation.

Well, it's been tricky to say the least. One of the challenges, of course, is that there is at least in some of these debates and some of this contention, there is, of course, real substance there that when we're talking about trying to bring in the law, especially the criminal law, to bear on some of these issues, we do have to be incredibly mindful of unintended consequences.

We have to be mindful of the real risk to suppressing speech. We have to worry about the punitive nature of the criminal law. We have to worry about injustices within the criminal justice system.

I don't want to minimize the fact that drafting constitutionally sound laws that still advance the goals of justice, it's a difficult thing to do, but it's not impossible, and one of the problems I think we face in this space is that very often the world gets divided into advocates and experts, and What happens in many cases is that your average citizens who are most likely to be hurt by certain forms of conduct, they are seen as sort of acting on feelings and emotions and experiences, whereas the American Civil Liberties Union or other groups that sort of do this for a living will say yes, but, you know, the real issue here is constitutional doctrine, and that's what you don't understand.

And what I think what I've tried to do is to say, well, there are people who can do both. There are people who have real expertise in the doctrine and who have a fairly deep understanding of how the law and criminal law in particular should operate ideally, and that there's no reason to think that those two pieces of this advocacy and expertise can't actually be used together.

Something that I found really interesting in the text was when you talk about how constitutional fundamentalism is deployed by both liberals and conservatives and you compare the gun lobby, specifically the NRA to the free speech lobby, specifically the ACLU.

I'd love to hear more about how this constitutional fundamentalism is shaping both sides of the political establishment. And this is where it gets a little controversial for some people that very often when we think about uses and abuses of the Constitution or the attempt to sort of meld religious ideas into our legal discourse, you know, the easy targets in some sense are conservatives because they have a much more open history of doing so.

And if you look at, if you speak to most liberals and you talk. About the NRA, you, you'll pretty quickly get to something close to consensus about how those tactics and the rhetoric of the gun lobby is really in bad faith, that it really is disingenuous and that it's really dangerous. But what I find so interesting is that the very same tactics, almost down to the letter, you will also see replicated in the ACLU when it comes to the First Amendment.

So much so that you've actually seen, we've actually seen as a society, a kind of convergence between liberals and conservatives on the issue of free speech. It may have been in the past that the ALU was perceived largely as a liberal organization and standing up for the sort of outsiders of society, but of course, we've seen in the last few decades that the First Amendment is more often deployed on behalf of corporations and on behalf of really powerful groups, which are really the kind of playbook of from the conservatives, right?

Make sure that the powerful stay in power. What I'm really trying to show is that what some people can see so clearly with the NRA is that they have a single-minded focus on one right in the Constitution. They read it in an extraordinarily odd way, and they insist on using that right as a means of essentially stripping any authority from any government, local, state, or federal, from engaging in any type of rulemaking or regulation that might make us, any of us safer.

And they do that in part because they managed to whip up their base by saying, you know, they're trying to take away your Second Amendment rights. But if you look at the ACLU and the rhetoric around the 1st Amendment, it's so similar. If you open the door to regulation, if you have even The slightest, most modest regulation of things like nonconsensual pornography, the next thing you know, we're all going to be censored and we're going to be thrown in jail for our thoughts.

And it really is that same kind of bunker mentality that activates both populations that this is the endangered right, it has to be interpreted this way, and we can brook no dissent on this issue. In the book, you make the really compelling argument that things we now consider to be speech rights wouldn't have been considered to be speech rights 20 years ago or even 30 years ago, right, that we've gotten only progressively more expansive when it comes to even labeling certain things as speech.

If you think of a few decades ago, the courts were still struggling to answer the question of whether or not wearing an armband to school in protest of the Vietnam War was actually speech or conduct, whether burning a flag was actually something we should consider speech or conduct or burning a draft card.

And now it seems that we have, we've moved into this territory we don't even do that first part of the analysis. In other words, every First Amendment analysis should start by saying, is the speech at all? And then it becomes a question of whether or not it's protected speech.

We're just now thinking of almost everything as kind of by default speech. So essentially, every transaction you undertake online is presumed to be speech, which makes no sense. the courts have long said that, you know, commercial transactions are not the same thing as speech.

But now you have, for instance, free speech arguments made on behalf of platforms or services like Amazon that sell products. So, if you sell somebody a defective dog leash, Amazon is plausibly able to say in 2019, well, that's a form of speech. And with this expansive understanding of what counts as speech, I guess that can lead to this much more expansive call of censorship, the final sentence from your cult of the internet chapter, where you write that the voice of white men dominates virtually every online and offline space, crying out ceaselessly of censorship.

One of the interesting moves that's being made here in the contemporary view of free speech is that sense of persecution, completely made up persecution, to be clear, right, the sense that What you hear from, especially the, the far right, is that they're constantly being silenced, that they are being suppressed, that Christians are being persecuted, that gun owners are being hounded, and it's all made up, right?

It's, it's all completely false, and part of the way we know it's false is because we hear them talking about it all the time. And so what you've got here is something that I call in the book, victim claiming, as opposed to the more just the traditional victim blaming idea. It's really the powerful trying to rush into the position of the powerless and try to take up the mantle of martyrdom constantly, so as a way of, first of all giving themselves a sort of virtuous finish, but also to delegitimize anybody who actually is being censored or being suppressed to crowd them out of that space.

Technology companies are beginning to regulate online environments in some small ways. And in the book you discuss how good regulation we can see already is beginning to reduce harassment or have the potential to increase free speech by diverse groups. And I love the way that you write about this because you say that Free speech fundamentalists on the internet should be thrilled because the market is essentially correcting itself, but they aren't thrilled.

And why do you think this is the fact that they're complaining that the free market is doing some interesting things when it comes to abuse and harassment and trying to take some sort of innovative measures to try to reduce it.

That suddenly now we're skeptical of the free market and suddenly now we're not so sure that private actors are not governed by the 1st or 2nd Amendments, and that's extremely telling to say that you supported the system so long as you want, but at the moment where it might seem like your dominance is no longer assured, you suddenly are becoming incredibly critical.

I'd love to begin to talk about what you raised towards the end of the book, this concept of fearless speech, reorientation of constitutional defenses perhaps away from the most hateful speech and towards protecting the most vulnerable speaker. Could you explain a little bit more about your vision for what we want to replace this free speech fundamentalism with? Definitely, I'm very excited about this part of it because there's a part of me that is always happier talking about what I think we ought to be doing than criticizing what we are doing, partly because that is essential to what I'm disturbed by that is Free speech is not just a question of doctrine, it's not just a question of what cases we get and what cases, how cases are decided.

It's very much about how the general public understands free speech and what we give our attention to, and who gets to occupy the place in our society of a free speech hero, and what we've had for the last decade at least, and I'd say a lot longer than that, but We've got this really perverse and depressing view of who should be counted as a free speech hero, and it's, it's neo-Nazis, it always is, right?

This is where it always comes back, whether we're talking about the 1970s with The neo-Nazi rally that tried to engage in this demonstration in Skokie, or to the present day when it's Richard Spencer trying to promote his far right white male supremacy, culturally, who we value and who we give attention to as speakers, really does a lot for social norms and free speech norms.

And so my diagnosis is that what we've done with the concept of free speech is we've reduced it to what I call reckless speech, that the kind of speech that we are giving most attention to and valorizing. is the kind of speech that in an oversimplified way, just to say a couple of things about that concept, tends to impose harm on other people, that the risk that's taken in that kind of free speech is mostly about making other people's lives more precarious.

And in this concept that goes all the way back, you know, to the basic Greek democratic idea of Parasia, the notion of fearless speech, it's not about imposing harm on other people. It's about taking a risk upon yourself to speak the truth. And in Michel Foucault's reinterpretation of this concept as fearless speech, as he translates it, he really emphasizes the fact that that kind of speech has characteristics that I think can be usefully Contrasted with the reckless speech culture that we've got, and those characteristics, the ones that I find most important, are sincerity and uh criticism and courageousness.

And those are the kinds of markers we can use to try to see whether there's the speaker that we're giving attention to or who is defining our norms, to see whether or not they deserve that, right? Again, in terms of trying to cultivate a free speech culture that is healthier and braver and more robust. And I really do think if we use that metric of, you know, how sincere is the speech, that is, how much is a person willing to say, I own this speech, this is truly what I think about this issue.

How much is this critical speech, that is, it actually speaks truth to power in the old sense, and how courageous is it? Did you actually have to take a risk to yourself in order to speak? And I think we have an abundance of examples of extraordinary fearless speakers that we don't give any attention to, that we don't even characterize as free speech issues.

At the same time, you had this, you know, media circus. Over Milo Yiannopoulos or Richard Spencer, you got barely any recognition of the fact that the Me Too movement, for instance, is a free speech movement. It's about women, in particular, taking the stage and taking the platform against people who are more powerful than they are, and saying this is what this person did to me and saying this is something that should be accounted for or responded to.

If we care about speech that does something to make us think twice about the status quo, then those are the kinds of conversations and the kinds of speech that really should be getting a lot more attention as free speech issues.

Yeah I'd really like to learn a bit more about your priorities as president of the Cyber Civil Rights Initiative, because I know that the organization calls for a range of interventions to advance cyber civil rights. And so how contemporary groups that you work with, whether it's social networks, whether it's lobbies like the EFF or the ACLU, what level of responsibility do you think lies with these organizations and what kind of interventions do you think that they should be undertaking?

It's such a complicated question partly because of the state of the law in this country right now with regard to social media platforms, as I talk about in the book, when you have a law like the 1996 Communications Decency Act, Section 230, that essentially lets these platforms off the hook, legally speaking, when it comes to the responsibility for speech or conduct for that matter.

That is facilitated by their platforms, you end up in a, in a very strange place in terms of very misaligned incentives. You know, how is it that you would expect the internet to have gone any way that any way differently than it did if you essentially announced to all the powerful players that, look, you can reap the benefits of whatever you want to do in the space, and you basically have to pay for none of the consequences.

And that's essentially what's been happening. So on the one hand, It's hard to even say what should social media platforms be doing because without a legal backstop, without a real reason for them to care, it's going to be really difficult for them to do anything.

Now, now that they're left to basically their own devices, I hope that the shame or the feeling of responsibility for the massive role that they play now in everyone's lives, that that would be enough to make any company be careful and ethical about its products and services.

Unfortunately, we've seen that the companies are incentivized to do the opposite. You roll these products out and you see who it hurts, and if it hurts a lot of people and people get mad, you say, oh, we're going to try to reduce that by 2%, right? So, that's a really poor way of conducting business.

Get a You mentioned the CDA section 230, and I wondered what your prediction was for improving this legislative environment to help to hold some of these social networks to account. We are moving towards a period where there is more appetite to rein in the tech industry than there was before. The concern I have is that a lot of that newfound appetite comes from a place of bad faith itself.

So we've, we've seen a lot and we were mentioning before about how There is a real persecution narrative there that says, you know, Twitter needs to not suspend far right views because that's discriminatory. So I'm, I'm very concerned about the fact that some of the newfound willingness to tinker with what we've got in terms of technology and platforms is coming from the the possibly the worst impulse, which is, let's make it even more difficult to escape the kind of monoculture that we've got when it comes to free speech.

That being said, there's also the sincere attempt to try to make things better and to be aware of the harm that I think many people are waking up to. And that includes, you know, members of Congress as well as some principal individuals within these institutions themselves who are grappling with the, the universe that they've essentially created and put us all into. With this difficult and dichotomized political environment that we're in right now, what are the cyber civil rights' future priorities?

With every new terrible thing that happens, some person who was not alive to the harm becomes alive to the harm. The depressing silver lining here is that the way that technology has become essential to all of our lives means that we're all in some respect, made vulnerable by it. There's something that I've sometimes referred to as the kind of feminization of technology, by which I mean Technology has the power to turn us all into women, by which I mean, uh, has the power to turn all of us into objects and into subordinated subjects.

And so, the more that people become aware of how they themselves might be vulnerable, even if they were not 5 years ago or 10 years ago. There is what Derek Bell calls an interest convergence that can be useful here. So I think we, we try to focus on places where we can get that kind of interest convergence.

So we're really trying to speak as broadly as possible to people's underlying sense of decency and autonomy for their own interests, even if they don't think about it necessarily for other peoples. So my final question is slightly more reflective one, certainly for me studying your work and the work of the movement to promote cyber civil rights, especially for victims of cyber sexual harassment. It's been a real privilege.

So many key members of the cyber Civil Rights Initiative and associated activists are survivors of forms of cyber sexual harassment, and you mention in the book, briefly, you know, that the threats of violence that you've received due to your advocacy work, and I wanted to know what inspires and motivates you to continue conducting your work.

In some ways, the first part of your question answers the last part, which is exactly the, the people that you've mentioned when I think of Holly Jacobs, who's the founder of Cyber Civil Rights Initiative, how it is that we came to work together and how we came to, to have this vision together of civil rights for all.

Very much when she came to me, I was reluctant to, to do what she was asking me and to be clear what she was asking me was I want to change the law. So looking at Holly Jacobs, who is saying to me, my most intimate moments are out there and have been weaponized against me, and when she sat in my office the first time we met and told me about how this affected her ability to finish her education, it affected her ability to get a job, it affected her relationships with her family, it affected and jeopardized her current relationship.

What she was telling me was the fact that all of this is happening to me and is destroying or trying to destroy every aspect of my life isn't making me curl up and go away, it's making me want to get out in front and say, this should not happen.

It is not right that this is happening, and it shouldn't happen to anyone else. My first instinct was to run away from this because I was not a legislator, um, I was not an activist in any real sense at that point, and And I knew what what becoming an activist would mean in terms of the backlash and and the kind of reception that you would engender, especially when you are a woman.

There's no way that I could look at her doing that and not think to myself, if she is willing to make that kind of sacrifice in order to, to improve this world a little bit, then I really cannot justify, even to myself, standing back because I hadn't suffered what she suffered.

I think being surrounded by those kinds of people has really made me believe that the small contributions that I can make are the ones I have to make because I could not stand back and do nothing, especially in light of what these women are able and willing to do.

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