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ONE-TO-ONE SPEECH VS. ONE-TO-MANY SPEECH, CRIMINAL HARASSMENT LAWS, AND "CYBERSTALKING"

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ABSTRACT—Until recently, criminal "harassment" usually referred to telephone harassment—unwanted communications *to* a particular person. Likewise, stalking laws were originally created to deal with people who were physically following a person or trying to talk to that person. The same has historically been true with regard to restraining orders.

But in recent years, these laws have been increasingly reworded or interpreted in ways that also cover speech *about* a person, even when that speech is communicated to potentially willing listeners. The law is in effect returning to an era when criminal libel laws could impose liability not just for falsehoods, but also for true statements or opinions that were supposedly not said with "good motives."

This Article will argue that this approach is unconstitutional when applied to speech said about the target rather than just to the target, at least when the speech is outside the traditional First Amendment exceptions (chiefly threats and "fighting words," plus perhaps libel). Courts should therefore reject the application of these laws to such one-to-many speech, and legislatures should resist the broadening of such laws.

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I'm delighted to have been invited to participate in this Festschrift honoring Marty Redish, whose theoretical and doctrinal First Amendment work I have long admired. Having little to add to Marty's important contributions on the particular subjects that he has confronted, and little to say in disagreement with them, I thought I'd follow another Festschrift tradition by writing an article in Marty's honor and in Marty's field, inspired by the high standards that he has set.

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INTRODUCTION

Let me begin with four stories, as it happens all from Summer 2011.

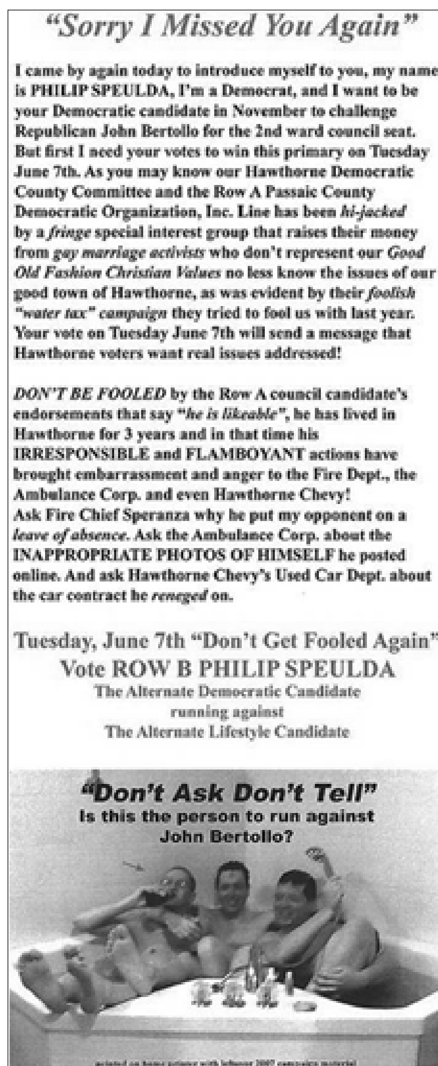
1. Philip Speulda was a primary candidate for the Hawthorne, New Jersey city council. One of Speulda's campaign flyers, pictured below in Figure 1, included a picture of his opponent, Robert Van Deusen, in a hot tub with two other men. (Van Deusen apparently had the picture taken as a joke and had posted it online himself.) Speulda used the photo to suggest that Van Deusen shouldn't be elected because he was gay, or at least because he had acted inappropriately by posting the photo.[1]

It was a silly flyer from someone who wasn't a serious candidate, and it likely didn't impress the voters. But it did impress the police, who in June 2011 issued Speulda a criminal summons for "harassment." Under New Jersey law, it is a crime to, "with purpose to harass another . . . [m]ake[] . . . a communication . . . anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner

[1] *See* Complaint–Summons, State v. Speulda, No. 1604-S-2011-000159 (Hawthorne Bor. Mun. Ct., June 9, 2011), *available at* http://www.volokh.com/wp/wp-content/uploads/2011/07/speuldacomplaint.pdf; Kristie Cattafi, *Hawthorne PD Files Harassment Charges Against Primary Candidate*, GAZETTE (Hawthorne, N.J.) (June 28, 2011, 12:28 PM), http://www.northjersey.com/news/124654139_Harassment_charges_filed_against_candidate.html.

likely to cause annoyance or alarm."[2] The police theory was apparently that the flyer was made with the "purpose to harass" Van Deusen and was "likely to cause annoyance or alarm" to Van Deusen. Some months later, the charges were dismissed, though with no precedent being set foreclosing similar future uses of the statute.[3]

FIGURE 1: SPEULDA CAMPAIGN FLYER



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[2] N.J. STAT. ANN. § 2C:33-4 (West 2005).

[3] Kristie Cattafi, *Harassment Charges Dismissed Against Hawthorne Primary Candidate*, GAZETTE (Hawthorne, N.J.) (Oct. 6, 2011), http://www.northjersey.com/news/131197624_Harassment_charges_dismissed_.html.

2. A couple of weeks later, an anonymous cartoonist who went by MrFuddlesticks created a set of Internet video cartoons parodying the Renton, Washington police department. Some of the videos seemed to relate to real incidents, including incidents with a sexual component, and some of the police officers who were involved in those incidents could be identified by those in the know.[4]

The city prosecutor concluded that the videos might constitute "cyberstalking," which is defined under Washington law as "mak[ing] an electronic communication to [another] person or a third party" "with intent to harass, intimidate, torment, or embarrass [that] other person" "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[5] The theory was that some of the sexual references used "lewd" or "indecent" words, and that the video was created "with intent to harass, intimidate, torment, or embarrass" its subjects.[6] The prosecutor got a search warrant aimed at figuring out MrFuddlesticks' identity, though after a public outcry the warrant was stayed and later withdrawn, and the city decided not to press charges.[7]

3. Around the same time, Johanna Hamrick—who runs the *Berea Post* blog and had been candidate for mayor and city council president of Berea, Ohio—posted various items critical of Norma Kleem. Kleem was a member of the Berea Commission on Aging, the organizer of the Berea July Fourth parade, and the sister of Berea mayor Cyril Kleem. One of Hamrick's blog posts read:

> DON'T FORGET YOUR TOMATOES!
>
> As the Fourth of July Parade is approaching we are getting so excited here at The Berea Post. It is sure to be a special year as we have heard of only one parade participant having a discriminatory letter.
>
> All persons receive a letter to be a part of the parade. As you guessed it, you have to return your form to Norma Kleem. In prior years she has limited who is allowed in the gate, what vehicles, and many other obstacles have been

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[4] *Cartoonist Targeted with Criminal Probe for Mocking Police*, KIROTV.COM (Aug. 3, 2011, 4:46 PM), http://www.kirotv.com/news/news/cartoonist-targeted-with-criminal-probe-for-mockin/nDjfB; *see also* Affidavit for Search Warrant, *In re* King County Search Warrants 11-1172, No. 11-2-12056-2 KNT (Wash. Super. Ct. July 28, 2011), *available at* http://www.law.ucla.edu/volokh/crimharass/61571607-Renton-Parody-Doc1-8.pdf; Declaration of City of Renton Police Chief Kevin Milosevich, *In re King County*, No. 11-2-12056-2 KNT (Wash. Super. Ct. Aug. 16, 2011), *available at* http://www.volokh.com/wp-content/uploads/2012/06/Renton-Declarations.pdf.

[5] WASH. REV. CODE ANN. § 9.61.260 (West 2010).

[6] City of Renton's Response to Movant's Motions at 4 n.3, 5, *In re King County*, No. 11-2-12056-2 KNT (Wash. Super. Ct. Aug. 17, 2011) (emphasis omitted), *available at* http://www.volokh.com/wp-content/uploads/2012/06/Renton-Memorandum.pdf (arguing that the videos "involve the use of obscene language by using the 'F' word" and "suggest the commission of a lewd or lascivious act . . . when discussing [alleged] sexual relations in a car or while bent over a motorcycle").

[7] Jeff Hodson, *Renton Drops Court Quest to Find 'Mrfuddlesticks,'* SEATTLE TIMES, Aug. 11, 2011, at B1.

> put up. This year the letter was the same as prior years, all except one. One persons letter stated that only Berea City Fire Trucks were allowed in. Why? Well if the City Club gets their donated fire truck in, someone could look better on the fire truck. Yes, one letter stated this information. How low can you go? Well the little dictator wants control. Little dictator wants to make sure any opponent is denied like in past years.
>
> Please Sunday July 3rd, DO NOT FORGET YOUR TOMATOES!!! I truly would love to chuck one right at someone in THAT camp. It would be quite enjoyable. Happy Independence Day Berea.[8]

Now, if Hamrick had thrown a tomato at Kleem, she would have been guilty of a crime. Perhaps if Hamrick's post were seen as serious—maybe based on past interactions between Hamrick and Kleem—she might be guilty of punishable solicitation of crime.[9] But the Ohio legal system's response to Hamrick's post was something else: Norma Kleem sought a protection order against Hamrick based on this post and other conduct (including, allegedly, following Kleem in her car and trying to hit Kleem with her car), and Judge Nancy Russo entered the following order:

> [Hamrick] is prohibited from posting any information/comments/threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family; . . . Respon[dent] is known to post as Lilly on the cleveland.com blog and Berea Post; she is prohibited from blogging/posting on any site [about] petitioner including but not limited to these blogs.[10]

So Hamrick was barred from saying *anything* on her own blog or in the comments to the Cleveland.com blog either about local commissioner and parade organizer Norma Kleem or about her brother Mayor Cyril Kleem. The order was reversed a week later.[11]

4. One week later, federal prosecutors started a criminal harassment prosecution in Maryland. Alyce Zeoli is a leading American Tibetan Buddhist religious figure,[12] the subject of a somewhat critical book-length biography written by a *Washington Post* writer,[13] and a Twitter user with

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8 Johanna Hamrick, *Don't Forget Your Tomatoes!*, BEREA POST, http://berea-post.celebration-of.com/About.aspx (last visited Mar. 10, 2012).

9 *Compare* United States v. Williams, 553 U.S. 285 (2008) (solicitation of child pornography is constitutionally unprotected), *with* Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (statement by a demonstrator, as an illegal demonstration was being cleared up, that "We'll take the fucking street later" was constitutionally protected even if seen as "advocacy of illegal action at some indefinite future time").

10 Order of Protection at 3, Kleem v. Hamrick, No. CV 11 761954 (Ohio Ct. Com. Pl. Aug. 15, 2011), *available at* http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf.

11 Journal Entry, *Kleem*, No. CV 11 761954, *available at* http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf, at 5.

12 Martha Sherrill, *The Buddha from Poolesville*, WASH. POST, Apr. 16, 2000, at W12. As of 2000, Zeoli was the leader of the largest Tibetan Buddhist monastery in the United States.

13 MARTHA SHERRILL, THE BUDDHA FROM BROOKLYN (2000).

23,000 followers.[14] William Lawrence Cassidy had gotten involved with Zeoli's Buddhist group (Kunzang Palyul Choling) to the point of becoming Chief Operating Officer of the group; but he was then expelled because he had apparently lied to them about having had cancer and because "they came to doubt his reincarnation credentials."[15] After he left, Cassidy began to post insulting Twitter messages about Zeoli, eventually producing about 8000 tweets over the span of several months.[16]

A few could be seen as potentially threatening, e.g., "ya like haiku? Here's one for ya: 'Long, Limb, Sharp Saw, Hard Drop' ROFLMAO."[17] But others were criticisms of Zeoli: for instance, "[Zeoli] is a demonic force who tries to destroy Buddhism" and "[Zeoli] is no dakini: shes a grossly overweight 61 yr old burnt out freak with bad bowels & a lousy outlook: her 'crown' is a joke."[18] And federal prosecutors prosecuted Cassidy not under the threat provision of the statute,[19] but rather on the theory that Cassidy's messages constituted the federal crime of "engag[ing] in a course of conduct [using the mail or interactive computer services] that caused substantial emotional distress to a person" "with the intent to harass and cause substantial emotional distress to [that] person."[20] The district judge eventually threw out the prosecution on First Amendment grounds.[21]

In May 2012, a Maryland court likewise enjoined a blogger from blogging about a political activist who was also a convicted criminal.[22] Some weeks later, a Massachusetts court ordered a blogger (and former

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[14] Somini Sengupta, *Case of 8,000 Menacing Posts Tests Limits of Twitter Speech*, N.Y. TIMES, Aug. 27, 2011, at A1.

[15] *Id.*

[16] United States v. Cassidy, 814 F. Supp. 2d 574, 579 (D. Md. 2011).

[17] Careful readers may notice that this is not actually a haiku.

[18] Criminal Complaint at 5–6, *Cassidy*, 814 F. Supp. 2d 574 (No. 11-501 CBD).

[19] *Cassidy*, 814 F. Supp. 2d at 583 n.11.

[20] *Id.* at 576; *see also* 18 U.S.C. § 2261A(2) (2006).

Cassidy apparently deliberately copied Zeoli on his tweets by including the text @ZeoliUserName, which would lead those tweets to show up in Zeoli's @Mentions tab in Twitter. One might argue that this decision to include the @ sign followed by Zeoli's username makes the tweets one-to-one speech sent to Zeoli as well as one-to-many speech about Zeoli. But this wasn't the government's theory. The indictment doesn't refer to sending messages to Zeoli; it says Cassidy is guilty for "us[ing] an interactive computer service . . . to engage in a course of conduct that caused substantial emotional distress to that person, to wit: the posting of messages on www.twitter.com and other Internet websites concerning [Alyce Zeoli]." Indictment, *Cassidy*, 814 F. Supp. 2d 574 (No. 11 CR 0091). The criminal complaint filed by the FBI agent doesn't note any use of the @ feature by Cassidy; indeed, it lists Cassidy's anti-Zeoli blog posts alongside his Twitter messages—blog posts, of course, don't have an analog to the @ feature. Criminal Complaint, *Cassidy*, 814 F. Supp. 2d 574 (No. 11 CR 0091). And the statute under which Cassidy is being prosecuted doesn't impose any such limitation.

[21] *Cassidy*, 814 F. Supp. 2d at 581–88.

[22] Final Peace Order, Kimberlin v. Walker, No. 0601SP019792012 (Md. Dist. Ct. May 19, 2012), *available at* http://www.law.ucla.edu/volokh/crimharass/AaronWorthing-order.jpg; Hearing at 59–60, *Kimberlin*, No. 0601SP019792012 (Md. Dist. Ct. May 29, 2012). I assisted the defendant's lawyer, on a pro bono basis, in getting the order vacated.

professional journalist) to remove his blog posts about a woman who had been accused of criminal negligence and leaving the scene of an accident after hitting a pedestrian with her car, and who happened to be the daughter of a local judge.[23] Both orders were vacated by higher courts.[24]

And these are just the most explicitly political examples. Courts have enjoined people from saying anything at all online about ex-lovers[25] or ex-spouses' lawyers.[26] Courts have enjoined people from criticizing those with whom the people have had business dealings.[27] One court has issued a restraining order based on a defendant's having repeatedly publicized the fact that the plaintiff had been suspended from practicing law for defrauding a client.[28] The court concluded that the defendant was motivated not by any "legitimate purpose" of informing people of plaintiff's professional misconduct, but only by hostility arising out of a past real

[23] Harassment Prevention Order, Nilan v. Valenti, No. 12 27RO 235 (Mass. Dist. Ct. June 27, 2012), *available at* http://www.volokh.com/wp-content/uploads/2012/07/nilanorder.png; Andrew Amelinckx, *Judge Gives Nilan Harassment Protection from Valenti, Orders Him to Redact Blog*, BERKSHIRE EAGLE, June 27, 2012, *available at* LexisNexis.

[24] Order of Denial of Petition for Peace Order, Kimberlin v. Walker, No. 8526D (Md. Cir. Ct. July 5, 2012), *available at* http://www.law.ucla.edu/volokh/crimharass/99246349-Peace-Order-Vacated-7-5-12.pdf; Modification, Extension or Termination of Harassment Prevention Order, *Nilan*, No. 12 27RO 235 (Mass. Dist. Ct. July 9, 2012).

[25] Morelli v. Morelli, No. A06-04-60750-C, at 9 (Pa. Ct. Com. Pl. June 6, 2011), *available at* http://www.law.ucla.edu/volokh/crimharass/MorelliTranscript.pdf ("Father [sic] shall take down that website and shall never on any public media make any reference to mother at all, nor any reference to the relationship between mother and children, nor shall he make any reference to his children other than 'happy birthday' or other significant school events."); Injunction at 2, Schmidt v. Ferguson, No. 10CV1611 (Wis. Cir. Ct. Apr. 9, 2010), *available at* http://www.volokh.com/wp/wp-content/uploads/2010/09/ferguson-schmidt-order.pdf ("Respondent may NOT use internet in any manner to communicate about Petitioner ever again."); *see also* Flash v. Holtsclaw, 789 N.E.2d 955, 957–58 (Ind. Ct. App. 2003) (discussing court order banning an ex-boyfriend from sending letters about his ex-girlfriend to local bars, asking that they not serve alcohol to her).

[26] Injunction at 3, Martin v. Ferguson, No. 10CV2326 (Wis. Cir. Ct. June 22, 2010), *available at* http://www.volokh.com/wp/wp-content/uploads/2010/09/ferguson-martin-order.pdf ("Respondent may not use the internet in any manner to communicate about petitioner [respondent's ex-husband's lawyer] or her law firm while the injunction is in place."); *id.* ("Respondent shall immediately remove website www.lisamartin-attorney.com from the internet and shall make no future websites or postings to other websites, or on Yahoo, regarding petitioner or her law firm while the injunction is in place.").

[27] *See, e.g.*, R.D. v. P.M., 135 Cal. Rptr. 3d 791, 800 n.11 (Ct. App. 2011) (upholding an injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace; though defendant argued that she had distributed these leaflets "to inform consumers about her negative experience with [defendant] as a clinical social worker," "[t]he trial court concluded . . . that [plaintiff's] intention was less to address an issue of public importance than to harass [defendant]"); Lamont v. Gilday, No. 07-2-37030-7SEA, 2008 WL 4448652, at *3–4 (Wash. Super. Ct. Mar. 5, 2008) (concluding that defendant's statements accusing plaintiff, a small businesswoman for whom he had worked as a handyman, were false and defamatory, and enjoining plaintiff from making *any* statements about plaintiff "and/or [this] lawsuit or anyone who testified in the trial, either directly by name, or indirectly by reference, via . . . any . . . form of communication").

[28] Welytok v. Ziolkowski, 752 N.W.2d 359 (Wis. Ct. App. 2008). For more on the underlying fraud, see *In re Gilbert*, 595 N.W.2d 715 (Wis. 1999) (per curiam).

estate transaction in which defendant had lost out in the bidding to the plaintiff; therefore, according to the court, the speech constituted criminal harassment.[29]

* * *

A few decades ago, criminal "harassment" usually referred to telephone harassment—unwanted communications *to* a particular person. Likewise, stalking laws were originally created to deal with people who were physically following a person or trying to talk to that person.[30] The same has historically been true with regard to restraining orders. But, as the examples given above show, these laws have been increasingly reworded or interpreted in ways that also cover speech *about* a person, even when that speech is communicated to potentially willing listeners.

The law seems to be returning—not deliberately, but in effect—to an era when criminal libel laws could impose liability not just for falsehoods, but also for true statements or opinions that were supposedly not said with "good motives."[31] To be sure, the laws require that the speech be distressing, annoying, abusive, or harassing, rather than injurious to reputation, and they generally require an intent to distress, annoy, abuse, or harass rather than just generally "bad motives." But in practice, the laws are starting to be applied to speech about a person (rather than just speech to a person) when the speech is harshly critical and thus potentially damaging to reputation, as in the examples given above.[32] Without any reference to criminal libel laws, and indeed in jurisdictions where even criminal libel laws limited to false factual assertions have been repealed, some judges and legislatures seem to be responding to the same feeling that drove the old criminal libel laws: people should be legally barred from saying derogatory things (even opinions or true statements) about other people unless they have a good reason to do so.

This Article will argue, however, that such an approach is unconstitutional when applied to speech said about the target rather than just to the target, at least when the speech is outside the traditional First Amendment exceptions (chiefly threats and "fighting words," plus perhaps libel and other knowing falsehoods). Courts should therefore reject the

[29] *Welytok*, 752 N.W.2d at 370. Though the speaker wasn't prosecuted for the harassment, he was ordered not to engage in such speech in the future; the injunction that the court upheld banned "harassment," *id.* at 371, and the court concluded that the defendant's speech had indeed constituted harassment.

[30] *See* Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 992–93 (1993).

[31] *See, e.g.*, State v. Hoskins, 80 N.W. 1063, 1063 (Iowa 1899).

[32] *See supra* notes 27–28 (citing *R.D.*, 135 Cal. Rptr. 3d 791, and *Welytok*, 752 N.W.2d 359); *infra* note 268 (discussing State v. Ellison, 900 N.E.2d 228 (Ohio Ct. App. 2008)).

application of such laws to one-to-many speech, and legislatures should resist the broadening of such laws. The Supreme Court has expressly rejected the notion that derogatory statements on matters of public concern about people can be punished based on bad motives. And the logic of other Supreme Court opinions suggests that the same rejection of a bad motive First Amendment exception should apply even to statements on matters of supposedly private concern.[33] (I speak here of constitutional protection against injunctions, criminal punishment, and civil liability. In this Article, I don't discuss the government's power as K–12 educator to restrict speech by students that disrupts the educational environment for other students—whether the speech is on campus or off campus[34]—or for that matter the government's power as employer.[35])

Some courts[36] and legislatures have indeed narrowed criminal harassment laws in response to First Amendment objections. The Tennessee legislature, for instance, enacted a broad law in 2011 but then dramatically narrowed it in 2012 in response to public criticism.[37] Both houses of the Arizona legislature likewise passed such a broad law in 2012 but then dramatically narrowed it, following a flurry of public criticism,

33 *See infra* Part II.E.1.

34 *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (concluding that the government as K–12 educator may discipline students for their speech if it is sufficiently disruptive of the school's operation, in a case involving on-campus speech); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219–22 (3d Cir. 2011) (Jordan, J., concurring) (noting that the question whether *Tinker* applies to off-campus speech is not settled).

35 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (noting that the government as employer may dismiss or discipline employees for their speech if it is sufficiently disruptive of the employer's operation).

36 *See, e.g.*, United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011).

37 2011 Tenn. Pub. Acts ch. 362 amended TENN. CODE ANN. § 39-17-308 (2010) to ban (among other things) purposefully, knowingly, or negligently "caus[ing] emotional distress" to a person by "transmit[ting] or display[ing] an image [without legitimate purpose] in a manner in which there is a reasonable expectation that the image will be viewed by the victim." This led to a good deal of criticism, apparently beginning with a blog post of mine on the *Volokh Conspiracy* blog and continuing in turn to other blogs, a political blog on a Tennessee newspaper's website, and mainstream media outlets. *See* Eugene Volokh, *Crime to Post Images that Cause "Emotional Distress" "Without Legitimate Purpose*,*"* VOLOKH CONSPIRACY (June 6, 2011, 2:37 PM), http://www.volokh.com/?p=47003; *see also* Mike Masnick, *Post a Picture that 'Causes Emotional Distress' and You Could Face Jailtime in Tennessee*, TECHDIRT (June 7, 2011, 11:33 AM), http://www.techdirt.com/articles/20110606/22513614573/post-picture-that-causes-emotional-distress-you-could-face-jailtime-tennessee.shtml; Michael Silence, *TN's 'Unconstitutional' Law on What You Say on the Internet*, KNOXNEWS.COM: NO SILENCE HERE (June 9, 2011, 10:07 AM), http://blogs.knoxnews.com/silence/archives/2011/06/tns_unconstitut.shtml; *e.g.*, Erica Horton & Richard Locker, *Law Tough on Cyber Bullies*, CHATTANOOGA TIMES FREE PRESS, June 11, 2011, at B1. Several months later, the Tennessee Legislature amended the law that essentially limited the statute to constitutionally unprotected threats. 2012 Tenn. Pub. Acts ch. 992 (codified at TENN. CODE ANN. § 39-17-308 (Supp. 2012)).

before sending it to the Governor.[38] This attention to First Amendment concerns is good, and there ought to be more of it.

I. THE ORIGIN OF HARASSMENT, STALKING, AND RESTRAINING ORDER LAWS: UNWANTED SPEECH *TO* A PARTICULAR PERSON

A. *Restrictions on Unwanted One-to-One Speech*

For many decades, American law has restricted certain kinds of unwanted speech said *to* a particular person:

- State and federal telephone harassment laws have long banned calls made to people with the intent to "abuse," "annoy," "harass," or "offend" (sometimes with the limitation that the calls must be repeated or anonymous).[39]
- More recently, stalking laws have banned (among other things) repeated annoying letters, phone calls, or personal contacts with a person.[40]
- Federal law has let any householder ban further mailings to his home of "advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing

[38] H.B. 2549, sec. 1, 50th Leg., 2d Sess. (Ariz. 2012) (Senate engrossed version), would have provided that it was a crime (among other things) "for any person, with intent to . . . harass, annoy or offend, to use any electronic . . . device and use any obscene, lewd or profane language." This led to a good deal of criticism, apparently beginning with a letter from the Media Coalition to the Arizona Governor, which was reported by the Comic Book Legal Defense Fund site, which was then in turn picked up by a post of mine on the *Volokh Conspiracy* blog, which was then linked to by various other blogs, and then eventually picked up by mainstream media outlets. *See* Letter from David Horowitz, Exec. Dir., Media Coal., Inc., to Gov. Janice Brewer, Request for Veto of House Bill 2549 (Mar. 29, 2012), *available at* http://mediacoalition.org/mediaimages/AZ%20HB%202549%20Letter%20to%20Governor%20Brewer%20requesting%20veto%203%2029%202012.pdf; Charles Brownstein, *Arizona Legislature Passes Sweeping Electronic Speech Censorship Bill*, COMIC BOOK LEGAL DEF. FUND (Mar. 30, 2012), http://cbldf.org/homepage/arizona-legislature-passes-sweeping-electronic-speech-censorship-bill; Eugene Volokh, *A Crime to Use "Any Electronic or Digital Device" "And Use Any Obscene, Lewd or Profane Language" "With Intent to . . . Offend"?*, VOLOKH CONSPIRACY (Mar. 31, 2012, 9:11 PM), http://www.volokh.com/?p=58105; *e.g.*, Alyssa Newcomb, *'Annoying, Offending' Language Online Would Be Crime Under Arizona Bill*, ABC NEWS (Apr. 3, 2012), http://abcnews.go.com/US/arizona-passes-internet-bullying-bill/story?id=16063158. (A search through the LEXIS NEWS;CURNWS database for *arizona and harass! and electronic and date(< 6/1/2012) and date(> 3/1/2012)* can give some sense of the progress of the story.)

After a good deal of criticism, the bill was limited to speech that was either "direct[ed]" to the person whom the speaker intended to "harass," speech that threatened physical harm, or speech that consisted of "anonymous, unwanted or unsolicited electronic communications" and disturbed "the peace, quiet or right of privacy" of the recipient. It was this narrower version that was enacted. H.B. 2549, sec. 1, 50th Leg., 2d Sess. (Ariz. 2012) (Conference engrossed version).

[39] *See, e.g.*, 47 U.S.C. § 223(a)(1)(C), (E) (2006); LA. REV. STAT. ANN. § 14:285(A)(2) (2004); N.C. GEN. STAT. § 14-196(a)(3) (2011).

[40] *See, e.g.*, D.C. CODE §§ 22-3132 to -3133 (LexisNexis 2010).

or sexually provocative.'"[41] I will call this the *Rowan* law after the case, *Rowan v. United States Post Office Department*, that upheld the statute. Some states have likewise barred unwanted mailings or unwanted telephone calls after the recipient has said "stop," generally without limitation to "erotically arousing" material.[42]

- Restraining order laws have allowed people to get court orders barring further letters, phone calls, or personal contact from a particular person.[43]

Some of these laws have been struck down in some states,[44] but on balance they have generally been upheld by lower courts;[45] and the Supreme Court has upheld the federal ban on repeated unwanted mailings.[46]

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[41] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 730 (1970) (citing 39 U.S.C. § 4009(a) (1964 ed., Supp. IV)).

[42] *See, e.g.*, OHIO REV. CODE ANN. §§ 2913.01(X), 2917.21(A)(5) (West 2006) (banning any "telecommunication," including telephone calls and e-mails, after the recipient "has told the caller not to make a telecommunication to those premises or to any persons at those premises"); Dzwonczyk v. Syracuse City Police Dep't, 710 F. Supp. 2d 248, 266 (N.D.N.Y. 2008) (concluding that repeatedly transmitting "unwanted written and verbal communications" on religious themes to a particular person, when the sender had "been twice contacted by police regarding the matter," could constitute criminal harassment); State v. Rettig, Nos. 7-91-14, 7-91-15, 1992 WL 19326, at *2 (Ohio Ct. App. Feb. 3, 1992) (upholding a similar state law provision and citing *Rowan*); Ramsey v. Edgepark, Inc., 583 N.E.2d 443, 452 (Ohio Ct. App. 1990) (upholding an injunction against repeated unwanted mailings and citing *Rowan*).

[43] *See, e.g.*, CAL. CIV. PROC. CODE §§ 527.6, 527.8 (West 2011 & Supp. 2013).

[44] *See, e.g.*, People v. Gomez, 843 P.2d 1321, 1323–24 (Colo. 1993) (striking down as unconstitutionally vague a ban on any conduct that intentionally "harasses, threatens or abuses another person"); Bolles v. People, 541 P.2d 80, 81 & n.1 (Colo. 1975) (striking down a telephone harassment statute that banned "communicat[ing] with a person . . . by telephone, telegraph, mail, or any other form of communication, in a manner likely to harass or cause alarm"); People v. Klick, 362 N.E.2d 329, 330, 332 (Ill. 1977) (striking down a telephone harassment statute that banned "mak[ing] a telephone call" "[w]ith intent to annoy"); State v. Machholz, 574 N.W.2d 415, 417–18 (Minn. 1998) (striking down a ban on "intentional conduct" that causes "a reasonable person . . . to feel oppressed, persecuted, or intimidated"); State v. Vaughn, 366 S.W.3d 513, 519–20 (Mo. 2012) (striking down a ban on "repeated unwanted communication to another person"); State v. Pierce, 887 A.2d 132, 133, 135 (N.H. 2005) (striking down, without citing *Rowan*, a ban on "communicat[ing] with [a] person" "with the purpose to annoy or alarm [such person], having been previously notified that the recipient does not desire further communication"); State v. Brobst, 857 A.2d 1253, 1254, 1257 (N.H. 2004) (striking down a ban on telephone calls made "with a purpose to annoy or alarm"); State v. Blair, 601 P.2d 766, 767 (Or. 1979) (striking down a ban on "communicat[ing] with a person" "in a manner [intended to and] likely to cause annoyance or alarm"); City of Everett v. Moore, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984) (striking down a law banning "communicat[ing] with a person . . . in a manner likely to [and intended to] cause annoyance or alarm" or "engag[ing] in a course of conduct that [intentionally] alarms or seriously annoys another person and which serves no legitimate purpose"); State v. Dronso, 279 N.W.2d 710, 712 n.1, 714 (Wis. Ct. App. 1979) (striking down a ban on "mak[ing] a telephone call" "[w]ith intent to annoy another"); *see also* Gormley v. Dir., Conn. State Dep't of Adult Prob., 449 U.S. 1023 (1980) (White, J., dissenting from denial of certiorari) (suggesting that a statute that bans telephone calls that are intended to and likely to "cause annoyance or alarm" is likely unconstitutional).

[45] *See, e.g.*, United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978); City of Montgomery v. Zgouvas, 953 So. 2d 434, 443 (Ala. Crim. App. 2006); South v. City of Mountain Brook, 688 So. 2d

But all these laws have one thing in common: In the great bulk of their applications, they restrict what one may call "unwanted one-to-one" speech—speech said to a particular person in a context where the recipient appears not to want to hear it, whether because the recipient has expressly demanded that the speech stop or because the speaker intends to annoy or offend the recipient.[47] The laws are aimed at restricting speech *to* a person, not speech *about* a person. And that is the context in which they have generally been upheld against First Amendment challenge.[48]

This is especially clear with regard to traditional telephone harassment law and unwanted postal contact law because the telephone and the letter are one-to-one media: each phone call or letter has one particular recipient.[49] In principle, stalking laws and harassment orders could be broader and could apply to speech said to the public (or to individual willing listeners) that annoys the subject of the speech. Indeed, those are the applications that this Article criticizes. But when the stalking and harassment laws have been upheld, this has almost invariably been in one-to-one speech cases and with arguments that made sense because of the one-to-one nature of the speech.[50]

When the laws apply to one-to-one unwanted speech, they interfere only slightly with debate and the spread of information—both grant

292 (Ala. Crim. App. 1996); People v. Weeks, 591 P.2d 91, 95 (Colo. 1979), *overruled on other grounds by* People v. Seven Thirty-Five E. Colfax, Inc., 697 P.2d 348 (Colo. 1985); State v. Roesch, Nos. CR94-87735, CR94-87736 & CR94-90639, 1995 WL 356776, at *5 (Conn. Super. Ct. June 6, 1995); State v. Elder, 382 So. 2d 687, 689 (Fla. 1980); Constantino v. State, 255 S.E.2d 710, 713 (Ga. 1979); State v. Richards, 896 P.2d 357, 362 (Idaho Ct. App. 1995); People v. Blackwood, 476 N.E.2d 742, 746 (Ill. App. Ct. 1985); Rzeszutek v. Beck, 649 N.E.2d 673, 680–81 (Ind. Ct. App. 1995); Yates v. Commonwealth, 753 S.W.2d 874, 875–76 (Ky. Ct. App. 1988); State v. Meunier, 354 So. 2d 535, 538 (La. 1978); State v. Cropley, 544 A.2d 302, 305 (Me. 1988); People v. Taravella, 350 N.W.2d 780, 784 (Mich. Ct. App. 1984); State v. Koetting, 691 S.W.2d 328, 331 (Mo. Ct. App. 1985); Gilbert v. State, 765 P.2d 1208 (Okla. Crim. App. 1988); State v. Hauge, 547 N.W.2d 173, 175–76 (S.D. 1996); State v. Mott, 692 A.2d 360, 365 (Vt. 1997); State v. Alexander, 888 P.2d 175 (Wash. Ct. App. 1995); Luplow v. State, 897 P.2d 463 (Wyo. 1995).

[46] *Rowan*, 397 U.S. at 740.

[47] *See, e.g.*, People v. Dupont, 486 N.Y.S.2d 169, 173 (App. Div. 1985) (stating that the harassment statute focuses on "annoying and harassing communications transmitted directly to the complainant" rather than "dissemination . . . [or] publication of vexatious material about an individual"); Kramer v. State, 605 S.W.2d 861, 867 (Tex. Crim. App. 1980) (upholding a statute banning annoying telephone or written communications in vulgar language because "[n]o provision is made in [the statute] for punishing acts not directed to a private recipient," and relying on *Rowan*); Towner v. Ridgway, 182 P.3d 347, 352–53 (Utah 2008) (upholding an antistalking injunction because it bars "communications from [defendant] to [plaintiffs], not communications by [defendant] about [plaintiffs] to others").

[48] All the cited cases in notes 45 and 47, for instance, involved one-to-one speech.

[49] I oversimplify here a little: One can address a letter to two people who live at the same home or call one person and ask that the person invite another person to listen in on another phone. But I think for our purposes such speech to a couple of family members can be treated the same as one-to-one speech.

[50] *See* cases cited *supra* note 45.

political debate and everyday conversations among friends and acquaintances about what is happening in their social circle.[51] A one-to-one unwanted statement is highly unlikely to persuade or inform anyone, precisely because the listener does not want to hear it. Its only effect is likely to be to offend or annoy. And restricting such statements thus leaves speakers free to communicate to other, potentially willing listeners.[52]

But one-to-many speech—such as picketing, signs, drive-in movie screens, inscriptions on clothing, and the like—is generally constitutionally protected even when some of its viewers are likely to be offended.[53] So long as some of the viewers are likely to be open to the message, the message remains protected, precisely because restricting the message would cut off constitutionally valuable communication to willing listeners as well as constitutionally valueless communication to unwilling listeners.

To be sure, one-to-many speech critical of a particular person will very likely be seen by that person and offend that person. The subject of the speech might run across the speech the same way that others run across it—for instance, if one blog commenter is saying rude things about another blog commenter or about the blogger. Or some other reader might alert the subject to the speech, and the subject might feel it necessary to figure out what others are saying about him. But in either case, though the subject will likely be offended by the speech, other readers may find the speech valuable. Suppressing one-to-many speech would thus unacceptably restrict communication to potentially willing listeners.

Of course, this presupposes a First Amendment theory in which either (1) the value of speech stems from its value as a means of persuading, informing, or entertaining listeners, or (2) the value of speech also stems from its value as a means for the speaker's self-expression, but only when both the speaker and listener consent to such self-expression.[54] One can

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[51] This Article generally won't discuss the question whether injunctions against speech—as opposed to criminal punishment of speech—are unconstitutional prior restraints. For more on this question, and in particular on why *permanent* injunctions that follow a trial at which speech is found to be unprotected are generally constitutional but *preliminary* injunctions that are entered based on a mere "likelihood of success" are generally unconstitutional, see Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 150 (1998).

[52] *Cf.* MARTIN H. REDISH, THE LOGIC OF PERSECUTION 124 (2005) (reasoning that the freedom of speech is "about the freedom to persuade" and "the freedom to inform"); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67, 116 n.134 (2007) (noting that speech may sometimes be restricted to protect "unwilling listeners").

[53] *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cohen v. California, 403 U.S. 15 (1971); Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).

[54] *See, e.g.*, Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMMENT. 417, 434–35 (2011) (arguing in favor of a self-expression theory of free speech but concluding that such a theory "may readily . . . distinguish harassing speech on the grounds that it does not involve a consensual communicative relation"; "[a]lthough as thinkers we have an interest in expressing our thoughts and in

imagine a contrary theory under which speakers have the power to remonstrate with individual listeners (at least using some one-to-one media), even when the listeners want those communications to stop.

But this is not the view that the Court has arrived at (as I will discuss in Part I.C) or that lower courts have arrived at, given the general trend of upholding telephone harassment and stalking laws. And I think the Court's conclusion is likely correct. To the extent the First Amendment protects speech as a tool for advancing the search for truth, marketplace of ideas, or self-government, unwanted one-to-one speech does little to promote these goals. And to the extent that the First Amendment protects speakers' self-expression, it should also protect listeners' freedom not to be intruded on by that self-expression (at least when preventing such intrusion leaves speakers free to communicate with willing listeners). As the Court unanimously concluded in *Rowan*, "no one has a right to press even 'good' ideas on an unwilling recipient."[55]

B. Protection Even for Some Unwanted One-to-One Speech

To be sure, there are some important limitations on government power to restrict unwanted one-to-one speech. First, unwanted speech to some recipients—for instance, government officials, candidates for office, and possibly businesses that serve the public—might have constitutional value even when the listener doesn't want to hear it. People may have the right to remonstrate with government agencies and petition for redress of grievances even when the target doesn't want to hear the petitions or the petitions are offensively worded.[56]

The exact scope of this principle is not clear. It doesn't extend to threats,[57] and it might not extend to telephone calls to an official's home.[58]

being known, we do not have a right to command the *personal* audience of any other thinkers we like, irrespective of their interests in hearing us out").

[55] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970).

[56] *See* United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999); U.S. Postal Serv. v. Hustler Magazine, Inc., 630 F. Supp. 867 (D.D.C. 1986); State v. Fratzke, 446 N.W.2d 781, 783–85 (Iowa 1989) (letter to police officer is an attempt to "protest[] governmental action" even when it contains vulgarities and is "inten[ded] to annoy," and is thus not covered by a statute that applies only to communications "without legitimate purpose"); State v. Drahota, 788 N.W.2d 796 (Neb. 2010).

[57] City of San Jose v. Webster, No. H026491, 2004 WL 2904438, at *3–5 (Cal. Ct. App. Dec. 16, 2004) (upholding "an injunction prohibiting [defendant] from contacting Herbert [a police department lieutenant] and ordering him to stay at least 300 yards away from Herbert, her home, and her workplace," because Webster's past conduct would lead "[a] reasonable person [to] fear for her safety"); State v. Roesch, Nos. CR94-87735, CR94-87736 & CR94-90639, 1995 WL 356776, at *8 (Conn. Super. Ct. June 6, 1995) (upholding conviction for sending threatening letters to police officers); *see also* Luoma v. Hamm, No. CO-97-1240, 1997 WL 785701, at *2 (Minn. Ct. App. Dec. 23, 1997) (upholding injunction ordering citizen not to further contact the superintendent of schools, based on past communications to the superintendent that the court seemed to perceive as threatening, though stressing that the defendant remained free to publish his criticisms of the superintendent, to attend school board meetings, or communicate with other school board members).

It's also not clear whether at some point repeated contacts could be restricted because they tie up phone lines or otherwise interfere with government officials' duties in ways that are unrelated to the offensiveness of the communication.[59] But some such protection for some unwanted one-to-one speech to government officials should exist.

Second, some attempts to identify unwanted speech might be unconstitutionally vague or overbroad.[60] This is especially so when the speech is defined using terms such as "intent to annoy," which are potentially broad enough to cover what should be permissible attempts to explain to people what they've done wrong—calls to businesses to tell them off about poor product quality, e-mails to acquaintances or former friends to tell them how they've hurt you, and the like.[61] Nonetheless, suitably narrow and clear harassment statutes limited to one-to-one speech ought to be constitutional for reasons given in the preceding section.

C. The Supreme Court Doctrine

This distinction between one-to-one and one-to-many speech has not been explicitly set forth by the Supreme Court. But I think it well explains the Court's tolerance for some speech restrictions.

1. Mailings to Unwilling Recipients' Homes.—Most clearly, *Rowan v. United States Post Office Department* upheld the ban on mailings sent to people who demanded that the mailer stop sending them mail, and in the process relied heavily on the fact that the restriction was on speech said specifically *to* an unwilling listener. "[N]o one has a right to press even 'good' ideas on an unwilling recipient," the Court held, and noted that the listener who said no to future mailings was entitled to protection as an "unreceptive addressee."[62]

Indeed, just a year after *Rowan*, *Organization for a Better Austin v. Keefe* made explicit the distinction between speech to an unwilling listener

[58] *See, e.g.*, Hott v. State, 400 N.E.2d 206, 207–08 (Ind. Ct. App. 1980) (upholding conviction under statute that banned "indecent" telephone calls, based on vulgarity-filled late-night calls to the homes of the chief of police and the prosecutor).

[59] *See, e.g.*, People v. Smith, 392 N.Y.S.2d 968, 971 (App. Term 1977) (per curiam) (upholding conviction for calling police department twenty-seven times in three and a half hours to make a complaint, despite having been told that the matter was civil rather than criminal); City of E. Palestine v. Steinberg, Nos. 93-C-34, 93-C-35, 1994 WL 397267, at *1, *4 (Ohio Ct. App. July 21, 1994) (upholding conviction for calling 911 eight times in half an hour for nonemergency purposes after having been told to stop).

[60] *See, e.g.*, Gilbreath v. State, 650 So. 2d 10, 12–13 (Fla. 1995) (excising from the telephone harassment statute the prohibition on calls made with "intent to offend [or] annoy," on the grounds that "offend" and "annoy" are too vague).

[61] *Cf., e.g.*, Paradise Hills Assocs. v. Procel, 1 Cal. Rptr. 2d 514, 521, 523 (Ct. App. 1991) (concluding that disgruntled customers had a First Amendment right to picket home building company).

[62] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737, 738 (1970).

and speech about an unwilling subject.[63] In holding that Keefe couldn't enjoin the defendants from distributing leaflets that criticized Keefe's business practices in Keefe's neighborhood, the Court concluded that, "[a]mong other important distinctions" between *Organization for a Better Austin* and *Rowan*, Keefe "[was] not attempting to stop the flow of information into his own household, but to the public."[64] If someone wanted to send things *to* Keefe, a statute or court order might well have protected Keefe from such speech. But the legal system may not protect Keefe from things said *about* him.

Likewise, *Consolidated Edison Co. v. Public Service Commission of New York*[65] struck down a ban on utilities' mailing advocacy to people's homes, and *Bolger v. Youngs Drug Products Corp.*[66] struck down a ban on the mailing of contraceptive advertisements. Both laws were defended on the grounds that they protected householders from unwanted speech, but in both instances the Court rejected the argument. Though *Rowan* let individual householders block continued unwanted speech into *their own* homes, the government couldn't protect unwilling householders by restricting mass speech that could reach willing listeners.

"[W]e have never held," the Court reasoned in *Bolger*, "that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."[67] Likewise, in *Consolidated Edison*, the Court relied on *Martin v. City of Struthers*, a case that held that cities couldn't categorically ban all house-to-house political or religious leafleting but could enforce "No Soliciting" signs put up by the householders.[68] So a restriction on speech that leaves speakers free to speak to willing listeners (e.g., the law in *Rowan* or a law enforcing "No Soliciting" signs) is constitutional. But a restriction on speech that interferes with speakers' ability to speak to potentially willing listeners (e.g., the laws in *Keefe*, *Bolger*, and *Consolidated Edison*) is unconstitutional. And this is so even when—as in *Keefe*—the restrictions focus on speech that's about an *unwilling subject* though it is said to potentially *willing listeners*.

2. Physical Approaches to People and Continued Physical Presence Outside Their Homes.—Likewise, in *Hill v. Colorado*,[69] the Court upheld a law that banned people from approaching within eight feet of others to give them leaflets unless the recipient specifically consented to

[63] 402 U.S. 415 (1971).
[64] *Id.* at 420.
[65] 447 U.S. 530, 544 (1980).
[66] 463 U.S. 60, 75 (1983).
[67] *Id.* at 72.
[68] Martin v. City of Struthers, 319 U.S. 141, 148 (1943).
[69] 530 U.S. 703 (2000).

such an approach. (The law was limited to speech within 100 feet of a health care facility.) The law, the Court held, was constitutional because it focused on speech that was "so intrusive that the unwilling audience cannot avoid it"[70] and yet left open "ample alternative channels" for reaching potentially willing listeners.[71] The Court reaffirmed the *Rowan* principle that "no one has a right to press even 'good' ideas on an unwilling recipient," in a context where the speech was being targeted to particular individual listeners.[72] But the Court also stressed that people remained free to speak in a one-to-many way to the public at large (for instance, by displaying signs), even if some unwilling listeners were included.[73]

Frisby v. Schultz takes a similar approach. In *Frisby*, the Court upheld a content-neutral ban on residential picketing on the theory that residential picketing "is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[74] And when the speakers retain "ample alternative channels" for speaking to the rest of the public—such as marching through the neighborhood, going door-to-door to express their views to the target's neighbors, and the like—the restriction is permissible.[75]

Here, the Court might have been mistaken in treating the picketing as "narrowly directed at the household" instead of the public. It might well be that residential picketing is aimed *both* at the subject (who will be highly unlikely to be persuaded or informed by the speech) and at the subject's neighbors (who might find it persuasive or informative if it tells them something about their neighbor that they see as morally relevant). Nonetheless, the Court was still trying to draw a line between one-to-one speech *to* the target and one-to-many speech *about* the target.

3. Radio Broadcasts.—There is one case in which the Court upheld a clear restriction on one-to-many speech justified by a worry that the speech is offensive—*FCC v. Pacifica Foundation*.[76] But even here the narrowness of the Court's decision helps illustrate the strength of the one-to-one/one-to-many distinction.

In *Pacifica*, five Justices upheld the ban on the broadcast of the "seven dirty words" on radio, relying partly on *Rowan*,[77] which they characterized

[70] *Id.* at 716.

[71] *Id.* at 726.

[72] *Id.* at 718.

[73] *Id.* at 714–15.

[74] Frisby v. Schultz, 487 U.S. 474, 486 (1988).

[75] *Id.* at 483–84.

[76] 438 U.S. 726 (1978).

[77] *Id.* at 748; *id.* at 759 (Powell, J., concurring in part and concurring in the judgment, joined by Blackmun, J.).

as generally allowing people to be protected from offensive messages in their homes. Justice Brennan's dissent responded—in my view, correctly—that the *Rowan* law was quite different. In *Rowan*, "householders who wished to receive the sender's communications were not prevented from doing so."[78] But in *Pacifica*, which dealt with a one-to-many medium rather than a one-to-one medium, protecting those who are offended by vulgarity on the radio meant barring speech to willing listeners as well.[79]

Nonetheless, this *Pacifica* exception was distinctly limited. The three-Justice lead opinion made clear that its rationale rested on the "low-value" status of vulgarities, so the result would have presumably been different had the Court examined speech that is offensive but doesn't "depict[] sexual and excretory activities."[80] And the three Justices also stressed that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[81]

Public criticism and ridicule of a person, for instance, wouldn't be stripped of constitutional protection just because they are broadcast by radio and arrive in the person's home. Vulgarities broadcast on the radio could be restricted even in this one-to-many medium, but other speech could not be.

4. Not Just Speech that Reaches into the Home.—These cases suggest that the protection for unwilling listeners is not limited to speech sent to the home, or even speech visible in the home. *Rowan*, *Frisby*, and *Pacifica* did rely on the listener's rights to exclude unwanted speech from the home, but *Hill* did not.

Conversely, *Pacifica* stated that much speech—including speech that contains ideas that many people might find offensive—is constitutionally protected even when it is conveyed by media that reach into the home (broadcast radio and television). The Court has also expressly declined to extend *Pacifica* to Internet communications, even though they tend to reach into the home to the same extent that radio does.[82] And the *Pacifica* lead opinion distinguished radio from newspapers, even though newspapers are often delivered to the home.[83]

5. The Common Threads: Intrusiveness Plus One-to-One Speech.—There are two common threads in the speech that can be restricted, at least in all the cases except *Pacifica*. First, the speech is seen as physically intruding into the listener's private space. That literally happens when a door-to-door evangelist refuses to honor a "No Soliciting"

[78] *Id.* at 766 (Brennan, J., dissenting).
[79] *Id.*
[80] *Id.* at 731–32 (Stevens, J.).
[81] *Id.* at 745.
[82] Reno v. ACLU, 521 U.S. 844 (1997).
[83] 438 U.S. at 748–50.

sign.[84] It happens when an unwanted letter makes its way into a recipient's mailbox.[85] It happens in some sense when a person receives an unwanted telephone call in his home,[86] or even in his office (or, these days, on his cell phone even when he is in a public place). It also happens when someone approaches someone else too closely, as in *Hill v. Colorado*,[87] or repeatedly follows someone even at a longer distance. The law plausibly treats all these sorts of speech as intruding onto a person physically, by using the person's real or personal property or coming too close to that person.

What's more, the speech intrudes even on listeners who have not made an informed choice to read a particular publication and thus run the risk that the publication has something offensive in it. A newspaper is generally free to print sexually offensive material (short of obscenity), and it might be a shock to some readers, but at least those readers have voluntarily chosen to read this particular newspaper. But when we hear our telephone ringing, get an envelope in the mail, or get an e-mail message—especially when the sender's identity is unfamiliar—we don't make the same deliberate choice to read a particular item, since we don't know what that item really is. And while we can avoid such intrusions by not having a telephone or an e-mail address, that is impractical in modern society.

Second, in all the cases but *Pacifica*, the particular instance of speech is seen as being said *to* the recipient, and basically no one else, so that restricting the physical intrusion on the person leaves the speaker free to communicate to others. This is true even when, as in *Rowan* or in the *Martin* "No Soliciting" hypothetical, the speech is part of a broader campaign to reach the public at large. The campaign is accomplished through individual contacts, and the speaker is able to avoid the contacts with the unwilling listeners while still remaining free to talk to the willing ones.

As I mentioned, *Pacifica* is the outlier here. The ban on broadcasts of vulgarities or sexually themed material does interfere with speech to willing listeners, and a radio listener or TV viewer receives a broadcast only when he tunes into a particular channel. Even in the old days of turn-the-dial analog tuning, a listener would generally have a pretty good idea what radio station he was listening to (and especially what TV station he was watching). And to the extent that the listener might not know the precise source, that is no different from when a householder leafs through an unfamiliar free newspaper or magazine that he has received in the mail.

[84] Martin v. City of Struthers, 319 U.S. 141 (1943).

[85] Rowan v. U.S. Post Office Dep't, 397 U.S. 728 (1970).

[86] *See, e.g.*, Von Lusch v. State, 387 A.2d 306, 310 (Md. Ct. Spec. App. 1978) (upholding a telephone harassment law partly because it protects each person from "the harassment and annoyance of having his own telephone used in an abusive fashion by an unwanted intruder upon his privacy").

[87] 530 U.S. 703 (2000).

The justly controversial *Pacifica*, though, has to be seen as a narrow case that was limited from the outset and has remained limited since. First, the lead opinion relies heavily on the judgment that the particular speech at issue in that case—vulgarities—is of low value.[88] Second, and relatedly, the lead opinion stresses that the speech was offensive only because of the particular words that were chosen and not because of the offensive message.[89] Third, the Court stressed the accessibility of radio to children,[90] "even those too young to read."[91]

Fourth, the lead opinion noted that the material was broadcast during the day, and left open the possibility that the same speech would be constitutionally protected if broadcast at night,[92] something that the D.C. Circuit later specifically held.[93] This further highlights the focus on protecting small children rather than protecting unwilling listeners, since unwilling listeners may be present at night and not just during the day. Fifth, the lead opinion noted that the case didn't involve a criminal prosecution.[94]

Finally, since *Pacifica*, the Court has refused to extend *Pacifica*, treating it as inapplicable to the Internet, even though the Internet, like radio and television broadcasting, is accessible from people's homes.[95] Whether the Court will ultimately expressly overrule *Pacifica* is unclear; though Justices Thomas and Ginsburg suggested in recent opinions that they would do so, the other Justices have not spoken to that.[96] But the Court certainly hasn't been treating *Pacifica* as a precedent that has broad analogical force outside radio and television broadcasting.

So the general pattern, I think, holds. There does seem to be something of an exception to First Amendment protection for one-to-one speech that is addressed to an unwilling listener and that can be restricted without blocking communication to willing listeners. The exception might extend only to situations where the speech physically intrudes into the listener's property or into an area around the listener. And, setting aside *Pacifica*, the exception is indeed limited to one-to-one speech to an offended listener and not one-to-many speech even when it is about an offended subject.

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88 *Pacifica*, 438 U.S. at 746–47 (Stevens, J.).

89 *Id.* at 746.

90 *Id.* at 749 (majority opinion).

91 *Id.*

92 *Id.* at 750 n.28.

93 Action for Children's Television v. FCC, 932 F.2d 1504, 1509 (D.C. Cir. 1991).

94 *Pacifica*, 438 U.S. at 750.

95 Reno v. ACLU, 521 U.S. 844 (1997).

96 FCC v. Fox Television Stations, Inc. (II), 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring); FCC v. Fox Television Stations, Inc. (I), 556 U.S. 502, 532–34 (2009) (Thomas, J., concurring).

II. INSULTING SPEECH ABOUT PEOPLE AND THE FIRST AMENDMENT

A. *The General Protection of Speech About People*

Restrictions on public speech *about* a person, then, stand on very different First Amendment footing from restrictions on unwanted speech *to* the person. Such restrictions on speech about a person can be constitutional when limited to speech that falls within the recognized First Amendment exceptions, such as threats, libel, and intentional incitement to likely and imminent criminal attack.[97] But when one-to-many speech about people falls outside these exceptions, it should be constitutionally protected.

As I mentioned above, I don't want to claim that one-to-many speech is *less harmful* than one-to-one speech. Indeed, many people might be much more upset about insulting things said publicly about them—to listeners who might be influenced by such criticism—than about insulting things said directly to them.

Nonetheless, for reasons discussed in Part I, one-to-many speech has full First Amendment value because it involves the expression of facts and opinions aimed at informing and persuading potentially willing listeners. It should therefore generally be constitutionally protected, notwithstanding the offense and distress it causes to its subjects. And this is certainly where current First Amendment doctrine points.

B. *First Amendment Exceptions: Threats, Knowingly False Statements, Incitement, and Solicitation*

Let me begin by elaborating briefly on the First Amendment exceptions I just mentioned in the preceding section.

1. Threats.—Speech about people can be punished when it constitutes a "true threat" of criminal attack.[98] Most harassment laws cover true threats,[99] and some are limited to them.[100]

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[97] *See, e.g.*, O'Brien v. Borowski, 961 N.E.2d 547, 554–57 (Mass. 2012) (interpreting the state harassment prevention order statute as limited to the constitutionally unprotected categories of fighting words and threats). Harassment laws may also cover fighting words, but that exception is generally limited to face-to-face speech to a person. *See, e.g.*, State v. Drahota, 788 N.W.2d 796, 802–04 (Neb. 2010). I therefore will not discuss it in this Part, which is focused on one-to-many speech about the target.

[98] Virginia v. Black, 538 U.S. 343, 359 (2003); Watts v. United States, 394 U.S. 705 (1969) (per curiam).

[99] *See, e.g.*, People v. Parkins, 396 N.E.2d 22, 24 (Ill. 1979) (reading the statute as limited to threats and therefore constitutional); People v. Munn, 688 N.Y.S.2d 384, 386 (Crim. Ct. 1999) (holding that the harassment statute permissibly covers threats). Not all forms of speech that might be labeled "threats," however, may be punished; for instance, *State v. Williams*, 26 P.3d 890, 894, 896 (Wash. 2001), struck down a statute that banned credible "threats" "to do any . . . act which is intended to substantially harm the person threatened or another with respect to his or her . . . *mental health*."

[100] *See, e.g.*, IOWA CODE ANN. § 708.11 (West 2003 & Supp. 2012); People v. Tran, 54 Cal. Rptr. 2d 650, 652–53 (Ct. App. 1996); Bouters v. State, 659 So. 2d 235, 237–38 (Fla. 1995); Johnson v.

2. *Knowingly False Statements About a Person.*—Knowingly false statements about a person can generally be restricted (subject to the First Amendment *mens rea* requirements), whether they are defamatory or merely offensive because of their falsehood.[101]

Several harassment cases have involved defendants impersonating their ex-girlfriends—either on websites or in responses to personal ads—and saying, in this persona, that they are interested in casual sex.[102] This can cause others to contact the ex-girlfriend in a distressing and frightening way, and could also unfairly damage her reputation. Such statements can likewise be punished as a form of libel.

To be sure, the libel exception generally arises these days in civil damages lawsuits, and some courts have held that injunctions against libel are unconstitutional.[103] But the emerging majority view seems to be that "an injunction issued following a trial that determined that the defendant defamed the plaintiff that does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the First Amendment."[104] (Preliminary injunctions against libel—entered before a full trial and based only on a finding of likelihood of success on the merits—are likely not constitutional, for reasons my coauthor Mark Lemley and I have explained elsewhere; I will set such preliminary injunctions aside for purposes of this Article.)[105]

Likewise, the Court in *Garrison v. Louisiana* suggested that criminal libel laws that are limited to knowingly or recklessly false statements are constitutional,[106] and criminal libel laws seem to be enforced with some

State, 449 S.E.2d 94, 96 (Ga. 1994); Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995); State v. Rucker, 987 P.2d 1080, 1094–95 (Kan. 1999); Woolfolk v. Commonwealth, 447 S.E.2d 530, 533 (Va. Ct. App. 1994).

[101] Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253–54 (1974) (concluding that civil liability for offensive knowing falsehoods was constitutional); Time, Inc. v. Hill, 385 U.S. 374, 390 (1967) (likewise); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (suggesting that criminal liability for defamatory knowing falsehoods was constitutional); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (concluding that civil liability for defamatory knowing falsehoods was constitutional).

[102] United States v. Sayer, Nos. 2:11-CR-113-DBH, 2:11-CR-47-DBH, 2012 WL 1714746 (D. Me. May 15, 2012); People v. Kochanowski, 719 N.Y.S.2d 461 (App. Term 2000); People v. Johnson, 617 N.Y.S.2d 577 (App. Div. 1994).

[103] *See, e.g.*, Willing v. Mazzocone, 393 A.2d 1155, 1157 (Pa. 1978) (holding that permanent injunctions against libelous speech are forbidden by the Pennsylvania Constitution); Lemley & Volokh, *supra* note 51, at 178–79 (noting other cases that take this view).

[104] Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 343 (Cal. 2007); *see also id.* at 343–52 (discussing similar decisions from other courts); RESTATEMENT (SECOND) OF TORTS § 623 special note on remedies for defamation other than damages (1977) (stating that an injunction may be available when a court has "formally determined" that the speech is unprotected).

[105] *See* Lemley & Volokh, *supra* note 51, at 169–79; *see also Balboa Island*, 156 P.3d at 347–52 (citing state court decisions stating that preliminary injunctions against libel are generally unconstitutional, even if permanent injunctions are allowed).

[106] 379 U.S. at 75.

regularity in a few states at the trial level. One recent study reports on 61 criminal libel prosecutions in Wisconsin from 1991 to 2007,[107] and a search through Virginia criminal records reveals more than 300 criminal libel or slander convictions from 1993 to 2008.[108] It thus seems likely that criminal punishment for knowing falsehoods, whether through criminal libel statutes or "harassment" statutes, are constitutionally permissible.

3. Knowingly False Statements About the Speaker, Used to Manipulate the Listener.—Knowing falsehoods were also involved in the infamous Lori Drew case. Drew, an adult woman, contacted Megan Meier, a thirteen-year-old girl, who had been a classmate of Drew's daughter.[109] Drew pretended to be a sixteen-year-old boy and flirted with Meier over two weeks on the MySpace computer service. Meier apparently developed an emotional connection with the fictional sixteen-year-old boy: When Drew deliberately broke off contact, "tell[ing Meier] that he [(the fictional sixteen-year-old boy)] no longer liked her and that 'the world would be a better place without her in it,'" Meier killed herself.[110] Drew apparently deliberately tried to distress Meier—she had a grudge against her because of Meier's interaction with Drew's daughter—though there was no allegation that she actually wanted Meier to kill herself.

Drew was then prosecuted for violating the MySpace terms of service by using a fictional identity, which prosecutors claimed was not merely a breach of contract but a criminal misuse of a computer system. The court threw out the charges because it concluded that a breach of the terms of service didn't suffice to turn ordinary use of a computer into a crime.[111]

But Drew could have been convicted, I think, under a law that specifically banned using knowing falsehoods about oneself in order to severely distress a minor, if such a law had existed. Following *United States v. Alvarez*, there seem to be five votes on the Supreme Court for the proposition that knowing lies can generally be restricted by laws that pass intermediate scrutiny—that are substantially related to an important government interest.[112] And a ban on these sorts of manipulative lies that are intended to cause severe distress to an especially vulnerable class of victims should likely pass this test.[113]

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[107] David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303 313 (2009).

[108] Westlaw search through CRIM-VA for *(libel slander)*.

[109] United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

[110] *Id.*

[111] *Id.* at 468.

[112] *See* 132 S. Ct. 2537, 2551–52 (2012) (Breyer, J., concurring in the judgment, joined by Kagan, J.); *see also id.* at 2560–61 (Alito, J., dissenting, writing for three Justices) (concluding that knowing falsehoods should generally be constitutionally unprotected).

[113] *See, e.g.*, *id.* at 2554 (Breyer, J., concurring in the judgment) (seemingly endorsing laws that ban lies when there is "proof of specific harm to identifiable victims," proof of a "context[] in which a

Moreover, the boundaries of such a law would have well fit what made Drew's scheme especially dangerous and culpable. Had Drew revealed her identity up front, it's unlikely that Meier would have let herself be emotionally manipulated by Drew. And had the incident involved a genuine other teenage boy who toyed with the affections of a teenage girl—even one three years younger than himself and even out of desire for petty revenge—then it seems to me that the case for punishing the boy would have been quite weak. While his conduct would have still been reprehensible and tragic, emotional manipulation aimed at producing heartbreak isn't and shouldn't itself be a crime, even in the tiny fraction of cases in which it leads to suicide.

It's not clear to me that the fortunately rare incidents such as the Drew case warrant enacting laws that prohibit such manipulative lies. But if legislatures want to do something about these incidents, a law narrowly focused on manipulative lies about one's own identity aimed at minors should be constitutional.

4. Incitement and Solicitation.—Speech that is intended to promote imminent and likely criminal conduct is constitutionally unprotected.[114] So is speech that is intended to solicit a particular crime, even when the crime is not supposed to take place imminently. The boundaries of this solicitation exception are not clear, but it seems likely that it will cover statements that intentionally urge people to attack a particular person or to vandalize a particular building.[115]

Nonetheless, such speech is unprotected only if it really is intended to promote violence. That speech harshly criticizes its target does not strip it of protection, even if some listeners might react to the speech by attacking or threatening the target. Thus, for instance, in *NAACP v. Claiborne Hardware Co.*, the NAACP organized a black boycott of white-owned stores and publicized the names of blacks who weren't following the boycott in order to pressure people into going along with the boycott. Some

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tangible harm to others is especially likely to occur," or proof that the lie is of a sort that is "particularly likely to produce harm").

Whether the same principle should apply to emotionally manipulative lies about oneself aimed at adults is hard to tell, given the vagueness of the intermediate scrutiny test. For a case holding that such lies said to adults are *not* civilly actionable and therefore not reaching the question whether such lies are constitutionally protected, see *Bonhomme v. St. James*, 970 N.E.2d 1 (Ill. 2012). *Bonhomme*, like *Drew*, arose in the context of online impersonation that lured an unsuspecting victim into an emotional relationship; fortunately, the case didn't lead to suicide, though the plaintiff claimed that it did cause severe depression.

[114] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[115] *Compare* United States v. Williams, 553 U.S. 285 (2008) (solicitation of child pornography is constitutionally unprotected), *with* Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (statement by a demonstrator, as an illegal demonstration was being cleared up, that "We'll take the fucking street later" is constitutionally protected even if seen as "advocacy of illegal action at some indefinite future time").

of the people whose names were so publicized were beaten, had their property vandalized, or had shots fired into their homes.[116] But despite this, the Court held that the NAACP and the people who participated in gathering and publicizing the names couldn't be held liable for the boycott.[117]

One recent injunction against speech about a particular person seemed to be justified by a concern that the speech led some readers to threaten the person whom the speech criticized. In *Kimberlin v. Walker*, political activist (and convicted bomber) Brett Kimberlin claimed that blogger Aaron Walker's harsh criticisms of Kimberlin led some readers to send threats to Kimberlin and his family; and the judge relied on this in ordering Walker to stop blogging about Kimberlin.[118] Nor was the judge (Judge Vaughey) impressed by the First Amendment argument:

> JUDGE VAUGHEY: [Y]ou are starting a conflagration, for lack of a better word, and you're just letting the thing go recklessly no matter where it goes.
>
> . . . .
>
> WALKER: But Your Honor, I did not incite [the reader who allegedly threatened Kimberlin] within the *Brandenburg* standard.
>
> JUDGE VAUGHEY: Well, forget *Brandenburg*. Let's go by Vaughey right now, and common sense out in the world.[119]

Fortunately, the reviewing court in this case apparently did not forget *Brandenburg*, and vacated the order prohibiting Walker from further blogging about Kimberlin.[120] And this is the correct result: If speakers could be ordered to stop criticizing their subjects whenever any of their thousands of readers threatened the subject (or were alleged to have threatened the subject), a vast range of criticism would be potentially suppressible. *NAACP v. Claiborne Hardware* and *Brandenburg* preclude that.[121]

C. Speech About a Person that Allegedly Invades "Privacy"

Sometimes, harassment prosecutions and restraining orders are based on speech that allegedly invades people's privacy. Are these justifiable

[116] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 904–05 (1982).

[117] *Id.* at 925–26.

[118] *See* Hearing at 55, Kimberlin v. Walker, No. 0601SP019792012 (Md. Dist. Ct. May 29, 2012).

[119] *Id.*

[120] Order of Denial of Petition for Peace Order, Kimberlin v. Walker, No. 8526D (Md. Cir. Ct. July 5, 2012), *available at* http://www.law.ucla.edu/volokh/crimharass/99246349-Peace-Order-Vacated-7-5-12.pdf.

[121] Allegations that public criticism of a person led some readers to threaten the person also arose in *Nilan v. Valenti*, No. 12 27RO 235 (Mass. Dist. Ct. June 27, 2012), *available at* http://www.volokh.com/wp-content/uploads/2012/07/nilanorder.png. *See supra* notes 22–24 and accompanying text.

based on a possible "invasion of privacy" exception to the First Amendment?

This question most clearly arises under Minnesota and North Dakota law but could also come up elsewhere. Minnesota law lets judges enjoin "repeated incidents of intrusive or unwanted acts, words, or gestures that . . . are intended to have a substantial adverse effect on the safety, security, or privacy of another."[122] A Minnesota court has upheld the statute because it is limited to what the court saw as constitutionally unprotected speech: "fighting words," "true threats," and "conduct that intrudes on the privacy of another."[123]

North Dakota law uses similar language, making it a crime to intentionally or recklessly "[e]ngage[] in harassing conduct by means of intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person."[124] And even in other states, a law that immunizes "constitutionally protected activity" could be read by a court as limited to speech that falls within a First Amendment exception[125]—which would then raise the question whether there is such an exception for speech that "invades privacy."

Now "privacy" is a famously flexible word, and the Minnesota decision cited above seemed to speak of privacy in the sense of freedom from intrusion into one's home, citing a leading telephone harassment case.[126] Intrusions on privacy could also include clandestine surveillance and the distribution of the results of such surveillance by the person who was doing the surveilling. The Tyler Clementi tragedy, in which a roommate secretly recorded Clementi kissing another man and distributed the recording online, which apparently led Clementi to commit suicide, would be a prominent example. Indeed, the roommate, Dharun Ravi, was convicted for violating the New Jersey invasion of privacy statute, which barred unauthorized disclosure of recordings of people who are engaged in sexual conduct.[127]

But "privacy" could also refer to a right not to have others say certain things about you. Indeed, one Minnesota appellate decision and two trial court decisions (later reversed on other grounds) took this view:

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[122] MINN. STAT. ANN. § 609.748, subdivs. 1(a)(1), (4)(a), (5)(a), (6) (West 2009 & Supp. 2013).

[123] Dunham v. Roer, 708 N.W.2d 552, 565–66 (Minn. Ct. App. 2006).

[124] N.D. CENT. CODE § 12.1-31-01.1(h) (2012).

[125] *See infra* Part II.D.

[126] *Dunham*, 708 N.W.2d at 565 (citing Gormley v. Dir., Conn. State Dep't of Prob., 632 F.2d 938, 942 (2d Cir. 1980)).

[127] N.J. STAT. ANN. § 2C:14-9(b) (West 2005); Indictment counts 1, 3, 5, & 7, State v. Ravi, No. 11-04-00596 (N.J. Super. Ct. Law Div. Apr. 20, 2011); Ian Parker, *The Story of a Suicide*, NEW YORKER, Feb. 6, 2012, at 36; Kate Zernike, *30-Day Term for Spying on Roommate at Rutgers*, N.Y. TIMES, May 22, 2012, at A1. Ravi was also charged with obstruction of justice and with committing the crime in order to intimidate Clementi based on Clementi's sexual orientation or knowing that Clementi would be thus intimidated. Indictment, *supra*, at counts 2, 4, 6 & 8–15.

- *Johnson v. Arlotta* concluded that defendant's "blogging and communications to third parties" about his ex-girlfriend could be enjoined on the grounds that they interfered with her "privacy," regardless of "their truth or falsity."[128]
- *Faricy v. Schramm* concluded that defendant's sending a letter to his son's Catholic school alleging that the son's grade school math teacher[129] was gay, and implying that the teacher should be fired as a result,[130] constituted "harassment," and enjoined such speech for the future.[131] (The court of appeals reversed on the grounds that the statute applied only to repeated incidents, and the letter was a single incident.)[132]
- *Beahrs v. Lake* concluded that it was "harassment" for a fired employee to retaliate against his ex-employer by sending "photocopies of public documents" "to more than 60 of [the ex-employer's] personal and business acquaintances."[133] The public documents were mostly related to the ex-employer's past minor misconduct, including a document evidencing the ex-employer's guilty plea to driving under the influence, a tax lien against the ex-employer, and a police report describing how one of the ex-employer's employees "had been cited for selling a cigar to an underage decoy during a tobacco compliance check."[134] (The court of appeals reversed on the grounds that the ex-employer

[128] No. A11–630, 2011 WL 6141651, at *3 (Minn. Ct. App. Dec. 12, 2011). The Johnson opinion did express concern that the statements were indirect attempts to contact the ex-girlfriend and not just speech about her. But the appellate court affirmed the trial court order that specifically directed defendant to "remove his blog [about the ex-girlfriend] from the Internet." *Id.* at *2. And the appellate court believed defendant's misconduct rested in part on his sending "extremely personal, sensitive information about" the ex-girlfriend to third parties and "shar[ing] sensitive information about [the ex-girlfriend] in a manner that substantially and adversely impacted her privacy interests." *Id.* at *3, *5.

[129] Statement of the Case of Appellant at 4–5, Faricy v. Schramm, No. C8-02-0689 (Minn. Ct. App. Apr. 29, 2002), *available at* http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf.

[130] No. C8-02-0689, 2002 WL 31500913 (Minn. Ct. App. Nov. 12, 2001). The defendant's evidence that plaintiff was gay was rather odd:

> Schramm based his suspicion on the fact that Faricy's car displays an Apple Computer decal and that Faricy "lives or has lived . . . in a neighborhood that has a higher population of homosexuals." Schramm had determined Faricy's place of residence through an internet search. Schramm contended in the letter that "both wearing a rainbow sticker on your car [and] living in a neighborhood where more homosexuals live is enough to send up a red flag."

Id. at *1. But the accuracy or inaccuracy of an allegation is irrelevant to the Minnesota statute.

[131] Restraining Order at 1, *Faricy*, No. C8-02-0689 (Minn. Dist. Ct. Mar. 1, 2002), *available at* http://www.volokh.com/wp-content/uploads/2012/06/FaricyvSchramm.pdf, at 13.

[132] *Faricy*, 2002 WL 31500913, at *2.

[133] No. C3-97-2222, 1998 WL 268075, at *1 (Minn. Ct. App. May 26, 1998).

[134] *Id.*

> "had no legitimate expectation of privacy" in "accurate copies of public records.")[135]

The appellate decisions in *Faricy* and *Beahrs* didn't deny that speech about a person might be covered by the privacy prong of the state statute. The reasoning in *Beahrs* suggests that the statute might apply to mailings of embarrassing information that is not in public records. And the decision in *Johnson* expressly concludes that speech that reveals embarrassing facts about a person can be labeled "harassment" and lead to a restraining order.[136]

The Supreme Court, however, has never recognized a First Amendment exception for speech that discloses supposedly private information about another. Some First Amendment cases have allowed restrictions justified by an interest in protecting privacy, but these have all involved privacy in the sense of freedom from intrusion into a private place, generally the home.[137] And a line of cases culminating in *Florida Star v. B.J.F.*, which set aside restrictions on revealing the names of rape victims and juvenile offenders,[138] shows that privacy-based restrictions on speech about another person are often unconstitutional.

The "disclosure of private facts" tort remains recognized by most lower courts. But the logic of the Court's cases casts some doubt on it; the dissent in *Florida Star* warned that the majority opinion "obliterate[s] . . . the tort of the publication of private facts"[139]—"[e]ven if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here."[140] A few judges have indeed rejected this tort based partly on free speech concerns[141] (a view I

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[135] *Id.*

[136] Johnson v. Arlotta, No. A11-630, 2011 WL 6141651 (Minn. Ct. App. Dec. 12, 2011). Likewise, in *Tarlan v. Sorensen*, No. C2-98-1900, 1999 WL 243567 (Minn. Ct. App. Apr. 27, 1999), the plaintiff wife sought a restraining order on the grounds that the defendant husband "released [plaintiff wife's] medical records without her permission." *Id.* at *2. The appellate court affirmed the denial of a restraining order but concluded that "while both parties have said inappropriate things about each other in front of, or to their employees, neither party's conduct rose to the level necessary to require the issuance of a harassment restraining order under Minn.Stat. § 609.748." *Id.* The court's reasoning seems to be that revelations of private information about others might be actionable under the statute if more egregious than that present in the case—for instance, if the information wasn't just revealed to a few employees.

[137] *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484 (1988); FCC v. Pacifica Found., 438 U.S. 726, 748 & n.27 (1978); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 737 (1970).

[138] Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); Oklahoma Publ'g Co. v. Dist. Court in & for Oklahoma County, 430 U.S. 308 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

[139] 491 U.S. at 550 (White, J., dissenting).

[140] *Id.*

[141] *See* Doe v. Methodist Hosp., 690 N.E.2d 681, 693 (Ind. 1997) (splitting 2–2–1 on whether the tort should be recognized, with one justice expressing no opinion); *id.* at 695 (Dickson, J., concurring);

have supported in detail elsewhere[142]), and those courts that recognize the tort have tended to read it narrowly, especially in recent years.[143]

Moreover, it isn't clear whether state statutes that prohibit speech "intended to adversely affect the safety, security, or privacy of another" are meant to incorporate the disclosure tort or were intended to cover something different, whether broader or narrower. The orthodox definition of the tort, given by the *Restatement (Second) of Torts*, is that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[144]
>
> [*Comment a.*] "Publicity[]" . . . means that the matter is made public, by communicating it [orally, in writing, or otherwise] to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. . . .
>
> Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section.[145]

Thus, even speech that "adversely affect[s]" another's privacy is not tortious if it's "of legitimate concern to the public," or if it is said "to a small group of persons" (including those persons, such as the subject's friends or family members, from whom the subject most wants to keep the matter secret).[146] So it might well be that the legislature understood the harassment statutes as covering more than just what is covered by the

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Hall v. Post, 372 S.E.2d 711, 715 (N.C. 1988); *see also* Anderson v. Fisher Broad. Cos., 712 P.2d 803 (Or. 1986) (rejecting the tort without reaching the free speech questions).

[142] For my criticism of the disclosure tort, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

[143] *See, e.g.*, Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 485 (Cal. 1998) (confining the tort to "extreme cases" because of First Amendment concerns).

[144] RESTATEMENT (SECOND) OF TORTS § 652D (1977).

[145] *Id.* cmt. a.

[146] A few jurisdictions depart from this requirement and impose liability even for disclosures to individual recipients. *See, e.g.*, McSurely v. McClellan, 753 F.2d 88, 113 (D.C. Cir. 1985) (per curiam) (purporting to apply Kentucky law); Johnson v. K Mart Corp., 723 N.E.2d 1192, 1197 (Ill. App. Ct. 2000); Beaumont v. Brown, 257 N.W.2d 522 (Mich. 1977), *overruled on other grounds by* Bradley v. Bd. of Educ., 565 N.W.2d 650 (Mich. 1997); Pontbriand v. Sundlun, 699 A.2d 856, 864 (R.I. 1997) (applying R.I. GEN. LAWS § 9-1-28.1 (1997), which omits the publicity requirement).

disclosure tort. On the other hand, as noted above, it's also possible that the reference to privacy was meant to cover only intrusion into private places and not disclosure of supposedly private facts.

Indeed, the one Minnesota decision I could find that considered whether the "adversely affect[s] . . . privacy" language follows the disclosure tort said that it did not: *Olson v. LaBrie* concluded that the harassment and restraining order statutes do not incorporate the disclosure tort, or any of the other privacy torts, because "[h]arassment is defined in the statute, providing no need to look beyond the statute to tort caselaw to define harassment."[147] Yet the statute defines harassment as "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another,"[148] which requires a definition of what constitutes "a substantial adverse effect on . . . privacy"—a definition that neither the statute nor Minnesota case law provides.

In any event, trying to clarify harassment laws by incorporating the disclosure tort poses problems of its own. Because the disclosure tort was developed as a civil cause of action—and a cause of action chiefly aimed at newspapers—it's in many ways a poor fit for criminal harassment laws.

To begin with, the "of legitimate concern to the public" standard is famously vague. The term requires a normative judgment that different people will likely make differently, and lower court cases haven't made the matter particularly clear, especially since the judgment is so fact-specific. Whether or not a statement about a person's being homosexual, being transsexual,[149] having an affair, suffering from an illness, owing a debt, and so on is "of legitimate concern" depends heavily on who the person is, what controversies he is involved in, what has been said about the allegations by others, and so on. As a result, it's unlikely that precedents will do much to clear up the uncertainty of the standard.

Even if such a vague standard is a permissible basis for civil liability, it may not be permissible when criminal punishment is involved.[150] And that the statutes require a purpose to invade privacy doesn't solve the vagueness problem because the vagueness lies in determining what constitutes invasion of privacy for purposes of the law.

To be sure, there is a similarly normative value-of-the-speech standard that is used in criminal cases: the obscenity law exclusion of speech that

[147] No. A11–558, 2012 WL 426585, at *2 (Minn. Ct. App. Feb. 13, 2012).

[148] MINN. STAT. ANN. § 609.748 subdiv. 1(a)(1) (West 2009 & Supp. 2013).

[149] Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Ct. App. 1983) (holding that a reasonable jury could conclude that publishing the fact that the first woman student body president at a community college was a transsexual wasn't "newsworthy" and was therefore actionable under the disclosure tort).

[150] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 872 (1997).

has "serious literary, artistic, political, or scientific value."[151] But the definition of obscenity is hardly a great success story of First Amendment jurisprudence. Modern obscenity law has avoided posing a grave threat to free speech only because it has in practice been read quite narrowly, and in particular has been limited to the sort of hard-core pornography that is very distantly removed from the communication of facts or ideas, whether on public topics or private topics.

Indeed, in recent years, the Court has refused to recognize new speech restrictions by analogy to obscenity law. In *United States v. Stevens*, the Court expressly rejected the theory that an exception for speech with "serious value" could save a ban on distribution of depictions of animal cruelty.[152] In *Brown v. Entertainment Merchants Ass'n*, the Court refused to expand the obscenity-for-minors category to cover depictions of violence as well as sex, concluding that an exception for speech with serious value "does not suffice" to validate laws other than obscenity laws.[153] And a two-Justice concurrence expressly noted the unacceptable vagueness of a "serious value" test when it is applied outside the area of pornography.[154]

It's also not clear how the disclosure tort applies to Facebook and other social media used by people to communicate with their acquaintances.[155] The tort, which was developed largely with the news media in mind, was never understood as keeping people from telling each other about developments in their social circle, whether these had to do with sexual behavior, disease, or financial setbacks.

Such gossip is commonplace. It often has significant value to the participants because it tells people who in their social circle is potentially untrustworthy or even dangerous. And restricting such speech would often affect people's ability to discuss their own lives: If you want to explain to your friends why you're depressed, or why you've broken up with someone, or why you're moving out of town or taking another job, you

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[151] Miller v. California, 413 U.S. 15, 24 (1973).

[152] 130 S. Ct. 1577, 1591 (2010) ("In *Miller* [*v. California*,] we held that 'serious' value shields depictions of sex from regulation as obscenity. . . . We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation.").

[153] 131 S. Ct. 2729, 2734 (2011).

[154] *Id.* at 2746 (Alito, J., concurring).

[155] For an example of a request for a restraining order based on alleged privacy invasions on Facebook, see *Olson v. LaBrie*, No. A11–558, 2012 WL 426585 (Minn. Ct. App. Feb. 13, 2012). The *Olson* court concluded that the Minnesota statute's prohibition on actions that "have a substantial adverse effect" on another's privacy should not be interpreted using tort law principles, and concluded that the speech there—"innocuous family photos" coupled with "mean and disrespectful" comments didn't substantially affect privacy. *Id.* at *3. But if a court concluded that a harassment statute should be read in terms of the disclosure tort, and the speech did indeed deal with private matters, the court would have to decide whether Facebook posts constitute sufficient publicity to be civilly actionable and therefore (by hypothesis) enjoinable and criminally punishable.

might need to tell them about your husband's cheating, your ex-boyfriend's sexually transmitted disease, your ex-girlfriend's impending bankruptcy, or even your mother's dementia.[156]

For all these reasons, the tort has generally required "publicity" in the sense of communication beyond a small group of personal acquaintances. But today, much of this speech has moved online, especially to sites such as Facebook. And the publicity requirement, developed in a time when people could either talk to a few people orally or to many thousands in a newspaper, does not offer much guidance about whether talking to one's circle of several dozen (or even several hundred) Facebook "friends" counts as publicity.

As I've argued elsewhere, privacy concerns might suffice to justify narrow restrictions on clearly defined kinds of speech that very rarely have value—public or private—to listeners or speakers. Nude photos or sex tapes might be one example.[157] Social security numbers might be another.[158] But a broad and vague criminal prohibition on speech that invades privacy ought not be constitutional.

D. General Statutory Exceptions for "Constitutionally Protected Activity"

Some stalking and cyberharassment statutes expressly exempt "constitutionally protected activity." For instance, D.C. law provides:

> (a) It is [a crime] for a person to purposefully engage in a course of conduct directed at a specific individual [that intentionally, knowingly, or negligently] cause[s] that individual [reasonably] to . . . [s]uffer [significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling] . . . .
>
> (b) This section does not apply to constitutionally protected activity.[159]

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[156] Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 907–11 (2006) (discussing how a person's autobiographical speech about herself will often need to mention others).

[157] Volokh, *Freedom of Speech and Information Privacy*, *supra* note 142, at 1094; *see, e.g.*, Cheatham v. Pohle, 789 N.E.2d 467 (Ind. 2003) (discussing jury verdict for plaintiff whose ex-husband had distributed nude photographs of plaintiff); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 235 (Minn. 1998) (stating that disclosure of nude photographs would generally be actionable).

[158] *See, e.g.*, Ostergren v. Cuccinelli, 615 F.3d 263, 280, 285–86 (4th Cir. 2010) (suggesting that private persons who make public records available could be required to redact social security numbers, but not so long as the government itself fails to redact such information on its own sites); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1146 (2005).

[159] D.C. CODE § 22-3133 (LexisNexis 2010); *see also, e.g.*, 18 PA. CONS. STAT. ANN. § 2709(a), (e) (West 2000 & Supp. 2012) (making it a crime to, among other things, "with intent to harass, annoy or alarm another," "communicate[] . . . about such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures," but excluding "any constitutionally protected activity").

> "To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to:
>
> (A) Follow, monitor, place under surveillance, threaten, or communicate to or about another individual; [or]
>
> . . . .
>
> (C) Use another individual's personal identifying information [defined to include a person's name].[160]

Does this express exemption of "constitutionally protected activity" save the statute from being unconstitutionally overbroad? And, relatedly, what exactly does this exemption mean?

"Constitutionally protected activity" and "constitutionally protected speech" are not clearly defined terms. One important difficulty is that First Amendment cases generally ask whether *a particular law* restricting speech is constitutionally permissible, not whether *a particular kind of speech* is constitutionally protected. The same speech might be constitutionally protected against one law but not against another.

Picketing fifty feet from a person's house, for instance, is constitutionally protected against content-based restrictions.[161] Such picketing is also constitutionally protected against a content-neutral restriction on picketing within three hundred feet of a house.[162] But it may or may not be constitutionally protected against a content-neutral restriction on picketing within fifty feet of a house.[163] Likewise, Cohen's wearing a "Fuck the Draft" jacket in a courthouse was speech constitutionally protected against punishment under a disturbing the peace law.[164] But it's not clear whether it would be constitutionally protected against punishment under a narrower law limited to vulgarities in courthouses.[165]

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[160] D.C. CODE § 22-3132(8).

[161] Carey v. Brown, 447 U.S. 455 (1980). I use 50 feet as an example here; the Court hasn't made clear how wide a bubble zone around a house can be set by a content-neutral rule, though it has said that a 300-foot zone is too wide. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

[162] *Madsen*, 512 U.S. 753; Ramsey v. Edgepark, Inc., 583 N.E.2d 443, 452 (Ohio Ct. App. 1990) (upholding injunction against picketing in front of plaintiffs' homes but striking down ban on picketing within 200 yards of plaintiffs' homes); *see also* Welsh v. Johnson, 508 N.W.2d 212, 216 (Minn. Ct. App. 1993) (pre-*Madsen* case upholding a ban on appearing within two blocks of plaintiff's house, reasoning that, "[a]lthough at first blush a two-block restriction may seem possibly excessive in light of the constitutional interests in free speech and exercise of religion, it is clear that the trial judge's knowledge of the configuration of streets in this rather secluded neighborhood rendered the limitation within the court's discretion").

[163] *See* Frisby v. Schultz, 487 U.S. 474 (1988).

[164] Cohen v. California, 403 U.S. 15 (1971).

[165] *See id.* at 19 (noting that the case didn't involve a restriction limited to courthouses); *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 685 (1992) (holding that viewpoint-neutral and reasonable restrictions on speech in government buildings are generally constitutional).

Indeed, the premise of many defenses of criminal harassment laws is precisely that these laws may constitutionally punish even speech that would be protected against other laws.[166] If those defenses are right, then perhaps no speech that intentionally annoys or harasses the subject is constitutionally protected when it is being punished through a harassment law or being restricted through a restraining order.

With this in mind, we can identify at least two possible definitions of exempted "constitutionally protected speech," matching two possible definitions of what constitutes constitutionally unprotected speech.

First, "constitutionally [un]protected speech" might mean speech that fits within the existing recognized First Amendment exceptions for imminent illegal conduct, libel, obscenity, fighting words, and true threats. Other speech would be "constitutionally protected speech" or "constitutionally protected activity."

To be sure, such speech that's not within an exception could still in some situations be restricted through content-neutral speech restrictions that pass the *Ward v. Rock Against Racism* test, or content-based speech restrictions that pass strict scrutiny. But it would still be "constitutionally protected speech" and thus exempted from the D.C. statute. So, for instance, under this interpretation, residential picketing immediately outside a person's home would *not* be covered by the statute because it would be "constitutionally protected activity" (absent some threats or fighting words or defamation by the picketers). And this would be so even though the residential picketing could have been restricted by a narrow content-neutral residential picketing ban.[167]

Under such an interpretation of the D.C. statute, the statute would be constitutional. It wouldn't be unconstitutionally overbroad because it would apply only to speech that fits within the existing exception.[168] And it wouldn't be unconstitutionally vague because—as so interpreted—the statute would be a combination of a criminal libel statute, a threat statute, a fighting words statute, and the like, though limited to situations where the defendant made at least two statements and purposefully, knowingly, or negligently caused "significant mental suffering or distress."[169]

Second, an exception for "constitutionally protected activity" might be read as an exception only for activity that the statute can't constitutionally

[166] *See, e.g.*, Wallace v. Van Pelt, 969 S.W.2d 380, 385 (Mo. Ct. App. 1998).

[167] *See Frisby*, 487 U.S. at 486.

[168] *See, e.g.*, O'Brien v. Borowski, 961 N.E.2d 547, 554–57 (Mass. 2012) (interpreting the state harassment prevention order statute as limited to the constitutionally unprotected categories of "fighting words" and threats, though doing so even in the absence of an express "constitutionally protected activity" exclusion).

[169] D.C. CODE § 22-3132(4) (LexisNexis 2010). The statute wouldn't violate the rule of *R.A.V. v. City of St. Paul*, because there is "no realistic possibility that official suppression of ideas is afoot." 505 U.S. 377, 390 (1992).

restrict. If the statute without this provision were found to, say, pass strict scrutiny as to all speech, then the provision wouldn't protect any speech because (by hypothesis) no speech would qualify as "constitutionally protected" against this statute. If the statute without this provision were found to pass strict scrutiny as to speech about private figures but not as to speech about public figures, then the provision would protect only speech about public figures. If it were found to pass intermediate scrutiny when applied to residential picketing within fifty feet of a home but to fail intermediate scrutiny when applied to residential picketing more than fifty feet outside the home, then the provision would protect only residential picketing more than fifty feet outside the home.

Under this reading, a "constitutionally protected activity" exemption would not affect the actual scope of the law. By definition, a mere statute cannot trump the Constitution and cannot ban "constitutionally protected activity" in the sense of activity that is protected against that statute by the Constitution. The provision would thus be no help to judges interpreting the terms of the law or to people who want to decide what the law bars them from doing. It would simply be a statement by the legislature that the legislature doesn't mean to cover that speech or action that it isn't allowed to cover.

To be sure, the provision might have one substantive goal: to immunize the statute from a First Amendment overbreadth challenge by definitionally preventing the statute from being overbroad. An overbreadth challenge is a challenge to a statute on its face, not just as applied to the challenger. The challenger is arguing that the statute is invalid as to everyone because it covers a substantial amount of constitutionally protected speech.[170] By expressly stating that the statute doesn't apply to constitutionally protected speech, the enactors of the law might have wanted to preclude such a finding of overbreadth.

But such an attempt to immunize a statute from overbreadth scrutiny can't work, precisely because it would deny citizens the benefits that the overbreadth doctrine provides.

The overbreadth doctrine recognizes that when a statute on its face seems to apply to a wide range of constitutionally protected speech, the existence of the statute deters such constitutionally protected speech.[171] Even people who believe their speech will ultimately be found to be constitutionally protected, and who thus think they have a good First Amendment defense to the statute, may reasonably worry that they will be prosecuted and even convicted under the statute before they ultimately prevail in court. Defendants—even ones whose own speech might be punishable by a narrower statute—are thus allowed to raise the overbreadth

[170] *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1587 (2010).

[171] *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

of a statute in trying to get the statute struck down on its face, so that this "chilling effect" caused by the overbroad statute is eliminated.[172]

A tautological statement that a statute shouldn't be read to cover constitutionally protected activity does nothing to mitigate the chilling effect posed by the statute's facial overbreadth. Despite such an exclusion of constitutionally protected activity, even people who believe their speech will ultimately be found to be constitutionally protected, and who thus think they have a good statutory defense under that clause, may reasonably worry that they will be prosecuted and even convicted under the statute before they ultimately prevail in court.

To prevent this, people have to still be able to raise the overbreadth of the statute—notwithstanding the statutory "constitutionally protected activity" exception—in trying to get the statute struck down on its face so that this chilling effect is minimized. In the words of the Minnesota Supreme Court, "a savings clause that provides that conduct protected by the state or federal constitutions is not a crime under this section" "cannot substantively operate to save an otherwise invalid statute."[173]

Another way of reaching the same result is through the void-for-vagueness doctrine.[174] First Amendment doctrine is complicated and uncertain, especially once one reaches beyond the historically defined First Amendment exceptions (for incitement, obscenity, threats, fighting words, and defamation). The Court has never expressly defined what it takes for an interest to be "compelling" or even "substantial." It has never decided whether there ought to be First Amendment exceptions for, say, speech that discloses private facts about another person or speech that uses another's name without that person's permission, and what the scope of those exceptions would be. A speaker who is considering whether her speech could get her sent to prison needs more guidance than that offered by an assurance that "constitutionally protected speech" is immunized from prosecution.[175]

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[172] *See, e.g.*, Alexander v. United States, 509 U.S. 544, 555 (1993).

[173] State v. Machholz, 574 N.W.2d 415, 421 n.4 (Minn. 1998) (citing Long v. State, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996)). For a contrary, and I think incorrect, conclusion, see *State v. Asmussen*, 668 N.W.2d 725, 729–30 (S.D. 2003), which relied on the savings clause in upholding a ban on "willfully, maliciously, and repeatedly" engaging in "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose," except for "constitutionally protected activity." But note that the "directed at a specific person" requirement in the South Dakota statute might mean that the statute is limited to one-to-one speech and therefore constitutional, *see supra* Part I; and indeed, the speech involved in the *Asmussen* case was one-to-one.

[174] *See* M. Katherine Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 788 (1994) ("[A]n exception for constitutionally protected activities . . . does not mitigate the vagueness of the law . . . because it does not provide specific guidelines that narrow the scope of the offending behavior.").

[175] *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-29, at 1031 (2d ed. 1988) (arguing that a hypothetical statute that reads, "It shall be a crime to say anything in public unless

And this vagueness also has the effect of making the law overbroad. What the Court held in *Reno v. ACLU* about a ban on speech that is "indecent" and "patently offensive" (even when limited to "sexual or excretory activities or organs") is equally true here: A law that covers otherwise protected speech but excludes constitutionally protected activity still has an unacceptable "chilling effect," poses a substantial "threat of censoring speech that, in fact, falls outside the statute's scope," and "unquestionably silences some speakers whose messages would be entitled to constitutional protection."[176]

So of these two interpretations of the "constitutionally protected activity" clause, the second, broader interpretation poses serious constitutional problems (and is indeed, I believe, unconstitutional). The better approach then is to use the first, narrower interpretation.[177] Under this interpretation, a statute that excludes "constitutionally protected speech" or "constitutionally protected activity" would cover only speech that falls within the existing, well-established First Amendment exceptions (such as incitement, threats, fighting words, and libel).[178] It would not cover speech that falls outside those exceptions.

E. Content-Based Speech Restrictions

Once we get outside the First Amendment exceptions, harassment laws that cover one-to-many speech should not be constitutional. Indeed, this is precisely what some state supreme courts have held in limiting their

the speech is protected by the first and fourteenth amendments," "simply exchanges overbreadth for [unconstitutional] vagueness"). "[T]he premise underlying *any* instance of facial invalidation for overbreadth must be that *the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct*, and that a law whose reach into protected spheres is limited *only* by the background assurance that unconstitutional applications will eventually be set aside is a law that will deter too much that is in fact protected." *Id.*

[176] 521 U.S. 844, 871, 872, 874 (1997).

[177] *See* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 577 (1988) (holding that statutes should be interpreted, when possible, to avoid serious constitutional problems).

[178] The D.C. statute's coverage of speech that only negligently causes significant distress does not make the statute unconstitutional under this interpretation. The speech would still have to constitute incitement, threats, fighting words, or libel—with the *mens rea* requirements that those exceptions mandate—in order to be punishable. Given that all such speech is already constitutionally unprotected, punishing only that speech that fits within those doctrines and also negligently causes significant mental distress would only narrow the scope of potential punishment. So, for instance, if someone is prosecuted under the statute for saying knowing falsehoods about a public figure on a matter of public concern in a way that negligently caused significant mental distress to that person, the prosecution would still have to prove the speaker's knowledge or recklessness about the falsity of the statements—in order to make the speech into "constitutionally [un]protected activity"—even though it would only have to prove negligence as to the causing of significant mental distress.

stalking or harassment laws to speech that fits within the First Amendment exceptions.[179]

1. Generally.—To begin with, all the restrictions I describe here are content-based speech restrictions. Many expressly target speech based on content: Consider, for instance, the Washington statute that makes it a crime to, "with intent to harass, intimidate, torment, or embarrass any other person, . . . mak[e] an electronic communication to such other person or a third party . . . [u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[180] Likewise, consider the Berea, Ohio order that "[Joanna Hamrick] is prohibited from posting any information/comments/ threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family."[181]

Some of the statutes don't mention content but punish speech or conduct done with the intent to "annoy," "harass," or cause "substantial emotional distress," e.g., "with purpose to harass another" "mak[ing] . . . a communication . . . [in any] manner likely to cause annoyance or alarm."[182] Yet when the communication causes annoyance because of its offensive content, rather than for other reasons (for instance, because it causes a

[179] *See, e.g.*, O'Brien v. Borowski, 961 N.E.2d 547, 554–57 (Mass. 2012) (interpreting the state harassment prevention order statute as limited to the constitutionally unprotected categories of "fighting words" and threats); sources cited *supra* note 100.

[180] WASH. REV. CODE ANN. § 9.61.260(1) (West 2010).

[181] *See* Order of Protection at 3, Kleem v. Hamrick, No. CV 11 761954 (Ohio Ct. Com. Pl. Aug. 15, 2011), *available at* http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf. Some courts have reasoned that harassment laws restrict "the manner and means" of speech—e.g., an unwanted telephone call—"rather than [the] content." State v. Anonymous, 389 A.2d 1270, 1273 (Conn. Super. Ct. 1978); *see also, e.g.*, State v. Brown, 85 P.3d 109, 112–13, 114 n.3 (Ariz. Ct. App. 2004) (reasoning that "criminal liability under the statute is based on the 'manner' in which certain communication is conveyed and the underlying purpose for the communication" and that it therefore does not "regulate[] speech on the basis of its content"); State v. Neames, 377 So. 2d 1018, 1022 (La. 1979) (Summers, C.J., dissenting) ("When the caller uses the phone, not to convey a message but to repeatedly annoy another, the rights of the recipient are abused. Because of this it is not the communication which the statute punishes but, instead, the manner in which it is exercised."). But this is not the case when a communication is found to be "likely to cause annoyance or alarm" precisely because of what it says, rather than (say) its waking someone up in the middle of the night. *Anonymous*, 389 A.2d at 1273. And the fact that a content-based restriction applies only to some media or some places doesn't keep it from being content based. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 135–36 (1992) (concluding that a content-based permit fee for demonstrations was unconstitutional); Carey v. Brown, 447 U.S. 455, 458–59 (1980) (likewise as to a content-based ban on residential picketing); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (likewise as to a content-based ban on picketing outside schools).

[182] N.J. STAT. ANN. § 2C:33-4 (West 2005). John B. Major, Note, *Cyberstalking, Twitter, and the Captive Audience: A First Amendment Analysis of 18 U.S.C. § 2261A(2)*, 86 S. CAL. L. REV. 117, 144 (2012), suggests that this focus on "the consequences of speech" rather than "the content of speech" may make such statutes content neutral; but for the reasons discussed in this subsection, I think that's not right.

phone to ring in the middle of the night[183]), restricting such a communication because of its annoying content is a form of content-based speech restriction.[184]

Indeed, many of the leading cases striking down restrictions on offensive speech involved laws that on their face didn't mention content but focused on the offensive purpose and effect of the defendant's behavior. Consider, for instance, *Snyder v. Phelps*[185] and *Hustler Magazine, Inc. v. Falwell*,[186] which relied on the First Amendment to reverse judgments for intentional infliction of emotional distress that were based on the content of speech. Though emotional distress tort claims are often based on speech, speech isn't an element of the tort. Either speech or nonspeech conduct can be actionable if it recklessly or purposefully inflicts severe emotional distress through "outrageous" conduct. But when the distress and the outrageousness "turn[] on the content and viewpoint of the message conveyed"—when it is "what [defendant] said that exposed it to tort damages"—the application of the tort is treated as content based and therefore unconstitutional.[187]

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[183] *See, e.g.*, WASH. REV. CODE ANN. § 9.61.230(1)(b) (West 2010) (criminalizing, among other things, telephone calls made "at an extremely inconvenient hour").

[184] *See* 18 U.S.C. § 2261A(2)(A) (2006) (making it a crime to, "with the intent . . . to . . . cause substantial emotional distress to a person in another State . . . use[] the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person"); United States v. Cassidy, 814 F. Supp. 2d 574, 584 (D. Md. 2011) ("The portion of Section 2261A(2)(A) relied on in the Indictment amounts to a content-based restriction because it limits speech on the basis of whether that speech is emotionally distressing to A.Z."); State v. LaFontaine, 16 A.3d 1281, 1288 n.5, 1289 (Conn. App. Ct. 2011) (concluding that a telephone harassment prosecution of defendant who insulted his ex-wife's lawyer was "on the basis of [defendant's] speech" and therefore unconstitutional given the absence of a finding that the speech was an unprotected threat).

Asgian v. Schnorr, No. C1-96-622, 1996 WL 557410 (Minn. Ct. App. Oct. 1, 1996), reasoned that a restraining order barring all contact with a person was content neutral "because it prohibits all communication with respondent and serves purposes unrelated to the content of the expression," namely "the well-being, tranquility, and privacy of the home." *Id.* at *3 (quoting Welsh v. Johnson, 508 N.W.2d 212, 215 (Minn. Ct. App. 1993) (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988))). But I think this is mistaken: The order was entered based on a finding that the person had engaged in speech that was seen as "an intentional invasion of privacy," *id.* at *2, due to its content; repeated letters seeking donations to the university or offering supermarket coupons couldn't have led to such an order, and the order was aimed at preventing the repetition of such intrusive, offensive, and frightening content.

The order, which barred future one-to-one contact, may well have been constitutional for the reasons described in Part I. But it was justified by the content of speech, not by content-neutral factors that were unrelated to the content.

[185] 131 S. Ct. 1207 (2011).

[186] 485 U.S. 46 (1988).

[187] *Snyder*, 131 S. Ct. at 1218–19 ("The facts here are obviously quite different [from situations where targeted picketing restrictions are treated as content neutral] . . . . [A]ny distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."); *see also id.* at 1218 ("To the extent [certain funeral picketing

Likewise, in *Hess v. Indiana*, *Cohen v. California*, *Edwards v. South Carolina*, *Terminiello v. Chicago*, and *Cantwell v. Connecticut*, defendants were found guilty of breach of the peace and disorderly conduct, crimes that cover nonspeech conduct as well as speech.[188] Yet the Court focused on how the speech restrictions applied to the speech because of "the effect of [the speaker's] communication upon his hearers"[189] and reversed the convictions on those grounds.[190]

Some courts have upheld the laws in part by calling them restrictions on the "conduct" of "harassment" or "stalking" rather than "speech"[191] (though only when dealing with restrictions on one-to-one speech). Such attempts to evade free speech protection by labeling are reminiscent of Justice Blackmun's dissent in *Cohen v. California*, in which the entirety of the First Amendment discussion consisted of this paragraph:

> Cohen's absurd and immature antic, in my view, was mainly conduct and little speech. See *Street v. New York*, 394 U.S. 576 (1969); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949). The California Court of Appeal appears so to have described it, 1 Cal. App. 3d 94, 100, 81 Cal. Rptr. 503, 507, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), where Mr. Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court's agonizing over First Amendment values seems misplaced and unnecessary.[192]

Justice Blackmun was, I think, mistaken in concluding that vulgarities should be substantively unprotected by the First Amendment (which is

restrictions] are content neutral, they raise very different questions from the tort verdict at issue in this case."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation." (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55–56 (1988))).

[188] 414 U.S. 105 (1973) (per curiam); 403 U.S. 15 (1971); 372 U.S. 229 (1963); 337 U.S. 1 (1949); 310 U.S. 296 (1940).

[189] *See Cantwell*, 310 U.S. at 308–09.

[190] Later cases have likewise treated *Cohen*, *Edwards*, *Terminiello*, and *Cantwell* as involving content-based restrictions. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *Forsyth County*, 505 U.S. at 134–35; Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); Street v. New York, 394 U.S. 576, 592 (1969).

[191] *See, e.g.*, Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988); Gormley v. Dir., 632 F.2d 938, 941–42 (2d Cir. 1980); McKillop v. State, 857 P.2d 358, 363 (Alaska Ct. App. 1993); State v. Musser, 977 P.2d 131, 133 (Ariz. 1999); State v. Brown, 85 P.3d 109, 113 (Ariz. Ct. App. 2004); Baker v. State, 494 P.2d 68, 70 (Ariz. Ct. App. 1972); State v. Roesch, Nos. CR94-87735, CR94-87736 & CR94-90639, 1995 WL 356776, at *5 (Conn. Super. Ct. June 6, 1995); State v. Elder, 382 So. 2d 687, 690 (Fla. 1980); State v. Richards, 896 P.2d 357, 362 (Idaho Ct. App. 1995); People v. Taravella, 350 N.W.2d 780, 783 (Mich. Ct. App. 1984); State v. Lee, 917 P.2d 159, 162 (Wash. Ct. App. 1996); State v. Alexander, 888 P.2d 175, 180 (Wash. Ct. App. 1995); State v. Hemmingway, No. 2011AP2372-CR, 2012 WL 5416222, ¶ 13 (Wis. Ct. App. Nov. 7, 2012).

[192] *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

what the *Chaplinsky* reference was suggesting). But he was even more clearly mistaken in dismissing Cohen's wearing of the jacket as "mainly conduct and little speech." The noncommunicative part of the conduct—simply wearing a jacket, any jacket—was not why Cohen was being punished; Cohen was being punished precisely because of the speech written on his jacket. That's a speech restriction, and labeling it "conduct" or "disturbing the peace" shouldn't strip it of constitutional protection.

The same is true as to "harassment." The government may not "foreclose the exercise of constitutional rights by mere labels,"[193] such as "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression."[194] Likewise, it may not eliminate First Amendment scrutiny by just labeling communication as the "conduct" of "harassment."

2. *"Secondary Effects".*—The Court has, controversially, concluded that some facially content-based laws should be treated as content neutral if they are justified with reference to the "secondary effects" of speech (such as the supposed tendency of adult bookstores and movie theaters to attract the crime prone).[195] But the tendency of speech to distress people is not treated as a secondary effect, and neither is the tendency of speech to cause harms that flow from such distress—for instance, potential fights,[196] policing costs needed to prevent fights,[197] and injury to international relations caused by protests outside foreign embassies.[198]

Restrictions justified by such harms are thus seen as content based, not content neutral. "[T]he emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself."[199] "Listeners' reaction to speech is not a content-neutral basis for regulation."[200]

3. Hill v. Colorado.—In *Hill v. Colorado*, the Court upheld as content-neutral a restriction on "knowingly approach[ing]" within 8 feet of another person (and within 100 feet of a health care facility) without that person's consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling

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193 NAACP v. Button, 371 U.S. 415, 429 (1963) (referring to the label "solicitation").

194 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (footnotes omitted).

195 *See, e.g.*, City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002); *id.* at 447 (Kennedy, J., concurring in the judgment) (noting that these restrictions are indeed content based but nonetheless constitutional under narrow circumstances).

196 *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

197 *See* Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

198 *See* Boos v. Barry, 485 U.S. 312 (1988).

199 Texas v. Johnson, 491 U.S. 397, 412 (1989) (quoting *Boos*, 485 U.S. at 321) (internal quotation mark omitted); *see also R.A.V.*, 505 U.S. at 394 (same).

200 *Forsyth County*, 505 U.S. at 134; *see also R.A.V.*, 505 U.S. at 394.

with such other person."[201] This too was a controversial judgment, both among the Justices[202] and among scholars.[203] As the dissent pointed out, under the statute, a "speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent," and "[w]hether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on *what he intends to say* when he gets there."[204]

Nonetheless, even under *Hill* the harassment laws that I describe remain content based. *Hill*'s judgment of content neutrality rested on the premise that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech."[205] Coming within eight feet of someone without that person's consent is an intrusion into the target's personal space because of the speaker's physical proximity, quite apart from whether the speaker's message is offensive or simply unwanted.

Harassment statutes that restrict speech about a person, on the other hand, apply to speech that is physically far removed from the subject of the speech. To the extent that they aim at protecting "privacy," they aim at protecting against intrusions that stem precisely from the "content of the [defendant's] speech"—the information revealed by the speech or the insulting or otherwise offensive nature of the speech—and not the physical intrusiveness of the speech.

This distinction is also visible in the Court's observation that the law in *Hill* was a "minor place restriction on an extremely broad category of communications with unwilling listeners."[206] To be sure, the narrowness of the restriction is generally not an aspect of the content discrimination analysis.[207] Even a minor place restriction on speech with a certain content is generally seen as content based.[208] Nonetheless, the physical narrowness and topical breadth of the restriction, coupled with the focus on the intrusion on unwilling listeners, reinforces the judgment that the law

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[201] 530 U.S. 703, 707 (2000).

[202] *Id.* at 742–43 (Scalia, J., dissenting).

[203] *See, e.g.*, Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights:* Hill v. Colorado*, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 182 (2001); *see also* Richard W. Garnett, *Changing Minds: Proselytism, Freedom, and the First Amendment*, 2 U. ST. THOMAS L.J. 453, 464 & n.65 (2005); Michael W. McConnell, *Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 747–49 (2001); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 736–37 (2001).

[204] *Hill*, 530 U.S. at 742 (Scalia, J., dissenting).

[205] *Id.* at 719–20 (majority opinion).

[206] *Id.* at 723.

[207] *Id.* at 748 n.2 (Scalia, J., dissenting).

[208] *See supra* Part II.E.1.

focuses on the physical intrusiveness of the speech: intrusiveness that is present only in a particular place, intrusiveness that is present without regard to the subject matter of the speech, and intrusiveness that stems from the fact that the speech is speech to an unwilling listener.

Harassment laws that restrict speech about a person apply to a wide range of places and are thus hardly "minor place restriction[s]." They apply only to communications that are offensive because of their message, a much narrower category than all "protest, education, or counseling." And they are not limited to speech directed to "unwilling listeners."

F. Bad Purpose

1. Generally.—Most of the restrictions I describe apply only to speech that is said with a purpose to "annoy," "embarrass," "harass," "torment," or produce "substantial emotional distress." These purposes, though, don't strip the speech of constitutional protection.

When speakers criticize a person for what they see as serious ethical failings—whether that person is a supposedly corrupt or oppressive politician, hypocritical religious leader, biased journalist, bigoted police officer, dishonest or rude professional or business owner, or unfaithful ex-lover—they often believe that the target of the speech *should* feel bad because of the target's misconduct. They may want the target to be socially ostracized, economically punished, and emotionally racked with guilt, regret, and a perception of social condemnation.

Not all speakers take this view. Some might genuinely speak in sorrow, not in anger. Some might have an emotional or philosophical attitude that lets them wish that the subjects of their criticism reform without the subjects' feeling bad in the process. And some might have a purely instrumental focus in which they (for instance) seek only that listeners vote against the subject of the speech and genuinely don't care how the subject feels about it.

Yet many speakers (maybe most) do feel, as a matter not just of malice but of justice, that the person whom they are condemning ought to feel annoyed, embarrassed, harassed, tormented, and substantially distressed by the groundswell of righteous hostility that the speakers are trying to foment. And that is true whether the hostility is from the public at large or from the speaker's and subject's mutual circle of acquaintances, once those acquaintances learn how badly the subject of the speech had supposedly mistreated the speaker. The purpose of making the subject feel bad is thus not an uncommon purpose, nor one held only by a few evil people.

Nor is it a purpose that strips the speech of constitutional protection. As a general matter—as the Court recently said, quoting Martin Redish's work—"under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional

protection,"[209] at least outside the narrow First Amendment exceptions such as incitement. This is so for four reasons.

First, speech remains valuable to public debate even when the speaker is motivated by hostility. Often much of the most useful criticism of a person comes from people who have good reason to wish that person ill—if you are mistreated by a politician, religious leader, businessperson, or lawyer, you might acquire both useful information about the person's faults and resentment towards that person.

To be sure, the motivations of critics who are personally hostile to their subjects may make the criticism less credible, just like praise is made less credible when the speaker has good reason to wish the person well. But the criticisms may nonetheless be apt, despite the bias of the source. And if all those who wish a person ill were excluded from discussion of the person's qualities, many accurate criticisms would never be aired.

Second, speech remains an important part of a speaker's self-expression even when the speaker is motivated by hostility to the target of the speech. Those who feel themselves wronged by someone may have powerful emotional and moral reasons to complain about the alleged mistreatment and to warn others to be wary of the target. People whose ex-spouses or ex-lovers have cheated on them, beat them, emotionally abused them, defrauded them, or infected them with sexually transmitted diseases are just as much engaged in self-expression when talking to their friends impartially—to the extent such a thing is possible—as when talking to their friends with the desire that the ex be banished from their social circle.[210]

Third, precisely because people who intend to inform listeners about a person's misdeeds often also intend to make the listener feel bad, even speakers who lack any hostile intent might be deterred by the fear that a prosecutor will think they were speaking out of hostility. Say you have long battled a politician, a religious figure, a journalist, an academic, a lawyer, or a businessperson, and each of you has hurt the other politically and economically. You now want to harshly criticize the person, not because of any desire to annoy, embarrass, or harass the person but simply because of a desire to inform the public of the person's latest misbehavior.

Yet you know that a prosecutor, judge, and jury might infer that you are motivated by a desire to annoy the other person, simply because such a desire is so common in situations like this (even if you know it's absent in

[209] FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.) (alteration omitted) (citing MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)).

[210] I assume here that the speech consists of true statements or of opinions, albeit ones that might have been motivated by hostility. If the speech consists of falsehoods, and especially knowing or reckless falsehoods, then it would be unprotected by the First Amendment regardless of the speaker's motivation. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

your own mind).[211] This is what *FEC v. Wisconsin Right to Life, Inc.* referred to when it wrote that "an intent-based test"—there, a test focused on an intent to urge people to vote for or against a candidate—

> would chill core political speech by opening the door to a trial on every [item of speech], on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by [the statute] if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion."
>
> . . . "First Amendment freedoms need breathing space to survive." An intent test provides none.[212]

Fourth, people often assume the worst purposes in their adversaries and the best purposes in their allies. When someone harshly criticizes someone you approve of, it's easy to infer not just that the critic is wrong but that he's deliberately trying to annoy, harass, or distress. When someone harshly criticizes someone you disapprove of, it's easy to infer that the critic must be animated purely by a desire to speak the truth and inform the public. People who have unpopular views might thus often be convicted of having an intent to annoy even when they lack such an intent—and might often be deterred from engaging in harsh but justified criticism for fear of being convicted.

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[211] Consider, for instance, *R.D. v. P.M.*, 135 Cal. Rptr. 3d 791, 800 n.11, 801 (Ct. App. 2011), which upheld an injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace. Defendant argued that she had distributed these leaflets "to inform consumers about her negative experience with [defendant] as a clinical social worker," but "[t]he trial court concluded . . . that [plaintiff's] intention was less to address an issue of public importance than to harass [defendant]." Perhaps the trial court correctly evaluated defendant's predominant purpose. But even someone who has a legitimate grievance against a professional, businessperson, or government official—and who, as a result of this grievance, is obviously angry with the target—might reasonably worry that a court will find that his mixed intentions were mostly "to harass" rather than to criticize.

Likewise, consider *Welytok v. Ziolkowski*, 752 N.W.2d 359 (Wis. Ct. App. 2008), in which defendant set out to publicize plaintiff's record of having been suspended for three years from the practice of law for defrauding a client. *See In re* Gilbert, 595 N.W.2d 715 (Wis. 1999) (per curiam). The court concluded that defendant was motivated only by hostility arising out of a past real estate transaction in which defendant had lost out to the plaintiff, and not by any "legitimate purpose" of informing people of plaintiff's professional misconduct. *Welytok*, 752 N.W.2d at 370. Again, it's possible that the court's perception of defendant's motivation was correct. But if speech about a person loses its constitutional protection when the court concludes that the speaker's true motivation was revenge, then even speakers who are motivated by more than revenge might well be deterred from speaking by the worry that a court would misinterpret their intentions.

[212] 551 U.S. at 468–69 (citation omitted); *see also* Garrison v. Louisiana, 379 U.S. 64, 73 (1964) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . .").

Note also that many of these laws define petty offenses for which the maximum sentence is six months or less, which means they can be tried without a jury.[213] Other such laws call for injunctions and contempt proceedings for violating injunctions, for which a jury trial is likewise unavailable if the sentence is six months or less.[214] A speaker might thus rightly worry that a misjudgment of motive on the part of just two people (a prosecutor and a judge)—or even just a judge acting alone—could lead to jail time for his speech.

2. "Solely" Bad Purposes/"No Legitimate Purpose".—Some statutes try to minimize the dangers of a purpose test by covering only behavior that is "solely" intended to annoy, embarrass, and the like.[215] This, the theory goes, would focus only on an especially narrow range of speech that deserves no protection;[216] and even if some instances of such speech should still be protected, at least they will be rare enough that the law would not be unconstitutionally overbroad.

But nearly all speech to multiple listeners has multiple intentions, even when one of the intentions is to annoy the subject of the speech. Speakers who talk to others about someone they dislike will generally also want to persuade their listeners to condemn or shun that person. Among other things, such education of the listeners about the subject's failings will help serve the goal of annoying the subject.

Speakers who condemn someone to the public, or to their acquaintances, may also want to get the emotional reward that comes from expressing their true feelings. Speakers who cruelly mock someone might also want "to amuse and gain approval or notoriety" from some of their

[213] *See, e.g.*, District of Columbia v. Clawans, 300 U.S. 617, 623–24 (1937).

[214] *See, e.g.*, Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 826–27 (1994).

[215] *See, e.g.*, 47 U.S.C. § 223(a)(1)(E) (2006) (outlawing "mak[ing] repeated telephone calls or repeatedly initiat[ing] communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication"); McKillop v. State, 857 P.2d 358, 364 (Alaska Ct. App. 1993) (interpreting the telephone harassment statute as "prohibit[ing] telephone calls only when the call has no legitimate communicative purpose—when the caller's speech is devoid of any substantive information and the caller's sole intention is to annoy or harass the recipient"); State v. Richards, 896 P.2d 357, 362 (Idaho Ct. App. 1995) (interpreting the telephone harassment statute as "requiring that the sole intent of the call be to annoy, terrify, threaten, intimidate, harass or offend"). Major, *supra* note 182, at 136, suggests that the federal cyberstalking statute could likewise be saved from unconstitutionality by "be[ing] interpreted to apply only to speech with the sole intent of causing substantial emotional distress."

[216] *See, e.g.*, Commonwealth v. Strahan, 570 N.E.2d 1041 (Mass. App. Ct. 1991).

listeners.[217] They may also want to shame the target into not repeating the target's alleged misbehavior, whether towards the speakers or others.[218]

So any law that is limited to speakers who have a "sole purpose" to annoy could be applied in one of three possible ways. First, it could be basically a dead letter, and known to be such, at least as to one-to-many speech, for the reasons I just mentioned. Indeed, one court has held that "[v]irtually all speech, other than threats or incitements to crime, has a constitutionally protected purpose" (and therefore a legitimate purpose), which is "conveying the speaker's point of view. The fact that the listener is annoyed by what is said does not detract from the legitimate purpose of conveying the thoughts."[219]

Second, prosecutors, judges, and juries might ignore the "sole purpose" requirement and apply the law whenever they see annoying the target as the "main" or "predominant" purpose of the speech. But such a judgment of what constitutes the predominant purpose is so vague and subjective that it necessarily creates the three problems that the Court has identified as endemic to vague laws.[220] It doesn't provide speakers with guidance about what is and what isn't a crime. It opens the door to viewpoint-discriminatory enforcement, as prosecutors, judges, and jurors fall into the normal human habit of applying vague rules more favorably towards those they like than towards those they dislike. And it tends to cause people to "steer far wider of the unlawful zone,"[221] for fear that they would be wrongly found to have spoken with an improper predominant purpose.

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[217] *See, e.g.*, A.B. v. State, 885 N.E.2d 1223, 1225, 1227 (Ind. 2008) (reversing harassment conviction under a statute that required a showing of "no intent of legitimate communication," because the speaker might have "merely intended to amuse and gain approval or notoriety from her friends, and/or to generally vent anger for her personal grievances").

[218] Some nonspeech conduct might come closer to having a sole purpose to annoy—calling someone in the middle of the night and then hanging up might qualify since it doesn't inform any third parties of anything, doesn't provide the catharsis of telling someone how you really feel about her alleged mistreatment of you, and doesn't even communicate to the listener the message that she should feel ashamed or remorseful. Even there, the caller would have the purpose of enjoying herself, or perhaps even laughing with her friends about it, but one might see those purposes as stemming from the annoyance of the listener. But speech, especially speech to people other than just the person being criticized, generally has many more purposes.

[219] People v. Hogan, 664 N.Y.S.2d 204, 207 n.1 (Crim. Ct. 1997), *aff'd*, 698 N.Y.S.2d 388 (App. Div. 1998); *see also id.* at 207 ("The registering of displeasure with another person is legitimate, protected speech."); *Strahan*, 570 N.E.2d at 1043 (concluding that defendant couldn't be convicted of harassment under a statute that required a "sole purpose" to harass because, even if part of his purpose was to harass, "nothing in the evidence furnished a reasonable basis for concluding that the defendant was not motivated at least in part by a desire to reestablish a relationship with the woman"); People v. Bethea, No. 2003BX036814, 2004 WL 190054 (N.Y. Crim. Ct. Jan. 13, 2004) (discussed *infra* note 225).

[220] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–14 (1972).

[221] Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

Third, judges interpreting the law may conclude that, as a matter of law, "sole purpose to annoy" covers not just the purpose to annoy but also the purpose to ostracize, the purpose to get emotional reward from berating someone, the purpose to shame, and so on. But this would broaden the law—and make it vaguer—to the point that any supposed narrowing benefit of the "sole purpose" requirement would be lost.

Much the same is true of statutory provisions that seek to narrow a statute's coverage by limiting it to behavior that lacks a "legitimate purpose."[222] What constitutes a legitimate purpose, especially when it comes to speech, is a matter of obvious dispute—dispute that often relates to the viewpoint of the speech involved.[223]

Is it a legitimate purpose to start a public campaign to persuade people to stop doing business with a lawyer or a business owner who allegedly behaved rudely? Who belongs to an allegedly racially prejudiced organization? Who belongs to a religious group that one thinks has a heretical or satanic theology?

Likewise, is it a legitimate purpose to try to get your friends and acquaintances to shun someone who has cheated on you? Has been promiscuous but not unfaithful? Has engaged in unsafe sex? Has engaged in homosexual sex? Has had an abortion? Has aborted what would have been your child and might do the same with other lovers in the future?[224] Is "a poor father to [your and his] child"?[225] Secretly belongs to a religious group that holds racially prejudiced beliefs?

Does "no purpose of legitimate communication" only cover speech that consists of "threats and/or intimidating or coercive utterances," as New

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[222] *See, e.g.*, ALA. CODE § 13A-6-92(c) (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 12-1809(R) (2003 & Supp. 2012).

[223] *Lafaro v. Cahill*, 56 P.3d 56 (Ariz. Ct. App. 2002), upheld one such statute by reasoning that the "serves no legitimate purpose" proviso "*exclude*[*s*] pure political speech" from the scope of the statute. *Id.* at 62. But this does little to cure the problem because the First Amendment protects much more speech than just "pure political speech." *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1591 (2010); *see also* Boychuk, *supra* note 174, at 790 ("A standard as vague as 'serves no legitimate purpose' gives law enforcement officers a great deal of discretion in deciding whether certain behavior falls within the statute's scope.").

[224] *See* Eugene Volokh, *When Facts About Another's Life Are Also Facts About Your Life*, VOLOKH CONSPIRACY (June 7, 2011, 7:58 PM), http://volokh.com/2011/06/07/when-facts-about-anothers-life-are-also-facts-about-your-life.

[225] *See* People v. Bethea, No. 2003BX036814, 2004 WL 190054, at *1–2 (N.Y. Crim. Ct. Jan. 13, 2004) (concluding that this is indeed a legitimate purpose "because Americans are, after all, free to criticize one another"). Defendant included Kareem Williams's picture, date of birth, social security number, address, and phone number, and the text:

> Wanted for child support, Kareem Williams . . . Last seen fucking some whore bitch he pick up. Like all deadbeat he thinks he some kind of pimp daddy. He lives off people. And when he gets a dollar, he acts like he is God. That's how you can tell he a asshole, not use to shit. Any information please call Child Support Hotline 212-226-7125.

Id. (alteration in original). The court's conclusion that the speech had a legitimate purpose may be correct, but, if it is, then virtually any speech has a legitimate purpose.

York's highest court held?[226] Or does mailing a torn-up copy of a support order to one's ex-wife—which seems likely to have been motivated by a desire to express one's feelings about the order, and perhaps also one's plans not to abide by it—also qualify as conduct that "serve[s] no legitimate purpose," as New Jersey's highest court held?[227]

None of these are settled questions, nor are they likely to become so any time soon.[228] One's judgment about the legitimacy of the purposes often depends on one's judgment about the view that the speech expresses. Those who believe that homosexuality is immoral may well see a "legitimate purpose" in trying to get people to shun a classmate because of his homosexuality; those on the other side of the issue may well disagree. Conversely, those who agree that bias against homosexuals is immoral may well see a "legitimate purpose" in trying to get people to shun a classmate because of his hostility to homosexuality; those on the other side of that question may disagree. The Colorado Supreme Court was right to conclude that:

> Adding a phrase "without any legitimate purpose" to that subsection injects a vagueness into the statute which cannot withstand First Amendment scrutiny. Such a "limiting construction" disguises the constitutional difficulties of the statute but does nothing to resolve them. . . . This delegation of power to judges or juries with no ascertainable standards does not give sufficient breathing room to the constitutionally guaranteed freedoms of speech and press.[229]

Judgments about the legitimacy of a speaker's purpose are troublesome enough in tort lawsuits, such as lawsuits for interference with business relations through ill-motivated true statements and statements of opinion. This is one reason why this tort has sometimes been held to be

[226] People v. Stuart, 797 N.E.2d 28, 41 (N.Y. 2003); People v. Shack, 658 N.E.2d 706, 712 (N.Y. 1995).

[227] State v. Hoffman, 695 A.2d 236, 243 (N.J. 1997).

[228] The few explicit state court attempts to define "no legitimate purpose" that I've seen hardly help. *See* Towell v. Steger, 154 S.W.3d 471, 475 (Mo. Ct. App. 2005) ("To find a 'course of conduct' to have no legitimate purpose, we must find that the actions were not sanctioned by law or custom, were not lawful, or allowed."); State v. Porelle, 822 A.2d 562, 566 (N.H. 2003) ("A legitimate purpose is one that is genuine or 'accordant with law.'"); Commonwealth v. Wheaton, 598 A.2d 1017, 1019 (Pa. Super. Ct. 1991) ("While the term 'legitimate purpose' has not been clearly defined, the comments to the Model Penal Code state that '[t]he import of the phrase, however, is broadly to exclude from this subsection any conduct that directly furthers some legitimate desire or objective of the actor. This element of the residual offense should limit its application to unarguably reprehensible instances of intentional imposition on another.'" (quoting MODEL PENAL CODE § 250.4 cmt. 5, at 368 (1980))); Commonwealth v. Bare, 1 Pa. D. & C.4th 480, 483 (Ct. Com. Pl. 1988) (defining "intent of 'legitimate communication'" as intent to engage in "communication that is justified in the sense that its purpose conforms to recognized and accepted standards of good conduct and decency and in that sense is otherwise lawful").

[229] Bolles v. People, 541 P.2d 80, 83 (Colo. 1975).

constitutionally precluded[230] and has generally been read quite narrowly.[231] But I think the constitutional vagueness problem—stemming from the lack of guidance to speakers, the risk of viewpoint discrimination in enforcement, and the risk of deterring even speech that is well-motivated—becomes insuperable when it comes to criminal punishment for speech that allegedly lacks "legitimate purpose."[232]

3. Criminal Libel Laws and the "Good Motives" Limitation on the Truth Defense.—As I noted in the Introduction, there is a precedent for the punishment of ill-motivated speech about someone. Pre-1960s criminal libel law in many states provided that truth was a defense only if the statements were made with "good motives" and for "justifiable ends."[233] A minority of states took the same view as to civil libel actions, though most states treated truth as a complete defense, perhaps because true allegations only took away from the plaintiff that part of his reputation that he had not properly earned.[234]

Starting in 1964, though, this sort of liability largely died out. In *Garrison v. Louisiana*, the Supreme Court expressly held that truth had to

[230] *See, e.g.*, Unelko Corp. v. Rooney, 912 F.2d 1049, 1057–58 (9th Cir. 1990).

[231] *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 954 & n.11 (Cal. 2003) (rejecting the theory that an interference with business relations tort could be based on lawful conduct so long as it is done for an improper motive); Walnut St. Assocs., Inc. v. Brokerage Concepts, Inc., 20 A.3d 468 (Pa. 2011); RESTATEMENT (SECOND) OF TORTS § 772(a) (1979) (providing that true statements cannot lead to liability for interference with business relations).

[232] *See* State v. Norris-Romine, 894 P.2d 1221, 1224–25 (Or. Ct. App. 1995) (striking down a state stalking statute on those grounds). *But see* State v. Fratzke, 446 N.W.2d 781, 782, 783 (Iowa 1989) (concluding that the presence of a "without legitimate purpose" proviso in a statute reading, "A person commits harassment when, with intent to intimidate, annoy or alarm another person, the person . . . [c]ommunicates with another by telephone, telegraph, or writing without legitimate purpose and in a manner likely to cause the other person annoyance or harm," "eliminates any constitutional impediment to application of the 'intent to annoy' element" (alteration in original)). Some courts have upheld statutes that ban conduct that poses a "credible threat with the intent to place such person in reasonable fear for such person's safety" and at the same time lacks a "legitimate purpose." State v. Rucker, 987 P.2d 1080, 1090, 1094–95 (Kan. 1999); *see* Donley v. City of Mountain Brook, 429 So. 2d 603, 611 (Ala. Crim. App. 1982), *rev'd on other grounds sub nom. Ex parte* Donley, 429 So. 2d 618 (Ala. 1983); People v. Tran, 54 Cal. Rptr. 2d 650, 652 (Ct. App. 1996); Johnson v. State, 449 S.E.2d 94, 96 (Ga. 1994); *see also* Bouters v. State, 659 So. 2d 235, 237–38 (Fla. 1995) (same as to a statute that required a "credible threat" and excluded "constitutionally protected activity"); Pallas v. State, 636 So. 2d 1358, 1359–60, 1363 (Fla. Dist. Ct. App. 1994) (same); Woolfolk v. Commonwealth, 447 S.E.2d 530, 533 & n.1, 536 (Va. Ct. App. 1994) (same as to statute that required conduct that purposefully or knowingly places the target "in reasonable fear of death, criminal sexual assault, or bodily injury," where the "no legitimate purpose" proviso was added by the court as a limiting construction rather than appearing in the statute). A threat requirement, however, materially narrows the scope of the statute—indeed, likely limits it to constitutionally unprotected true threats—and thus the potential deterrent effect of the vague "legitimate purpose" constraint. This Article discusses laws that restrict speech that does *not* fall within the First Amendment exception for threats.

[233] *See supra* note 31 and accompanying text.

[234] Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 807–08 (1964).

be an absolute defense when a libel lawsuit or prosecution is brought based on "criticism . . . of public officials and their conduct of public business," without regard to the speaker's motives.[235] In the 1974 *Gertz v. Robert Welch, Inc.* case, the Court rested the constitutionality of libel law generally—even when private figures were involved—on the assertion that "there is no constitutional value in false statements of fact."[236] And though the 1985 *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* decision held that states had broad latitude in defining libel law for statements on matters of purely private concern, the three Justices in the lead opinion plus Justice White repeatedly stressed that they were speaking of "false . . . statements."[237] Not since the 1952 *Beauharnais v. Illinois* group libel case has the Court upheld a truth defense limited to speech said with good motives;[238] and *Beauharnais* is widely believed to no longer be good law,[239]

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[235] 379 U.S. 64, 72–73 (1964).

[236] 418 U.S. 323, 340 (1974).

[237] 472 U.S. 749, 751 (1985) (three-Justice lead opinion) ("The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern."); *id.* at 762 (concluding that the speaker's and listeners' interest in purely economic questions "warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation"); *id.* at 763 (Burger, C.J., concurring in the judgment) (characterizing pre-*Sullivan* libel law as covering only falsehoods); *id.* at 767–68 (White, J., concurring in the judgment) (relying on the *Gertz* "no constitutional value in false statements of fact" quote and generally supporting broad libel liability for defamatory falsehoods). The dissenters would have followed *Gertz* even as to statements on matters of purely private concern. *Id.* at 775–76 (Brennan, J., dissenting).

[238] 343 U.S. 250, 265–66 (1952).

[239] *See, e.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989); Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Anti-Defamation League of B'Nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring); City of Cincinnati v. Black, 220 N.E.2d 821, 827–28 (Ohio Ct. App. 1966); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1043–45 (4th ed. 2011); TRIBE, *supra* note 175, § 12-17, at 926; Steven G. Gey, *What if* Wisconsin v. Mitchell *Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1055 (1997); Arnold H. Loewy, *Free Speech for Holocaust Deniers—It Is the American Way*, 47 U. LOUISVILLE L. REV. 721, 723 (2008–2009); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 219 (1991); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 330–31 (1988); Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 351–52 (2009); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 518; Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1116 n.29 (2006). Alexander Tsesis argues, in *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 637 (2010), that *Beauharnais* remains good precedent, but I feel comfortable saying that he is very much in the minority among those who have considered the matter.

partly because it rested on a theory that libel law was immune from First Amendment scrutiny[240]—a view rejected in *New York Times v. Sullivan*.[241]

Indeed, many lower courts have held that truth must be an absolute defense (notwithstanding the speaker's motives) when speech is on a matter of public concern.[242] Several have more broadly said that truth must be a defense generally, with no limitation to public-concern speech, just as *Gertz* defined libel law as justified on the grounds that it only punishes falsehoods, without limiting this principle to public-concern speech.[243] And two courts have expressly held that truth must be an absolute defense, even as to statements on matters of purely private concern.[244]

I have found only a smattering of lower court cases since *Gertz* that mention the "good motives" limitation on the defense of truth,[245] and none deals with the general First Amendment issue in any detail. All but two just follow older state law cases on the subject without discussing the First Amendment. One of the remaining two, the Illinois case *Welch v. Chicago Tribune Co.*, simply distinguishes an earlier First Amendment precedent on the grounds that "[t]he case at bar does not concern public figures or issues."[246] And the other case, also from Illinois—*People v. Heinrich*—involves a statute that, though framed as a criminal libel law, is limited only to defamatory statements that are also fighting words; the court's defense of the statute repeatedly stresses this feature.[247]

For the reasons given in Part II.G below, I think the general conclusion that libel law is limited to false statements of fact makes good First Amendment sense and is also dictated by *Garrison*, *Gertz*, and *Dun &*

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[240] *Beauharnais*, 343 U.S. at 254–58.

[241] 376 U.S. 254 (1964).

[242] *See, e.g.*, *Tollett*, 485 F.2d at 1098; Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); People v. Ryan, 806 P.2d 935, 940 (Colo. 1991); Farnsworth v. Tribune Co., 253 N.E.2d 408, 410 (Ill. 1969); Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925, 929 (Mass. 1998); State v. Powell, 839 P.2d 139, 143 (N.M. Ct. App. 1992); Parmelee v. O'Neel, 186 P.3d 1094, 1101 (Wash. Ct. App. 2008), *rev'd on other grounds*, 229 P.3d 723 (Wash. 2010).

[243] *See, e.g.*, Weston v. State, 528 S.W.2d 412, 415 (Ark. 1975); State v. Helfrich, 922 P.2d 1159, 1161 (Mont. 1996); Commonwealth v. Armao, 286 A.2d 626, 632 (Pa. 1972).

[244] Mink v. Knox, 613 F.3d 995, 1006 (10th Cir. 2010); Brown v. Kelly Broad. Co., 771 P.2d 406, 429 (Cal. 1989).

[245] Several apply Florida and Illinois law, and one each applies Massachusetts and Rhode Island law. Noonan v. Staples, Inc., 556 F.3d 20, 28 & n.7 (1st Cir.) (so stating this as a matter of state law), *reaff'd*, 561 F.3d 4 (1st Cir. 2009); Litman v. Mass. Mut. Life Ins. Co., 739 F.2d 1549, 1561 (11th Cir. 1984), *aff'd*, 791 F.2d 855 (11th Cir. 1986), *rev'd on other grounds*, 825 F.2d 1506 (11th Cir. 1987); Hoth v. Am. States Ins. Co., 753 F. Supp. 703, 712 (N.D. Ill. 1990); LRX, Inc. v. Horizon Assocs. Joint Venture, 842 So. 2d 881, 886 (Fla. Dist. Ct. App. 2003), *aff'd*, 922 So. 2d 984 (Fla. Dist. Ct. App. 2005); Lipsig v. Ramlawi, 760 So. 2d 170, 183 (Fla. Dist. Ct. App. 2000); Drennen v. Westinghouse Elec. Corp., 328 So. 2d 52, 55 (Fla. Dist. Ct. App. 1976); People v. Heinrich, 470 N.E.2d 966, 970 (Ill. 1984); Welch v. Chi. Tribune Co., 340 N.E.2d 539, 544 (Ill. App. Ct. 1975); Johnson v. Johnson, 654 A.2d 1212, 1216 (R.I. 1995).

[246] 340 N.E.2d at 544.

[247] 470 N.E.2d at 970–71.

Bradstreet. The rare cases that continue to apply the "good motives" limitation for speech on matters of "private concern" are mistaken. And the pre-1960s tradition of allowing criminal libel punishment for true statements, depending on the judge's and jury's evaluation of the speaker's motivation, should offer no support for modern criminal harassment laws.

G. Speech on Matters of Purely Private Concern

The four main examples that I gave in the Introduction all involved speech related to politics, religion, or government conduct. What if a harassment statute were limited to speech about people that is on matters of "purely private concern"? No harassment statutes currently embody such a limitation, but what if one did?[248]

The Court has indeed held that false statements of fact are less protected against civil defamation liability when they deal with matters of "purely private concern," and that the government acting as employer has broad power to fire and discipline employees when they speak on matters of "purely private concern."[249] And in *Snyder v. Phelps*, the Court suggested that statements on matters of purely private concern could lead to liability under the intentional infliction of emotional distress tort, which allows such liability for statements that are "outrageous" and that recklessly or purposefully inflict "severe emotional distress."[250]

But the Court has long resisted the notion that such speech can be criminally punished. We saw this in *United States v. Stevens*, which struck down a ban on certain depictions of violence towards animals.[251] The

[248] *See* State v. Brown, 85 P.3d 109, 111, 114 (Ariz. Ct. App. 2004) (rejecting First Amendment challenge to ban on "conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and [which] in fact seriously alarms, annoys or harasses the person" because "Brown's repeated entreaties to [his ex-girlfriend] that they resume their relationship do not contain any such particularized political or social message warranting First Amendment protection"); R.D. v. P.M., 135 Cal. Rptr. 3d 791, 800 (Ct. App. 2011) (upholding injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace, partly because the speech had "only slight apparent relationship to any issue of public interest"); Rzeszutek v. Beck, 649 N.E.2d 673, 680–81 (Ind. Ct. App. 1995) (rejecting challenge to protective order entered on behalf of a young woman against her family, partly because "person to person conversations between Lucy and her family members are largely unrelated to the market in ideas, and they are not protected by the first amendment"); Johnson v. Arlotta, No. A11-630, 2011 WL 6141651, at *5 (Minn. Ct. App. Dec. 12, 2011) (upholding injunction against speech that "affects or intends to adversely affect the . . . privacy of" the plaintiff, partly because the speech "did not implicate matters of public concern"). Note that the law in *Brown* may well be a permissible restriction on unwanted one-to-one speech, *see supra* Part I, whether or not the speech includes a "particularized political or social message."

[249] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759, 763 (1985); Connick v. Myers, 461 U.S. 138, 147–48 (1983).

[250] 131 S. Ct. 1207, 1215–16 (2011).

[251] 130 S. Ct. 1577 (2010). Much of the discussion in this section borrows from Eugene Volokh, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

statute had a specific exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value,"[252] and the government stressed that exception in defending the statute. But the Court concluded that the exception did not save the statute.

"*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value)," the Court held, "but it is still sheltered from government regulation."[253] "Even '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'"[254] The Court was thus not willing to limit constitutional protection to that speech which relates to matters of public concern. And the examples to which the Court pointed in reasoning that the statute was overbroad[255] were indeed not much connected to political, religious, scientific, or artistic matters—they included videos and photographs of hunting, depictions of certain livestock management and slaughter practices, and videos of cockfighting taken in places (such as Puerto Rico) where cockfighting is legal.[256]

Likewise, consider *Sable Communications v. FCC*, which struck down a ban on dial-a-porn.[257] Dial-a-porn, even nonobscene dial-a-porn, seems pretty far removed from matters of public concern. *City of San Diego v. Roe*,[258] cited by *Snyder v. Phelps*,[259] expressly viewed pornography as not being speech on matters of public concern, and thus concluded that the government could fire an employee for producing pornography. Yet the *Sable* Court unanimously applied the same strict scrutiny test to a criminal law restricting dial-a-porn as it has applied to criminal laws restricting speech on matters of public concern.[260] Other pornography cases, such as *United States v. Playboy Entertainment Group, Inc.* and *Ashcroft v. ACLU (II)*, have done the same.[261]

Consider also *Connick v. Myers*. In the course of adopting a public concern limit to protection against the government as employer, the Court wrote:

> "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. . . ." We in no sense suggest that

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252 *Stevens*, 130 S. Ct. at 1590.

253 *Id.* at 1591.

254 *Id.* (quoting Cohen v. California, 403 U.S. 15, 25 (1971)).

255 *Id.* at 1587–88 ("[T]he constitutionality of [the statute] hinges on how broadly it is construed. . . . We read [the statute] to create a criminal prohibition of alarming breadth.").

256 *Id.* at 1588–89.

257 492 U.S. 115 (1989).

258 543 U.S. 77 (2004) (per curiam).

259 131 S. Ct. 1207, 1216 (2011).

260 492 U.S. at 126.

261 *Ashcroft*, 542 U.S. 656, 670 (2004); *Playboy*, 529 U.S. 803, 826–27 (2000).

> speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. . . . We hold only that when a public employee speaks . . . as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[262]

So the areas in which First Amendment law offers lower protection for speech on matters of private concern—government employee speech (*Connick v. Myers*), false accusations that injure a person's reputation (*Dun & Bradstreet v. Greenmoss Builders*), and intentional infliction of emotional distress (*Snyder v. Phelps*)—are the exceptions rather than the rule. And they are exceptions that seem limited to civil lawsuits or other noncriminal punishment (such as loss of a job).

Moreover, limiting the private concern doctrine to civil cases is especially apt given the vagueness of the public concern/private concern line, which the Court has never defined clearly, and which has often been applied in surprising ways that seem quite inapt as to criminal liability for true statements. For instance, *Connick v. Myers* held that an assistant prosecutor's criticism of her managers was generally speech that was not on a matter of public concern. Yet—as *Connick* itself suggests—surely such criticism of prosecutors couldn't be made a crime, even when the speaker "intends to annoy" the prosecutors. Likewise, *Dun & Bradstreet* held that an erroneous and narrowly communicated credit report statement that a small business had declared bankruptcy wasn't on a matter of public concern and could thus more easily lead to libel liability. Yet true statements that a business had declared bankruptcy can't be criminally punished (or for that matter can't even lead to civil liability).[263]

Similarly, lower court libel and government employee speech opinions apply the public concern test in inconsistent ways. Nat Stern's *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category* offers a superb summary of just how inconsistent the decisions are;[264] here, I just offer a few examples.

Consider, for instance, accusations of crime. The New Jersey Supreme Court recently held that a person's online allegation that his uncle had molested him when the person was a child was a matter of purely "private concern" for libel law purposes.[265] On the other hand, the California Court

[262] Connick v. Myers, 461 U.S. 138, 147 (1983) (first alteration in original) (citation omitted) (quoting United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967)).

[263] *Cf.* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (rejecting liability for disclosure of personal information taken from government records); Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 560 (Cal. 2004) (same).

[264] 65 MO. L. REV. 597 (2000).

[265] W.J.A. v. D.A., 43 A.3d 1148, 1157 (N.J. 2012).

of Appeal concluded that the inclusion of a claim, in a leaflet posted around town listing alleged sexual attackers, that a particular man had attempted to rape a woman was a matter of "public concern."[266]

The California opinion noted that the specific allegation was included as part of a newsletter that discussed sexual assault, but I doubt that this would yield much of a distinction. The allegation in the New Jersey case was part of a discussion in which the nephew complained about what he saw as the miscarriage of justice in an earlier libel case arising from the same allegation, including "allegations of perjury and intimidation of a witness."[267] The bottom line is that lower courts haven't reached any clear answer as to when an allegation of a crime is a matter of public concern. A statute that defined punishable speech in terms of public concern would thus not give speakers, prosecutors, judges, or juries enough guidance about what speech is punishable.

And, more importantly, regardless of how such allegations should be treated for libel purposes when they are *false*, surely such allegations cannot lead to liability—including criminal punishment—when they are true. People ought to be free to discuss serious crimes that others have committed, even though naturally such discussions would annoy and distress the criminals (who would rather remain unknown) and may even be partly intended to distress the criminals.[268]

Likewise, consider three cases dealing with allegations of substance abuse. *Ayala v. Washington* held that a letter to an airline alleging that one of its pilots—the defendant's ex-boyfriend—was a marijuana user was merely on a subject of "private concern."[269] *Starrett v. Wadley*, on the other

[266] Carney v. Santa Cruz Women Against Rape, 271 Cal. Rptr. 30, 32, 37 (Ct. App. 1990); *see also* Forrester v. WVTM TV, Inc., 709 So. 2d 23, 26 (Ala. Civ. App. 1997) (concluding that depiction of a man slapping his child at the child's baseball game, included in a broadcast about excessive pressure on children in youth sports, "brought up a matter of public concern, i.e., whether adults put too much pressure on children in sports").

[267] *W.J.A.*, 43 A.3d at 1151.

[268] For an example of a harassment prosecution for speech alleging that someone committed child molestation—with no requirement of a proof of falsity—see *State v. Ellison*, 900 N.E.2d 228 (Ohio Ct. App. 2008). Ellison and Gerhard were girls who had been friends, but their friendship stopped in seventh grade when Ellison's younger brother alleged that Gerhard had molested him. (The police "investigated . . . and determined that [they] did not have enough evidence to substantiate" the claim. *Id.* at 229.) In high school, Ellison posted a message to her MySpace page, alleging that Gerhard had "[m]olested a little boy." *Id.*

For this, Ellison was prosecuted and convicted of "mak[ing] . . . a telecommunication . . . with purpose to abuse, threaten, or harass another person," *id.* at 230; no showing of falsehood was required under the statute. The Ohio Court of Appeals reversed, holding that the statute didn't apply, apparently partly because it read the term "harass" as implicitly requiring that the conduct "serve[] no legitimate purpose." *Id.* The court concluded that the prosecution didn't sufficiently disprove the theory that Ellison was motivated by "the legitimate purpose of warning others of what Ellison believed to be criminal behavior." *Id.* at 231.

[269] 679 A.2d 1057, 1068 (D.C. 1996).

hand, held that an allegation that a supervisor at a tax assessor's office had an alcohol problem was a matter of "public concern," because it revealed improper behavior by a government official.[270] And *Veilleux v. NBC* expressly rejected liability for true reports of drug use by a truck driver under the disclosure of private facts tort, concluding that the named driver's "drug test results were of legitimate public concern."[271]

As a result, it's hard to tell, in the wake of these cases, how allegations of drug or alcohol abuse would be treated under a public concern test. And in any event, whatever the right answer might be as to *false* allegations, or allegations that lead only to government employment action, surely *true* allegations of substance abuse should be fully constitutionally protected, as *Veilleux* indeed held.

Finally, consider two examples of statements related to political or social matters. One is the Mississippi Supreme Court's decision in *Mississippi Commission on Judicial Performance v. Osborne*.[272] Solomon Osborne was a black trial court judge who was running for reelection; at one campaign speech before a predominantly black political organization Osborne said, "White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around."[273] The Mississippi Supreme Court suspended Osborne for a year on the grounds that "conduct prejudicial to the administration of justice . . . brought the judicial office into disrepute,"[274] and it rejected Osborne's First Amendment defense by concluding that the speech was unprotected under the "legitimate public concern" test applicable to speech by government employees. Osborne's statement, the court held, "is not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity."[275]

It's not clear to me that speech by elected officials, such as judges, should be subject to the same First Amendment standards as speech by ordinary government employees. I also doubt that the speech here was rightly described as not "of legitimate political concern," since Osborne's statement—however prejudiced—was directly related to political power and race relations.

But in any case, it's hard to reconcile this decision with the same court's decision just five years earlier, in *Mississippi Commission on Judicial Performance v. Wilkerson*,[276] which held that sharply

[270] 876 F.2d 808, 817 (10th Cir. 1989).
[271] 206 F.3d 92, 134 (1st Cir. 2000).
[272] 11 So. 3d 107 (Miss. 2009).
[273] *Id.* at 109.
[274] *Id.* at 118.
[275] *Id.* at 113.
[276] 876 So. 2d 1006 (Miss. 2004).

antihomosexual statements by a sitting judge (made in a letter to the editor and then in a radio interview) *were* on a matter of public concern.[277] Again, a public concern standard in a criminal harassment law would leave speakers, prosecutors, judges, and juries uncertain about what speech is protected.[278]

And more importantly, whatever the right answer when it comes to the firing of government employees or the discipline of government-employed judges, surely the public concern standard as applied in these cases is an unconstitutional basis for criminal punishment for the expression of opinion. Even if Solomon Osborne was rightly disciplined for his statements about whites—on the grounds that judges are ultimately government employees and the government as employer has to have special power to control its employees' speech—he shouldn't be criminally punishable for such statements, even if he made the statements with the purpose of annoying, embarrassing, or distressing some people.

A public concern/private concern line may be acceptable in the limited circumstances in which it has operated for the last few decades: the government acting as employer and the imposition of liability for false statements (though even there it has been controversial[279]). And perhaps such a line is acceptable when it comes to civil liability—an area where vagueness concerns have been seen as less significant, though by no means insignificant—in the narrow zone of cases that involve "outrageous" conduct that recklessly causes severe emotional distress.[280] But given the vagueness and breadth of what courts have been willing to label "private concern," that line shouldn't be transplanted to criminal punishments for true statements.

H. Harm

Even "harassing" speech, then, is presumptively constitutionally protected, so long as it doesn't fit within one of the First Amendment exceptions. But should the presumption be rebutted, either under the rubric of strict scrutiny or through recognizing some new exception?

The answer, I think, is generally "no." This is particularly so as to speech on political, religious, or social matters—even when the speech is

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[277] *Id.* at 1011–13.

[278] Likewise, compare *Vern Sims Ford, Inc. v. Hagel*, 713 P.2d 736, 741 (Wash. Ct. App. 1986), holding that disgruntled customer's mailings alleging dishonesty by a car dealership did "not involve a matter of public concern," with *Gardner v. Martino*, 563 F.3d 981, 989 (9th Cir. 2009), holding that consumer advocacy show's statements alleging poor customer service by a boat dealer were on a matter of public concern, and *Paradise Hills Assocs. v. Procel*, 1 Cal. Rptr. 2d 514, 523 (Ct. App. 1991), holding that disgruntled customers had a First Amendment right to picket home building company.

[279] *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 774–76 (1985) (Brennan, J., dissenting, writing for four Justices); Connick v. Myers, 461 U.S. 138, 156–57 & n.1 (1983) (Brennan, J., dissenting, writing for four Justices).

[280] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

deliberately offensive and annoying to its target. *Snyder v. Phelps* and *Hustler Magazine, Inc. v. Falwell* held that such speech can't lead to civil liability even when it is "outrageous" and purposefully causes severe emotional distress[281] (historically a highly demanding standard[282]). It thus can't lead to criminal liability under the considerably lower standards imposed by criminal harassment laws.[283]

Nor does it matter whether the speaker's speech is repeated many times. The law may indeed restrict speaking *to* a person repeatedly, after it's clear that the recipient of the speech doesn't want to hear the speech.[284] But speech *about* a person remains constitutionally valuable whether it is said once or often. Trying to effectively reach an audience often requires multiple attempts, as well as follow-up arguments aimed at supporting and explaining one's initial criticisms.

As Part II.G noted, *Snyder* did suggest that speech that is outrageous and recklessly or purposefully causes severe emotional distress could lead to civil liability when it is on a matter of purely private concern. But, as that Part argued, the public/private concern distinction is too ill-defined to adequately protect free speech, both in the sense that the distinction is vague and in the sense that past attempts to define the distinction have yielded results that are unsuited to restraints on accurate speech imposed by the government as sovereign.

Perhaps District Attorney Harry Connick should be able to fire Sheila Myers for her criticisms of the D.A.'s office, on the grounds that such employment grievances are not on a matter of "private concern." But surely he should not be able to prosecute her for "criminal harassment" if she blogs her criticisms in a way that is supposedly intended to annoy or embarrass her higher-ups.

More broadly, as Part II.B noted, the existing First Amendment exceptions already recognize certain kinds of injuries to individual people that can be inflicted by speech. If false statements defame people, they may be unprotected libel.[285] If impersonating someone and claiming that she is seeking casual sex leads people to contact the victim of impersonation in

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[281] *Id.*; 485 U.S. 46, 50–52 (1988).

[282] *See* Hughes v. Pair, 209 P.3d 963, 976 (Cal. 2009); RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

[283] *See also* United States v. Cassidy, 814 F. Supp. 2d 574, 584–85 (D. Md. 2011) (rejecting the claim that a ban on one-to-many speech that causes substantial emotional distress is justified by a "compelling interest in protecting victims from emotional distress sustained through an interactive computer service").

[284] *See supra* Part I.

[285] *See, e.g.*, Evans v. Evans, 76 Cal. Rptr. 3d 859, 868 (Ct. App. 2008) (stating that a court could enjoin an ex-wife's false and defamatory communications about her ex-husband if those "specific statements [have been] found at trial to be defamatory" (emphasis omitted)).

distressing and frightening ways, such false speech may likewise be unprotected.[286]

If statements threaten someone, they may fit within the "true threats" exception. If they offend someone and are sent directly to that person, they might be restrictable one-to-one speech, as discussed in Part I. Perhaps if they reveal certain narrowly and clearly defined categories of highly dangerous or embarrassing information about others, such as their social security numbers or pictures of them naked or having sex, they could be covered by some possible exception for speech that unjustifiably invades privacy. (The scope of this privacy exception may also be somewhat broader than this, but the matter is far from settled.)[287]

But outside those exceptions, speech about a person—however offensive—consists simply of people expressing opinions and communicating facts about each other. "As a general matter, Americans are free to say and to write bad things about each other."[288] Even when the one-to-many speech is not on matters of public concern, it has value to listeners and to the speaker. And however much we might dislike people saying bad things about us, it doesn't follow that we should have a legal right to stop such gossip or criticism, especially by imposing criminal liability.[289]

Consider, for instance, a woman whose boyfriend or husband cheated on her, frequently and cruelly berated her, or even beat her.[290] (Recall that some courts treat even allegations of crime as matters of purely "private concern" for libel law purposes.)[291] She leaves him and announces this in several posts to her friends on Facebook—or even on a publicly accessible blog that she runs for her acquaintances and other readers.

She wants her friends to understand what's happening in her life. She wants to warn them against trusting her ex. She wants to feel that she's

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[286] *See supra* note 101.

[287] *See supra* Part II.C.

[288] People v. Bethea, No. 2003BX036814, 2004 WL 190054, at *1 (N.Y. Crim. Ct. Jan. 13, 2004); *see also* State v. Machholz, 574 N.W.2d 415, 418, 420–21 (Minn. 1998) (striking down a ban on any conduct that "would cause a reasonable person . . . to feel oppressed, persecuted, or intimidated" and does cause such a reaction as well as "interfer[ing] with another person or intrud[ing] on the person's privacy or liberty," partly because the law "criminalizes any number of day-to-day interactions between people," including ones that have no connection to political or social debate); State v. Dronso, 279 N.W.2d 710, 712 n.1, 714 (Wis. Ct. App. 1979) (striking down a ban on "mak[ing] a telephone call" "[w]ith intent to annoy another" because it would punish, among other things, "a consumer calling the seller or producer of a product to express dissatisfaction" and "a businessman calling another to protest failure to perform a contractual obligation").

[289] *See, e.g.*, *Evans*, 76 Cal. Rptr. 3d at 869–70 (reversing an injunction against an ex-wife's publishing on the Internet "confidential personal information" about her ex-husband, on the grounds that the term was unconstitutionally vague and overbroad, and suggesting that such speech could be restricted).

[290] *See, e.g.*, *Bethea*, 2004 WL 190054, at *4–5 (holding that defendant had the right to post offensive and vulgar flyers condemning her ex-boyfriend for refusing to pay child support).

[291] *See, e.g.*, W.J.A. v. D.A., 43 A.3d 1148, 1157–58 (N.J. 2012).

being open and honest with her friends. And she also wants her ex to feel ashamed of himself and to feel that he has lost many of his friends as a result of his bad conduct.

Under many of the laws I discuss in this Article, the woman's speech would be a crime. That is so, for instance, under the New Jersey law involved in the *Speulda* case, with which the Introduction began. The law—which the prosecutor interpreted as covering one-to-many speech and not just one-to-one speech—makes it a crime to make "a communication . . . in offensively coarse language, or any other manner likely to cause annoyance or alarm" "with purpose to harass another."[292] And the Facebook posts or blog posts would indeed likely cause annoyance or alarm, and might well have been posted with the purpose "to harass" in the sense of having, as one of its purposes, the purpose to make the ex feel upset. (A parallel provision of the law also covers "any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person," which suggests that "purpose to . . . seriously annoy" is seen as interchangeable with "purpose to harass" under the statute.)[293]

Likewise, the Washington law involved in the Renton cartoon case makes it a crime to, "with intent to harass, intimidate, torment, or embarrass any other person . . . make an electronic communication to such other person or a third party . . . [u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[294] If the woman's post used "indecent" or "lewd" words to describe the ex's cheating, and part of her intent was to "embarrass" her ex, her speech would likewise be criminal.[295]

Yet such speech, it seems to me, should remain constitutionally protected (again, if it's not a falsehood, a threat, or some other sort of speech that falls within an existing First Amendment exception). As I've argued elsewhere,[296] such speech on "daily life matters" is at least as constitutionally worthy as the movies, art, jokes, and reviews of stereo systems that the First Amendment has been repeatedly held to protect.[297]

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[292] N.J. STAT. ANN. § 2C:33-4(a) (West 2005).

[293] *Id.* § 2C:33-4(c).

[294] WASH. REV. CODE ANN. § 9.61.260(1)(a) (West 2010).

[295] To be sure, one might hope that a prosecutor won't go after a speaker who is justifiably upset about actual mistreatment and will focus the law on speakers who, say, are lying (though harassment laws aren't facially limited to falsehoods) or whose speech is otherwise seen by many as unjustified. But, as the Court held in *United States v. Stevens*, 130 S. Ct. 1577 (2010), a speech restriction may not be justified by the expectation of well-exercised prosecutorial discretion. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 1591.

[296] Volokh, *supra* note 142, at 1092–94.

[297] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 487, 503–04 (1984) (treating product review of stereo equipment as fully protected); Abood v. Detroit Bd. of Educ., 431

At least as much as those kinds of protected speech, daily life matters speech—communication related to "the real, everyday experience of ordinary people"[298]—indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or most of the editorials we read. That "the personal is political" may sometimes be an overstatement, but sometimes it's quite right: consider how our understanding of domestic violence, the justice or injustice of divorce law, and more can be influenced by learning what has happened with our own friends, rather than just what we see written in newspapers about strangers.

There is no doubt that such speech can deeply distress its subjects, even if it lacks sufficient provable falsehoods to be libel. That's especially so when the subjects are teenagers, who may lack the life experience to handle it effectively. But it's also true for adults. Humans are social creatures. We care deeply about our standing among our friends and neighbors, and we care deeply about what people say about us because such speech can affect that standing. Terms such as "cyberbullying" are, I think, poor labels for derogatory speech about people; I would reserve "bullying" for violence and threats of violence. Yet the concern about speech that makes people feel socially ostracized, or urges others to socially ostracize them, is understandable.

It doesn't follow, though, that we should have the right to use the coercive power of the legal system to protect our social standing, at least where provable falsehoods are not involved. Whether people respect us or not is for them to decide. And since those decisions are made based on what people hear and read about us, they are entitled to access opinions and facts about us without governmental interference.

Our high standing among our friends and neighbors also gives us some power over them: It can cause them to trust us with their money, their safety, or their affections. People who think this trust is misplaced, for instance because they believe that we have wronged them, should be free to express their opinions—and convey the facts that support those opinions.

For instance, if a lawyer has been suspended from the bar for misuse of client funds, the lawyer ought not be able to use the legal system to hide this information from the lawyer's friends and neighbors, who are all prospective clients. And third parties should therefore be free to convey that factual information, even if a court concludes that the third party's

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U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection."); Winters v. New York, 333 U.S. 507, 509–10 (1948) (treating entertainment as fully protected).

[298] Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 37 (1990).

motivation is petty or unworthy.[299] Likewise, if a client of a professional or a business believes that she has been ill-treated, other prospective clients and patrons are entitled to learn about the client's opinions and the facts that the client accurately relates, and to take those complaints for whatever the listeners think the complaints are worth.[300] The law ought not step in to block this information by threatening to imprison people who want to spread it.

So if the speech is libel, it can lead to liability as libel. If it is a threat or fighting words, it can be punished as such, and likewise for the other First Amendment exceptions. But outside those exceptions, one-to-many speech, whether about topics of great public moment or just about the speaker's own personal relationships and tragedies, should remain protected—even if it annoys or offends the subject of the speech, and is in part intended to do so.

CONCLUSION

To summarize:

1. The government has considerable power to protect unwilling listeners against unwanted speech *to* them, at least when that speech is one-to-one—when it is said directly to them rather than to the public at large, so that restricting such one-to-one speech will leave speakers free to communicate to willing listeners. This power is not unlimited, especially when the speech is to government officeholders or candidates for office. But it is generally quite broad, and it explains the constitutionality of properly crafted telephone harassment laws, anti-stalking laws, restraining order laws, and "stop mailing me" laws when those laws are limited to one-to-one speech.[301]

2. The government has some power to restrict speech about people, chiefly threats, knowing falsehoods, and solicitation of crime.

3. The government probably does not have broad power to criminalize speech that reveals private information that is supposedly not "of legitimate public concern." But it may have some power to restrict narrow and clearly defined subcategories of speech that reveal private information about people when those subcategories consist of speech that is almost never

[299] *But see* Welytok v. Ziolkowski, 752 N.W.2d 359, 370 (Wis. Ct. App. 2008) (concluding that such speech constituted punishable harassment).

[300] *Compare* R.D. v. P.M., 135 Cal. Rptr. 3d 791, 800 n.11, 801 (Ct. App. 2011) (upholding an injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace; though defendant argued that she had distributed these leaflets "to inform consumers about her negative experience with [defendant] as a clinical social worker," "[t]he trial court concluded . . . that [plaintiff's] intention was less to address an issue of public importance than to harass [defendant]"), *with* Paradise Hills Assocs. v. Procel, 1 Cal. Rptr. 2d 514, 521, 523 (Ct. App. 1991) (concluding that disgruntled customers had a First Amendment right to picket home building company).

[301] *See supra* Part I.

relevant to any discussion on either public or private topics. Nude pictures, sex videos, and social security numbers are likely the clearest examples of this.

4. Outside these categories, bans on speech about unwilling subjects (as opposed to speech to unwanted listeners) are generally unconstitutional. First, such bans are content-based speech restrictions. Second, even speech that is said with a purpose to annoy or offend is constitutionally protected. Third, speech ought not be criminally punishable on the grounds that it is of purely "private concern." And, fourth, while the speech can indeed be highly offensive and distressing to its subjects, that doesn't justify outlawing it.