NOTES

CYBERSTALKING, TWITTER, AND THE CAPTIVE AUDIENCE: A FIRST AMENDMENT ANALYSIS OF 18 U.S.C. § 2261A(2)

JOHN B. MAJOR*

TABLE OF CONTENTS

* Class of 2013, University of Southern California Gould School of Law; B.S. Biological Sciences 2010, University of Southern California. Many thanks to Professors Rebecca Brown, Michael Shapiro, and Eugene Volokh for their valuable comments; to my family for their patience and support; and to the members of the *Southern California Law Review* for their keen editing.

I. INTRODUCTION

That name rings in her head a thousand times each day . . . . .

A thousand voices call out . . . and she cannot shut off the silent scream

Terrors in the night disturb [her] sleep . . . anxiety rules her body like a slavemaster

Tweets like those above are a small sampling of the verbal assault Alyce Zeoli suffered at the hand of William Lawrence Cassidy.[1] Mr. Cassidy's Tweets were right on the mark: his name rang in Ms. Zeoli's head thousands of times each day, she could not shut off his incessant "Tweeting," and anxiety took hold of her life.

Ms. Zeoli, known to her followers as Jetsunma Ahkon Lhamo, is considered to be a reincarnated master in the Tibetan Buddhist religious tradition.[2] In the fall of 2007, she invited Mr. Cassidy, who had befriended monks at her teaching center, to a retreat.[3] The relationship between Mr. Cassidy and Ms. Zeoli quickly became bizarre. Shortly after meeting Ms. Zeoli, Mr. Cassidy asked her to marry him; after she declined, he requested

1. Somini Sengupta, *Case of 8,000 Menacing Posts Tests Limits of Twitter Speech*, N.Y. TIMES, Aug. 26, 2011, at A1, *available at* http://www.nytimes.com/2011/08/27/technology/man-accused-of-stalking-via-twitter-claims-free-speech.html?_r=1.

2. *Id.*

3. Criminal Complaint ¶ 6(a)–(b), United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011) (No. 11-501).

that she pretend they were married.[4] During another encounter, after hearing of Ms. Zeoli's failed relationship with her ex-husband, Mr. Cassidy asked her if she wanted her ex-husband killed.[5] Mr. Cassidy later claimed to have lung cancer, and Ms. Zeoli's organization cared for him.[6] When it became known that Mr. Cassidy had lied about having cancer and had used a fake name to sign up for the organization, however, the relationship between Ms. Zeoli and Mr. Cassidy soured.[7] This spurred Mr. Cassidy's relentless Tweeting.

Over the span of several months, Mr. Cassidy published over eight thousand Tweets from thirteen separate Twitter accounts,[8] the vast majority of which pertained to Ms. Zeoli.[9] The Tweets varied greatly in both substance and tone. Some Tweets could potentially be construed as criticism of Ms. Zeoli's fitness as a religious leader: "[Ms. Zeoli] is a demonic force who tries to destroy Buddhism,"[10] and "[Ms. 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."[11] Other Tweets took a banal, personally insulting tone: "that ho bitch [Ms. Zeoli] so fat if she falls & breaks her leg gravy will spill out,"[12] and "I do not believe [Ms. Zeoli] was a prostitute. I think that story is a made-up lie. Prostitutes are professionals."[13]

A final category of Tweets is particularly troubling, as it seemingly focused solely on intimidating or distressing Ms. Zeoli: "and that sound that keeps buzzing in the back of your head [Ms. Zeoli] is my hand touching the ground";[14] "Enough is enough. The final bit of magic begins now. Within 90 days, you will know. Owl and raven feathers separate . . . permanently";[15] and "Damn! I just heard more screams coming from the compound! Hope everything is OK! Worried!"[16] Indeed,

4. *Id.* ¶ 6(b).
5. *Id.*
6. *Id.* ¶ 6(c).
7. *Id.* ¶ 6(e).
8. *Id.* ¶¶ 10, 14.
9. *Id.* ¶ 10.
10. *Id.* ¶ 11(b).
11. *Id.* ¶ 11(j).
12. *Id.* ¶ 11(m).
13. *Id.* ¶ 11(ll).
14. *Id.* ¶ 11(d).
15. *Id.* ¶ 11(r). "'Owl and raven feathers separate' refers to . . . [separating] the defenses of the enemy so that the enemy is then left defenseless against attack." *Owl and Raven Feathers Separate*, PROTECTING NYINGMA (Nov. 14, 2010), http://protectingnyingma2.wordpress.com/2010/11/14/owl-and-raven-feathers-separate/.
16. Criminal Complaint, *supra* note 3, ¶ 13(g).

after Ms. Zeoli deactivated her Twitter account, Mr. Cassidy acknowledged that he was "play[ing] with" her, Tweeting that someone should "throw a couple shots of gin in the bitch & get her back on twitter."[17] Mr. Cassidy's Tweets caused Ms. Zeoli extensive emotional distress.[18] She did not leave her home for a year and a half except for meetings with her psychiatrist; experienced numerous physical ailments; forwent retreats and other professional obligations in fear of Mr. Cassidy; and at times, hired armed security guards for her home.[19] Mr. Cassidy's behavior led to him being charged with cyberstalking under 18 U.S.C. § 2261A(2) ("the cyberstalking statute"), and he raised a First Amendment defense.[20] As will be discussed further in Part IV, the district court found the statute unconstitutional as applied to Mr. Cassidy.[21] The court held that the statute was content based and failed strict scrutiny in part because it assumed Ms. Zeoli could have simply averted her eyes to avoid the offensive speech.[22]

There are multiple aspects of *United States v. Cassidy* that make it particularly difficult to analyze under the First Amendment but allow it to illuminate the limits of the cyberstalking statute. First, there are powerful competing interests here: Ms. Zeoli's right to avoid the harm she suffered, and Mr. Cassidy's right to communicate freely. Put more generally, *Cassidy* places the government's right to protect its citizens in conflict with an individual's right to communicate. Further, it is the first case to test the constitutionality of a portion of the cyberstalking statute that was added in a 2006 amendment.[23] Moreover, the speech that caused Ms. Zeoli substantial emotional distress occurred over Twitter and was thus both communicated to the public and targeted her as an individual.[24] This type of speech muddles a sometimes-important distinction in First Amendment law: whether speech is directed to the general public or targeted toward a specific individual.[25] Lastly, because the course of conduct at issue

17. *Id.* ¶ 11(c).
18. *Id.* ¶ 25.
19. *Id.*
20. United States v. Cassidy, 814 F. Supp. 2d 574, 580–81 (D. Md. 2011).
21. *See infra* Part IV.I.
22. *See infra* text accompanying notes 246–47.
23. *See infra* text accompanying notes 77–78.
24. Twitter is one example of an increasingly common phenomenon: public speech that is directed at another person. *See* Joseph B. Walther et al., *Interaction of Interpersonal, Peer, and Media Influence Sources Online: A Research Agenda for Technology Convergence*, *in* A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 17, 18 (Zizi Papacharissi ed., 2011) ("Technology has . . . generated new forms of communication, in social networking sites and other systems, which bridge the structural and functional characteristics of mass/interpersonal/peer communication.").
25. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws,*

occurred entirely over the Internet, a court must once again examine a congressional attempt to regulate the Internet in the shadow of the First Amendment.

This case also brings important questions to the fore: How does new technology mesh with previously rooted First Amendment principles, and can those principles apply to a changing technological landscape? While First Amendment protections remain paramount in contemporary society, new technologies force us to confront the breadth of First Amendment protections and to ask what cost we will pay to preserve our wholesale protection of speech. While there may be hesitation to limit potentially powerful avenues for speech, this very power also yields strong justifications for regulation.[26]

This Note will analyze how the cyberstalking statute applies to a particular form of new media, Twitter, within the framework of a First Amendment analysis. While the analysis within this Note is limited to the interplay between Twitter and the cyberstalking statute, the principles discussed, policies weighed, and doctrines explored also apply to the regulation of distressing speech on the Internet generally. Part II examines Twitter, focusing on how Twitter users interact and the effect this has on First Amendment principles. Part III looks closely at the crime of cyberstalking and the cyberstalking statute. It explores the definition of cyberstalking, the difficult nature of cyberstalking regulation, and the harms cyberstalking can cause. It then discusses the cyberstalking statute (including the 2006 amendment at issue in *Cassidy*), how courts have construed the statute, and what speech the statute criminalizes. Part IV applies First Amendment doctrine to the cyberstalking statute's regulation of Twitter. This part analyzes the following: how the First Amendment applies to Internet fora; vagueness and overbreadth challenges; the protection of speech covered by the statute; what level of scrutiny should apply to the statute; whether the statute serves to protect a "captive audience"; and how the statute holds up under each level of scrutiny. Further, after laying out these First Amendment principles, Part IV critiques the district court opinion issued in the *Cassidy* case. Part V proposes potential changes to the statute to ensure it does not run afoul of the First Amendment. Part VI concludes by refocusing on general First

and "Cyber-Stalking," 106 NW. U. L. REV. (forthcoming 2012) (manuscript at 7) ("The laws are aimed at restricting speech *to* a person, not speech *about* a person.").

26. *Cf.* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (recognizing that "each medium of expression presents special First Amendment problems," and limiting protection of broadcast media because of its "uniquely pervasive presence").

Amendment principles and the interests at issue in this case, and it emphasizes that protecting the captive audience may be the most appropriate role for cyberstalking laws to serve.

II. OVERVIEW OF TWITTER

"Twitter is one of the fastest-growing social-networking sites,"[27] with over one hundred million active users in 2011.[28] It functions as a "real-time information network," at the heart of which are "small bursts of information called Tweets."[29] Each Tweet's length is limited to 140 characters, but individual users can Tweet multiple times per day.[30] Users may choose to "follow" another user, which subscribes them to the followed user's Tweets.[31] Essentially, Twitter operates as a multiuser social and interactive message board with all of the messages taking the form of Tweets.[32] While the following sections examine Twitter in more depth for purposes of analytical completeness, a basic understanding of Twitter is sufficient for purposes of this Note.

A. LAYOUT OF THE TWITTER WEBSITE

The Twitter website consists of three main tabs: the "Home" tab, the "Connect" tab, and the "Discover" tab. The Home tab features a stream of Tweets by all of the people a user "follows."[33] The Connect tab (also

27. Gina Masullo Chen, *Tweet This: A Uses and Gratifications Perspective on How Active Twitter Use Gratifies a Need to Connect with Others*, 27 COMPUTERS IN HUM. BEHAV. 755, 755 (2011).

28. *See* Graeme McMillan, *Twitter Reveals User Number, How Many Actually Say Something*, TIME, Sept. 9, 2011, *available at* http://techland.time.com/2011/09/09/twitter-reveals-active-user-number-how-many-actually-say-something/ ("According to [Twitter's CEO], Twitter has 100 million active users currently, though not all of them are saying anything. . . . [A]lmost 40% log in merely to see what other people are saying.").

29. *About Twitter*, TWITTER.COM, https://twitter.com/about (last visited Nov. 6, 2012).

30. *Id.*

31. *FAQs About Following*, TWITTER.COM, https://support.twitter.com/articles/14019-what-is-following (last visited Nov. 6, 2012).

32. Two important aspects of Twitter and social media are important to note: First, Twitter's layout is constantly changing. *See* Lauren Dugan, *Everyone Now Has Access to the New Twitter.com*, ALLTWITTER (Feb. 17, 2012), http://www.mediabistro.com/alltwitter/everyone-now-has-access-to-the-new-twitter-com_b18752 (discussing Twitter's recent redesign). Second, new social media platforms are constantly being created. *See* Amy Kattan, *4 Reasons to Love the New Twitter*, SOCIALNOMICS (JAN. 16, 2012), http://www.socialnomics.net/2012/01/16/4-reasons-to-love-the-new-twitter/ (discussing the importance of adaptation by existing social media platforms in light of "new social media platforms emerging at such a rapid rate"). However, the principles within this Note apply regardless of changes in design or layout and can be applied broadly to different forms of social media.

33. *Welcome to Your New Home*, TWITTER.COM, http://support.twitter.com/articles/20169520 (last visited Nov. 6, 2012).

known as the "Mentions" tab) features "Interactions" users have had on Twitter (Interactions include when someone marks another person's Tweet as a favorite, mentions their username, follows them, or "retweets" their content).[34] The Connect tab also collects Tweets that mention a user by username so the user can keep track of them.[35] The Discover tab displays top news stories and trending topics.[36] The Discover tab also shows actions that have been recently taken by people a user follows,[37] and allows users to find "who to follow."[38]

Twitter also has a search bar that allows users to search for other users based on their username or for Tweets based on their content.[39] The search feature "gives [users] a real-time view onto the chatter of just about any topic imaginable."[40] The search functionality of Twitter is predicted to become more important, and more useful, over time.[41]

Last, Twitter has a "direct message" feature, allowing individual users to send direct messages to each other rather than Tweet.[42] A user can only receive direct messages from other users they have chosen to follow; thus, a user needs to take an affirmative step before they can be "direct messaged."

In sum, there are four principal ways that users interact with and find material relevant to their interests: viewing Tweets by followed users; viewing Tweets that mention them by username; viewing top news stories and trending topics; and searching for users or topics.

34. *Track Your Interactions*, TWITTER.COM, http://support.twitter.com/articles/20169523 (last visited Oct. 6, 2012).

35. *Monitor Your Mentions*, TWITTER.COM, http://support.twitter.com/articles/20169524 (last visited Nov. 6, 2012).

36. *Discover What's Happening*, TWITTER.COM, http://support.twitter.com/articles/20169525 (last visited Nov. 6, 2012).

37. *Keep Tabs on What Others Are Doing*, TWITTER.COM, http://support.twitter.com/articles/20169526 (last visited Nov. 6, 2012).

38. *Follow Interesting Accounts*, TWITTER.COM, http://support.twitter.com/articles/20169527 (last visited Nov. 6, 2012).

39. *Search to Discover Even More*, TWITTER.COM, http://support.twitter.com/articles/20169528 (last visited Nov. 6, 2012).

40. Steven Johnson, *How Twitter Will Change the Way We Live*, TIME, June 5, 2009, *available at* http://www.time.com/time/magazine/article/0,9171,1902818-2,00.html.

41. *See id.* ("As the archive of links shared by Twitter users grows, the value of searching for information via your extended social network will start to rival Google's approach to the search.").

42. *Send and Receive Direct Messages*, TWITTER.COM, http://support.twitter.com/articles/20169555 (last visited Nov. 6, 2012).

B. TYPES OF TWEETS

Tweets can have various aspects that affect where they will be shown on the Twitter website. Normal Tweets, which have no special characteristics, appear in the Tweets timeline view of anyone following the sender.[43] Mentions contain another Twitter username (in the form @username) and will show up in the recipient's Mentions and Interactions sections.[44] Both of these types of Tweets will appear in search results, and both can be pulled up based on either the content of the Tweet or the username of the individual who Tweeted.

C. PRIVACY ON TWITTER

Twitter protects user privacy by allowing users to block other users. Blocking another user prevents the blocked user from following the blocker, adding the blocker to lists, or having the blocked user's Tweets show up in the blocker's Mentions section.[45] However, significantly, blocking does not prevent the blocked user (or their Tweets) from showing up in search results. Further, the blocked user's Twitter remains visible to the blocker.

D. SOCIAL ASPECTS OF TWITTER

The social aspects of Twitter influence both the speech interests of Twitter users and the level of First Amendment protection the Twitter forum should receive. Twitter is simultaneously like a telephone conversation (a one-to-one interaction) and a bulletin board (a one-to-many interaction). Further, Twitter is also a many-to-many interaction.[46]

Twitter "requires a certain loss of volition over when messages are seen" and "differs in important ways from consciously logging on to a website in order to check and read updates."[47] These aspects of Twitter

43. *Types of Tweets and Where They Appear*, TWITTER.COM, https://support.twitter.com/groups/31-twitter-basics/topics/109-Tweets-messages/articles/119138-types-of-Tweets-and-where-they-appear (last visited Nov. 6, 2012).

44. *Id.* Indeed, cyberstalking cases involving extensive use of "Mentions" would seemingly be easier to adjudicate given that they show a clearer intent to communicate specifically to the victim.

45. *How to Block Users on Twitter*, TWITTER.COM, https://support.twitter.com/entries/117063 (last visited Nov. 6, 2012).

46. Kate Crawford, *Following You: Disciplines of Listening in Social Media*, 23 CONTINUUM: J. MEDIA & CULTURAL STUD. 525, 528 (2009). Twitter is also often analogized to radio. *See id.* ("The comparison [of Twitter to radio] may have been unexpected, but it is provocative. . . . [T]he radio analogy persists.").

47. *Id.* at 529.

arise from the "emergence of . . . broadband Internet" and the use of programs that provide pop-up messages whenever Tweets are received.[48] In this way, Twitter may be likened to broadcast media.[49]

Notably, unlike many other forms of media, interaction with other users lies at the core of Twitter.[50] Indeed, Twitter "is a medium that people actively seek out to gratify a need to connect with others."[51] Because "Twitter's strength comes in its ability to connect [users] with other people," the search functionality of Twitter takes on an important and nearly essential role.[52] There are numerous effective methods to find other Twitter users, including by their user names, their Tweets' content, or their email addresses.[53]

With this backdrop and these interests in mind, how Twitter interfaces with the cyberstalking statute and the First Amendment can be further explored.

III. OVERVIEW OF CYBERSTALKING AND § 2261A

A. THE PROBLEM OF CYBERSTALKING

Cyberstalking is a new crime born from advances in technology. Though it does not have a settled definition, it generally "involves the use of the Internet, e-mail, or other means of electronic communication to stalk or harass another individual."[54] As early as 1999, the Department of Justice recognized cyberstalking as a new and growing problem: an early report on cyberstalking estimated tens of thousands of cyberstalking incidents annually.[55] Indeed, millions of individuals may be victimized by some form

48. *Id.*

49. *Id.*

50. *See* Dawn R. Gilpin, *Working the Twittersphere: Microblogging as Professional Identity Construction*, *in* A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES, *supra* note 24, at 232, 234 ("Interaction . . . plays an especially strong role . . . in a conversational medium such as Twitter . . . .").

51. Chen, *supra* note 27, at 760.

52. Lisa Barone, *8 Ways to Find Relevant Followers on Twitter*, SMALL BUS. TRENDS (June 25, 2009), http://smallbiztrends.com/2009/06/find-twitter-followers.html (describing various techniques for finding people relevant to or known to the user, including Twitter's own "Find People" option).

53. *See id.* ("There are a great number of tools, directories and searches already available to help [users find people or information on Twitter].").

54. Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 126 (2007).

55. *See* ATT'Y GEN TO THE VICE PRESIDENT, 1999 REPORT ON CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY (1999), *available at* http://cs.txstate.edu/~hd01/Master-Resources/CS2315-Resources/Third%20Edition/Readings/Cyberstalking%20A%20New

of stalking in a given year,[56] and one in four stalking victims have been stalked through some form of technology.[57]

The general goal of a cyberstalker is similar to that of a conventional stalker: a desire to control the victim through repeated harassing or threatening behavior.[58] Thus, the harms caused by cyberstalking are correspondingly similar: post-traumatic stress disorder,[59] depression, and serious emotional distress.[60] Cyberstalking can also cause "changes in sleeping and eating patterns, nightmares, hyper-vigilance, anxiety, helplessness, fear for safety, and shock and disbelief."[61] These harms are amplified because "[c]yber-attackers can utilize the Internet to harass their victims on a scale never before possible," and their conduct can have both "immediate effect" and "global dissemination."[62] The harm of cyberstalking is also amplified because "[o]nline communications . . . have a permanent quality that real world conduct lacks."[63]

Cyberstalking is difficult to regulate because "[s]talking behaviors can include seemingly innocuous acts."[64] The innocuous nature of these acts may make each individual act appear minor, yet taken together, they create

%20Challenge%20for%20Law%20Enforcement%20and%20Industry.htm [hereinafter 1999 REPORT ON CYBERSTALKING] ("In the United States, there are currently more than 80 million adults and 10 million children with access to the Internet. Assuming the proportion of cyberstalking victims is even a fraction of the proportion of persons who have been the victims of offline stalking within the preceding 12 months, there may be potentially tens or even hundreds of thousands of victims of recent cyberstalking incidents in the United States."). Given increased Internet access and usage, this number is likely much higher today.

56. *See* KATRINA BAUM, SHANNAN CATALANO & MICHAEL RAND, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY: STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009), http://www.ovw.usdoj.gov/docs/stalking-victimization.pdf ("During a 12-month period, an estimated 3.4 million persons age 18 or older were victims of stalking.").

57. *Id.* at 5.

58. U.S. DEP'T OF JUSTICE, STALKING AND DOMESTIC VIOLENCE, REPORT TO CONGRESS 2 (2001), https://www.ncjrs.gov/pdffiles1/ojp/186157.pdf.

59. While post-traumatic stress disorder ("PTSD") is generally associated with a discrete event (for example, an assault or a rape), it can affect "anyone who has gone through a life-threatening event." *Posttraumatic Stress Disorder (PTSD)*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.myhealth.va.gov/mhv-portal-web/anonymous.portal?_nfpb=true&_pageLabel=commonConditions&contentPage=va_health_library/PTSD_intro.htm (last updated May 2009). Thus, given that stalking victims often fear for their lives, PTSD is a logical potential symptom of cyberstalking.

60. *See* Goodno, *supra* note 54, at 128 (describing similarities and differences between offline stalking and cyberstalking).

61. Nicolle Parsons-Pollard & Laura J. Moriarty, *Cyberstalking—What's the Big Deal?*, *in* CONTROVERSIES IN VICTIMOLOGY 103, 108 (Laura J. Moriarty ed., 2d ed. 2008).

62. Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1112 (2011).

63. *Id.*

64. Tracy Russo, *Understanding the Serious Crime of Stalking*, THE JUSTICE BLOG (Jan. 4, 2012), http://blogs.justice.gov/main/archives/1797.

a pattern of behavior that can have deleterious effects.[65] Thus, in stalking cases, "[a]lmost anything can be harassing, depending on the context of the conduct and the surrounding circumstances."[66] The variety of harassment methods that stalkers can use creates a need for statutes with a broad reach.[67]

Further, cyberstalking victims cannot simply avoid their stalkers or relinquish the use of the Internet. "[I]n today's interconnected world [avoidance] is not a viable option, as people who are forced offline forgo important personal and professional opportunities."[68] With that in mind, simply forgoing Twitter may represent a major loss and may not be a practical course of action.

Moreover, "online information is easily searchable through Google and other popular search engines."[69] With "self-Googling" serving an important role in managing one's online identity in today's digital world, cyberstalking victims may be exposed to harassing material without actively seeking it out.[70] Through this sort of search engine use, rather than "com[ing] to the nuisance," the nuisance comes to the victim (albeit in an indirect way)—an individual searching through the Internet for a topic of interest may stumble on harassing comments without searching or looking for them.[71]

B. THE CYBERSTALKING STATUTE: 18 U.S.C. § 2261A

Given the danger that stalking can pose, in 1996 Congress enacted 18 U.S.C. § 2261A,[72] commonly referred to as the Interstate Stalking Statute,

65. *See* Kerry Wells, *Prosecuting Those Who Stalk: A Prosecutor's Legal Perspective and Viewpoint*, *in* STALKING CRIMES AND VICTIM PROTECTION: PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT 427, 431 (Joseph A. Davis ed., 2001) (noting that "what may be otherwise innocuous behavior can . . . become terrifying" in the stalking context).

66. *Id.*

67. This point is discussed *infra* Parts IV.B.1, IV.H.1.

68. Lipton, *supra* note 62, at 1113. This fact will be addressed further *infra* Part IV.G in discussing Twitter as potentially creating a "captive audience."

69. *Id.* at 1112.

70. *See* News Release, Univ. at Buffalo, "Self-Googling" Isn't Just Vanity; It's a Shrewd Form of Personal "Brand Management," Says UB Internet-Culture Expert (Mar. 29, 2004), http://www.buffalo.edu/news/fast-execute.cgi/article-page.html?article=66380009 (proposing that "self-googling" is a "shrewd form of 'personal brand management' in the digital age").

71. Julie Hilden, *The Case of the Alleged Twitter Stalker: A Federal Judge Dismisses an Indictment on First Amendment Grounds*, JUSTIA.COM (Dec. 26, 2011), http://verdict.justia.com/2011/12/26/the-case-of-the-alleged-twitter-stalker.

72. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1069, 110 Stat. 2422, 2655 (1996) (codified as amended at 18 U.S.C. § 2261A (2006)).

as part of the Violence Against Women Act.[73] In its original form, the statute criminalized (1) travelling across state lines, (2) with the intent to injure or harass another person, and (3) as a result, placing that person in reasonable fear of death or serious bodily injury.[74]

Two amendments since the original enactment have made the statute applicable to cyberstalking. The first amendment, passed in 2000, changed the jurisdictional basis for the statute from "travel[] across a State line"[75] to "travel[] in interstate or foreign commerce."[76] Without this amendment, the statute could not have possibly encompassed cyberstalking because "a cyberstalker can harass his victim without even walking out of his front door, let alone travel[ing] across state lines."[77] The second amendment occurred in January of 2006. It added language to both the second and third elements of the crime, broadening the range of conduct criminalized by the statute. The statute now criminalizes, in relevant part, (1) "us[ing] the mail, any interactive computer service, or any facility of interstate or foreign commerce" (2) "to engage in a course of conduct that causes substantial emotional distress," "reasonable fear of . . . death," or "serious bodily injury" with (3) the intent "to kill, injure, harass, . . . or cause substantial emotional distress."[78] The addition of "interactive computer service" allows the statute to reach cases in which "cyberstalkers use the computer to send e-mail messages, anonymous or not, or post messages on blogs or Websites."[79]

Two cases that have examined First Amendment concerns with regards to § 2261A(2) show how courts have construed the statute. However, neither of these cases addressed the 2006 amendment language at issue in *Cassidy*.

In *United States v. Bowker*, the defendant sent disturbing emails and letters and made phone calls to his victim over the course of about a year.[80] Further, the defendant followed his victim to West Virginia and engaged in vaguely threatening behavior. Addressing the defendant's First Amendment challenge to the statute, the court found that the 2000 version

73. Beth Bates Holliday, Annotation, *Validity, Construction, and Application of Provisions of Federal Interstate Stalking Statute, 18 U.S.C.A. § 2261A*, 50 A.L.R. FED. 2D 189, 189 (2010).

74. 18 U.S.C. § 2261A (1996) (current version at 18 U.S.C § 2261A (2006)).

75. *Id.*

76. 18 U.S.C. § 2261A(1) (2000) (current version at 18 U.S.C. § 2261A (2006)).

77. Goodno, *supra* note 54, at 151.

78. 18 U.S.C. § 2261A(2) (2006).

79. Goodno, *supra* note 54, at 152.

80. United States v. Bowker, 372 F.3d 365, 371–72 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005).

of the statute was constitutional. First, the court held there was not an overbreadth issue, stating, "It is difficult to imagine what constitutionally-protected political or religious speech would fall under these statutory prohibitions."[81] Second, in addressing a vagueness challenge, the court held that words such as harass and intimidate "can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves because they possess a common and generally accepted meaning."[82]

In *United States v. Shrader*, the defendant called his ex-girlfriend daily for about two months and then sent her a thirty-two-page letter saying she had two weeks to decide what to do before he initiated his "next step."[83] The defendant was convicted under 18 U.S.C. § 2261A(2) despite his claim that the statute was targeted at speech, was overbroad, and was void for vagueness.[84] First, the court pointed out that while the defendant argued that § 2261A(2) punishes only speech, it actually punishes conduct as well. By requiring the use of interstate or foreign commerce facilities to engage in a course of conduct, the statute could not be violated by speech alone. However, the court's logic here seems questionable given that, in the *Cassidy* case, the entire course of conduct was based on speech. In addressing the defendant's vagueness challenge, the *Shrader* court looked to the intent requirement of the statute and stated, "This requirement vitiates the vagueness concerns" because "[c]itizens need not guess which intentions are forbidden."[85] The court further found that the statute "does not create a substantial sweep of constitutionally protected conduct," and thus, upheld the defendant's conviction.[86]

IV. FIRST AMENDMENT ANALYSIS OF § 2261A(2) AS APPLIED TO TWITTER

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech,"[87] which has been interpreted to

81. *Id.* at 379. Further, in *Bowker*, the court looked to a Michigan law which excepted constitutionally protected speech from its prohibition. *Id.* at 380–81. A similar exemption here would help overcome an overbreadth challenge. *See infra* Part V.

82. *Id.* at 381 (quoting Staley v. Jones, 239 F.3d 769, 791–92 (6th Cir. 2001)).

83. United States v. Shrader, No. 1:09-CR-00270, 2010 U.S. Dist. LEXIS 10820, at *5 (S.D. W. Va. Feb. 8, 2010).

84. United States v. Shrader, No. 1:09-CR-00270, 2010 U.S. Dist. LEXIS 53563, at *4–5 (S.D. W. Va. May 26, 2010).

85. *Id.* at *3.

86. *Id.* at *4.

87. U.S. CONST. amend. I.

grant strong but not absolute protection to citizens' speech rights.[88] There are four principal justifications for protecting speech: to further self-governance; to aid in the discovery of truth and maintain the marketplace of ideas; to promote autonomy and protect self-expression; and to encourage tolerance.[89] Though none of these justifications is alone dispositive, the backdrop for why speech is protected "is crucial in appraising specific First Amendment issues."[90]

This part considers various aspects of First Amendment doctrine and how they affect the constitutionality of the cyberstalking statute. The part first examines the regulation of Internet fora for speech and what protection these fora have been afforded. It then addresses the facial challenges to the cyberstalking statute: vagueness and overbreadth. After that, it discusses protection for certain types of relevant speech[91]: speech on matters of public concern, distressing speech, and threats. Proceeding to the central First Amendment question, this part then analyzes whether the statute is content based or content neutral—an often-dispositive question in terms of validity. Next, it analyzes whether the captive audience doctrine applies to the cyberstalking statute. Finally, it assesses how the statute would stand up to either strict or intermediate scrutiny, and it concludes with a critique of the district court opinion in *Cassidy*.[92]

A. THE FIRST AMENDMENT APPLIED TO INTERNET FORA

In examining how the First Amendment applies to Internet fora, two recent cases, *Reno v. ACLU*[93] and *Ashcroft v. ACLU*,[94] are particularly relevant as they both involved First Amendment challenges to laws regulating speech on the Internet. Both cases involved an attempt by Congress to protect children on the Internet by criminalizing certain online speech. In *Reno v. ACLU*, the Court found that two provisions of the

88. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 925 (3d ed. 2006).

89. *Id.* at 926.

90. *Id.* at 925.

91. The distinction between speech and conduct, and the standards applied to combined speech and conduct, are not discussed. Though this distinction may be relevant in some stalking cases, cases of pure cyberstalking over a website such as Twitter involve speech alone, without any meaningful conduct element. *Cf.* Cohen v. California, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech' . . . .").

92. Throughout, the Note discusses the interaction of Twitter and the cyberstalking statute in general terms rather than with constant reference to the *Cassidy* case. *Cassidy* is, however, used as an example at various points and is explicitly discussed *infra* Part IV.I.

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

94. Ashcroft v. ACLU, 542 U.S. 656 (2004).

Communications Decency Act ("CDA")—the "indecent transmission" and "patently offensive display" provisions—abridged freedom of speech as protected by the First Amendment. The "indecent transmission" provision prohibited the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age."[95] The "patently offensive display" provision prohibited the knowing sending or displaying to a person under eighteen any message depicting "sexual or excretory activities or organs" in a "patently offensive" way.[96] The statute contained affirmative defenses exempting those who took good faith, effective actions to restrict access by minors or restricted access via designated forms of age proof.[97]

The Court in *Reno* acknowledged that "[e]ach medium of expression . . . may present its own problems"[98] and that "some of our cases have recognized special justifications for regulation of the broadcast media."[99] It went on to say, however, that the Internet is not subject to the same justifications for regulation. Notably, the Court stressed that "the Internet is not as 'invasive' as radio or television"[100] and that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden."[101] Thus, in the Court's estimation, there was no basis for holding speech on the Internet to a different standard from all other speech. With this backdrop, the CDA was struck down as too vague and overly broad.

In *Ashcroft v. ACLU*, Congress's second attempt at protecting children on the Internet, the Child Online Protection Act ("COPA"), was challenged as running afoul of the First Amendment.[102] COPA imposed criminal penalties for the knowing posting, for commercial purposes, of content that was "harmful to minors."[103] The Supreme Court affirmed a preliminary injunction against the law because it likely violated the First Amendment. The Court found it likely that the statute was not narrowly tailored enough

95. *Reno*, 521 U.S. at 859.

96. *Id.* at 860.

97. *Id.* at 844.

98. *Id.* at 868 (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)).

99. *Id.* (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); FCC v. Pacifica Found., 438 U.S. 726 (1978)).

100. *Id.* at 869

101. *Id.* (quoting Reno v. ACLU, 929 F. Supp. 824, 844 (E.D. Pa. June 11, 1996)). However, the Court's conclusion as to the pervasiveness of the Internet has been questioned. *See* Debra M. Keiser, Note, *Regulating the Internet: A Critique of* Reno v. ACLU, 62 ALB. L. REV. 769, 785 (1998) ("Pervasiveness is not a characteristic the Internet lacks, but one that it shares with the broadcasting medium.").

102. Ashcroft v. ACLU, 542 U.S. 656, 659–60 (2004).

103. *Id.* at 661.

to pass the First Amendment scrutiny applied to content-based restrictions.[104]

These cases highlight two important points regarding congressional attempts to regulate the Internet: First, the Court applies the same level of scrutiny to the Internet as it would to other fora for speech. Second, even when plainly compelling interests, such as protecting children,[105] are at issue, the Court still insists on applying a rigorous and thorough First Amendment scrutiny.

However, Justice Alito recently urged the Court to regulate new technologies with caution:

> In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.[106]

Though Justice Alito's approach differs from the majority of the Court, it shows a more deferential approach to regulation of new technology that could apply to social media.

With these principles in mind, the cyberstalking statute's likely First Amendment implications can be analyzed.

B. FACIAL CHALLENGES: OVERBREADTH AND VAGUENESS

The 2006 version of the cyberstalking statute will be (and has been) challenged on both overbreadth and vagueness grounds, as seen in *Cassidy*.[107] These doctrines represent two distinct routes through which

104. *Id.* at 673.

105. *See* New York v. Ferber, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

106. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring).

107. Though the statute was challenged on these grounds in *Cassidy*, the district court did not address them as it found the statute unconstitutional as applied. *See* United States v. Cassidy, 814 F. Supp. 2d 574, 588 (D. Md. 2011) ("In this case, the Court concludes that the statute is unconstitutional as applied, and thus it is unnecessary to address the parties' arguments as to whether the emotional distress via an interactive computer service portion of [the cyberstalking statute] is facially invalid.").

imprecise laws may be attacked.[108] Though the court in *Cassidy* did not need to reach either of these issues because of its finding of as-applied unconstitutionality, both represent potentially serious challenges to the statute. Thus, each of these challenges, and how the statute will stand up to them, is discussed in turn.[109]

1. Overbreadth

The overbreadth doctrine acknowledges that "the First Amendment needs breathing space" and therefore, statutes restricting First Amendment rights must be "narrowly drawn."[110] It allows for the facial invalidation of a statute that has a substantial number of impermissible applications "judged in relation to the statute's plainly legitimate sweep."[111] The overbreadth doctrine, however, is "strong medicine" and is applied "sparingly and only as a last resort."[112] Further, statutes that regulate activity in "an even-handed and neutral manner" are subject to "less exacting overbreadth scrutiny."[113] For example, in *Broadrick v. Oklahoma*, a breach-of-the-peace statute was directed at political expression but was not directed at particular groups and viewpoints; thus, it sought to regulate political activity in an even-handed and neutral manner, and was not overbroad.[114] Lastly, in dealing with an overbreadth challenge to a federal statute, a federal court should "construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction."[115]

The Court addressed overbreadth in 2010 in *United States v. Stevens*.[116] In *Stevens*, the Court considered the constitutionality of 18 U.S.C. § 48, which criminalized the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute encompassed any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" if that conduct violated

108. City of Chicago v. Morales, 527 U.S. 41, 52 (1999).

109. At the outset, it is worth noting that similar state stalking statutes targeting traditional, nontechnological stalking have been challenged on vagueness and overbreadth grounds and passed constitutional muster. *See* United States v. Smith, 685 A.2d 380, 383 n.7 (D.C. 1996) (listing state court cases upholding stalking statutes against vagueness and overbreadth challenges).

110. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

111. *Id.* at 615.

112. *Id.* at 613.

113. *Id.* at 616.

114. *Id.*

115. New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)).

116. United States v. Stevens, 130 S. Ct. 1577 (2010).

federal or state law where the depiction was created, sold, or possessed.[117] The statute included a clause exempting depictions with serious religious, political, scientific, educational, journalistic, historical, or artistic value. The Court, over a lone dissent by Justice Alito, held that the statute was overbroad and therefore an unconstitutional infringement on the freedom of speech. The Court concluded that presumptively impermissible applications of the statute far outnumbered permissible ones because the statute could apply to hunting magazines or videos, which are far more numerous than "crush videos."[118] The Court further concluded that the statute's exceptions clause would not narrow the breadth of the statute enough to save it.[119] Lastly, the Court declined to construe the statute to avoid constitutional doubts, as it would "not rewrite a . . . law to conform it to constitutional requirements."[120]

The *Stevens* case shows how strictly the Court is willing to apply the overbreadth standard. Indeed, in dissent, Justice Alito stressed that he "s[aw] no reason to depart here from the generally preferred procedure . . . of overbreadth only as a last resort."[121] Justice Alito also stressed the Court's "duty to avoid constitutional objections," which "makes it especially appropriate to . . . ascertain the intent of its drafters."[122] However, Justice Alito was alone in his dissent—the majority of the Court applied the strong medicine of overbreadth in strict fashion. The majority seemingly emphasized that it would not save Congress from its own sloppy drafting and rather, would require Congress to draft statutes with an eye toward First Amendment concerns.[123]

The overbreadth doctrine could present a substantial challenge to the cyberstalking statute. While the court in *Bowker* found it "difficult to imagine what constitutionally-protected political or religious speech" could be punished, that case dealt with the 2000 version of the statute.[124] The

117. 18 U.S.C. § 48(c)(1) (2006), *invalidated by Stevens*, 130 S. Ct. at 1577 (current version at 18 U.S.C. § 48(b)(1) (2012)).

118. *Stevens*, 130 S. Ct. at 1592.

119. *Id.* at 1590–91.

120. *Id.* at 1592 (quoting Reno v. ACLU, 521 U.S. 844, 884–85 (1997)).

121. *Id.* at 1594 (Alito, J., dissenting).

122. *Id.* at 1595 (Alito, J., dissenting) (quoting United States v. Williams, 553 U.S. 285, 307 (2008) (Stevens, J., concurring)).

123. *Id.* at 1592.

124. United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005). However, even though the court was addressing an earlier version of the statute, it described a "prohibition of intentionally using the internet in a course of conduct that places a person in reasonable fear of death or serious bodily injury" as being constitutional. *Id.* at 378–79. Thus, though the court in *Bowker* addressed an earlier version of the statute, its holding remains relevant to the 2006

2006 amendment, which criminalizes the use of "any interactive computer service" to engage in a course of conduct causing "substantial emotional distress," may now encapsulate a vast array of protected speech not implicated by the older language.[125] Much political commentary could be seen as seeking to cause politicians "substantial emotional distress" in order to cause them to change their politics or views.[126] In this way, political blogs, message board postings, and Tweets all could be within the statute's sweep. Similarly, much religious speech may intend to harass religious leaders into changing their behavior by causing them substantial emotional distress. Indeed, some of the Tweets by Mr. Cassidy feasibly could be read this way.[127] As political and religious speech are at the core of the First Amendment,[128] the cyberstalking statute could restrict some of the most important speech that the First Amendment seeks to protect.[129]

However, there are plausible arguments as to why the statute is not overbroad.[130] First, the statute may be "even-handed and neutral" in such a way as to justify less exacting overbreadth scrutiny.[131] The statute does not target the speech of particular groups or viewpoints—even overtly kind messages (such as "Hey beautiful" or "I love you") could fall within the statute's reach if they caused substantial emotional distress and were spoken (or typed) with the requisite intent. Further, overbreadth concerns dissipate in light of what speech would actually be covered by the statute. *Bowker* already declared, seemingly correctly, that the 2000 amendment is

version.

125. 18 U.S.C. § 2261A(2)(B) (2006).

126. *See* Volokh, *supra* note 25 (manuscript at 22) ("[M]any 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. . . . The purpose of making the subject feel bad is thus not an uncommon purpose, nor one held only by a few evil people."); United States v. Popa, 187 F.3d 672, 676–77 (D.C. Cir. 1999) ("[A speaker may intend] to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed.") (quoting another source).

127. *See supra* text accompanying note 10.

128. As will be discussed further *infra* Part IV.C, First Amendment protection for matters of public concern (as opposed to those of "purely private significance") is extremely rigorous. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

129. However, viewing all of Mr. Cassidy's Tweets as political or religious speech is a substantial stretch. *See supra* text accompanying notes 13–16. The application of overbreadth to Mr. Cassidy's Tweets in particular, as opposed to the statute in general, is discussed *infra* Part IV.I.

130. Another district court concluded that, in addressing an overbreadth challenge to the cyberstalking statute, "the potential overbreadth of the [cyberstalking statute] is in fact modest, not substantial," particularly given the specific intent requirement and the causation requirement. United States v. Sayer, No. 2:11-CR-113-DBH, 2012 U.S. Dist. LEXIS 67684, at *22 (D. Me. May 15, 2012).

131. *See supra* text accompanying note 113.

not overbroad.[132] Thus, the major area of concern is the portion added in 2006 (that is, speech via any interactive computer service, with intent to cause substantial emotional distress, which then causes substantial emotional distress). The intent of much political speech is not to cause a politician substantial emotional distress.[133] Rather, it is to communicate views, to engage in political discourse, or to affect a change in policies or behaviors.[134]

Moreover, the Court could—and indeed should—construe the statute to avoid constitutional issues. Though the Court was unwilling to apply such a limiting construction in *Stevens*,[135] this statute is more susceptible to a limiting instruction. Looking to the drafters' intent, here are two plausible limiting constructions that could mitigate First Amendment concerns: First, the statute could be interpreted to apply only to speech with the sole intent of causing substantial emotional distress. This stronger intent requirement, if applied strictly, would prevent the statute from capturing much of the political speech that it may otherwise chill.[136] When speakers criticize the government or the qualifications of a religious leader, they may have an intent to harass or cause substantial emotional distress. However, they will also have an additional intent: to voice political or religious views.[137] This construction comports with the statute as a whole and its overall purpose.

Second, the statute could be interpreted to require an objective standard for substantial emotional distress.[138] Thus, rather than relying on the particular victim's subjective reaction to the speech, the statute would only apply when a reasonable person would experience substantial

132. United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005).

133. Indeed, "[s]eldom will speech about athletes or politicians be accompanied by the direct intent of substantial emotional distress; substantial emotional distress may be a *byproduct* of such speech, but generally not the *purpose*." *Sayer*, 2012 U.S. Dist. LEXIS 67684, at *22–23.

134. As discussed *supra* Part I and *infra* Part IV.I, many of the Tweets described in *Cassidy* did not have this intent.

135. *See* United States v. Stevens, 130 S. Ct. 1577 1590–92 (2010).

136. Examples of this type of Tweet from *Cassidy* include the following: "I have just one thing I want to say to [Ms. Zeoli], and its form [sic] the heart: do the world a favor and go kill yourself. P.S. Have a nice day."; and "want it to all be over soon sweetie?" United States v. Cassidy, 814 F. Supp. 2d 574 app. A at 588, 590 (D. Md. 2011).

137. *Cf.* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53–54 (1988) (discussing political cartoons not only as potentially causing emotional distress but also contributing to the debate on various public issues).

138. *But see* United States v. Shepard, No. CR 10-1032-TUC-CKJ, 2011 U.S. Dist. LEXIS 83246, at *10 (D. Ariz. July 28, 2011) (noting that the fear of death or serious bodily injury prong of the cyberstalking statute contains the modifier "reasonable" while the substantial emotional distress prong does not).

emotional distress. This would narrow the statute by preventing it from applying to individuals with particular sensitivity and thus mitigate overbreadth concerns.[139] Both the legislative history of the cyberstalking statute and the general meaning of the terms it includes support each of these limiting constructions.[140]

2. Vagueness

A statute may be impermissibly vague if it fails to establish standards for the public that are sufficient to "guard against the arbitrary deprivation of liberty interests."[141] More specifically, the void-for-vagueness doctrine requires that ordinary citizens be able to understand what conduct is prohibited, and it seeks to prevent a "standardless sweep [allowing] policemen, prosecutors, and juries to pursue their personal predilections."[142]

Here, the void-for-vagueness doctrine does not require extended treatment.[143] The intent requirement within the statute seemingly puts individuals on notice.[144] As the Supreme Court has recognized, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*,"[145] and "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."[146] Further, in *Bowker*, addressing the 2000 version of the statute, the court found that the statute was not void for vagueness.[147] As the court in *Bowker*

139. M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769, 788 (1994) (discussing the role of an objective standard in avoiding vagueness or overbreadth problems with stalking statutes).

140. Though the legislative history as to this particular amendment is sparse, it seems clear that the intended effect of the statute was not to target speech but rather to allow better protection of cyberstalking victims. *See infra* text accompanying notes 197–199.

141. City of Chicago v. Morales, 527 U.S. 41, 52 (1999).

142. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)) (internal quotation marks omitted).

143. *See* United States v. Sayer, No. 2:11-CR-113-DBH, 2012 U.S. Dist. LEXIS 67684, at *37 (D. Me. May 15, 2012) (denying a vagueness challenge to the cyberstalking statute because "with its specific intent requirement, the actual causation requirement, and the use of terms with a long history in the law, [the] statute contains adequate standards to avoid the arbitrary and discriminatory enforcement risk"). *Accord* United States v. Shepard, No. CR-10-1032-TUC-CKJ, 2012 U.S. Dist. LEXIS 4623, at *25, *40 (D. Ariz. Jan. 13, 2012) (denying a vagueness challenge to the cyberstalking statute).

144. *See Sayer*, 2012 U.S. Dist. LEXIS 67684, at *30 ("Necessarily a defendant knows his own intent.").

145. Colautti v. Franklin, 439 U.S. 379, 395 (1979).

146. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

147. United States v. Bowker, 372 F.3d 365, 381–83 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005).

noted, the terms utilized in the cyberstalking statute may be defined with reference to their dictionary meaning or the meaning they are given in other judicial decisions.[148] Moreover, substantial emotional distress possesses a common and generally accepted meaning and is therefore not vague.[149] Thus, as the court in *Shrader* found, the language of the cyberstalking statute "is sufficiently specific to put a person of reasonable intelligence on notice."[150]

There is also little danger of a standardless sweep by law enforcement. First, there must be intent by the cyberstalker and substantial emotional distress to the victim, both of which provide standards for enforcement. On an even more basic level, police cannot enforce this statute spontaneously; rather, a victim must first come forward. Thus, the fear of police pursuing their personal predilections is diminished.[151]

C. PROTECTION OF SPEECH ON MATTERS OF PUBLIC CONCERN

Because some speech covered by the statute may be of public concern, the effect this has on the protection of speech must be examined. The Court has held that when regulating emotionally distressing or outrageous speech, whether speech is of public or private concern has considerable weight in determining the appropriate level of First Amendment protection.[152] The First Amendment strongly protects speech on matters of public concern. This protection reflects a strong commitment to the marketplace of ideas and our principles of self-government.[153] On the other hand, matters of

148. *Id.*

149. *See Sayer*, U.S. Dist. LEXIS 67684, at *31–32 ("Like 'harass' and 'intimidate,' the word 'injure' has been used in criminal and noncriminal cases for years. The phrase 'substantial emotional distress,' added to the federal statute in 2006, appears to come from state stalking statutes."); *Bowker*, 372 F.3d at 381.

150. United States v. Shrader, No. 1:09-CR-00270, 2010 U.S. Dist. LEXIS 44656, at *17 (S.D. W. Va. Apr. 7, 2010).

151. Indeed, police cannot simply stop someone on the street and accuse them of cyberstalking. *Cf.* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (finding that a statute criminalizing the annoyance of police officers was vague because it provided no standard of conduct).

152. *Compare* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'") (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978), *with* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("'[N]ot all speech is of equal First Amendment importance,' however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.") (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

153. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

purely private significance will often receive less rigorous First Amendment protection.[154] Restricting speech on purely private matters does not "threat[en] . . . the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas."[155]

While "the boundaries of the public concern test are not well defined,"[156] the Court has provided "guiding principles" in making this determination.[157] Generally, deciding whether speech is of public or private concern forces the Court to examine the "content, form, and context" of the speech in light of the whole record.[158] Thus, in *Snyder v. Phelps*, the picketing of a funeral with signs reading "God Hates Fags," "Thank God for Dead Soldiers," and "Priests Rape Boys," among others, involved matters of public concern.[159] First, looking to content, the Court found that the signs touched on matters of public import—the political conduct of the United States, homosexuality in the military, and scandals involving the Catholic Church. Second, looking to context, the Court found that the mere proximity of the speech to the funeral setting did not convert the speech into a matter of private concern.[160] Lastly, the Court found that the speech was not a personal attack on the family attending the funeral, given that there was "no pre-existing relationship or conflict" suggesting the speech on public matters was intended to mask truly private speech.[161]

The strong protection of speech on topics of public concern arises in cases involving the cyberstalking statute—and does come up in *Cassidy*. In determining how to handle this sort of speech in the cyberstalking context, courts should look to the *Snyder* opinion. First, the content of speech punished by the cyberstalking statute often will not touch on matters of public concern. Second, the context will likely show intent to harass, even if the speech occurs through a superficially public forum. Lastly, the pre-existing relationship or conflict that will often fuel the speech in a cyberstalking case weakens the protection for even matters of ostensibly public concern: where personal conflicts motivate speech, the Court seems

154. *Snyder*, 131 S. Ct. at 1215.

155. *Dun & Bradstreet*, 472 U.S. at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (1977)).

156. City of San Diego v. Roe, 543 U.S. 77, 83 (2004) (per curiam).

157. *Snyder*, 131 S. Ct. at 1216.

158. *Dun & Bradstreet*, 472 U.S. at 761 (quoting Connick v. Myers, 461 U.S. 138, 147–48 (1983)).

159. *Snyder*, 131 S. Ct. at 1216–17.

160. *Id.* Justice Breyer, concurring, noted that the picketing "could not be seen or heard from the funeral ceremony itself" and that the plaintiff "saw no more than the tops of the picketers' signs as he drove to the funeral." *Id.* at 1221–22 (Breyer, J., concurring).

161. *Id.* at 1217.

to weigh its public concern status less heavily.[162]

Further, courts should be cautious in applying the public-concern label. The nature of the Internet has "pulled fame inside out,"[163] and thus, potentially blurred the line as to what is of public concern. Moreover, in deciding whether speech is of public concern, courts should keep in mind the policy behind its protection: to ensure a functioning marketplace of ideas. Most speech criminalized by the cyberstalking statute, however, does not meet this policy goal, as it will usually take the form of personal attacks.[164]

D. PROTECTION OF DISTRESSING SPEECH

It is clear that the First Amendment protects many types of speech, including speech that has "profound unsettling effects,"[165] "outrageous" speech,[166] and even "hurtful" speech.[167] Thus, much of the speech that will be covered by the cyberstalking statute will be entitled to some level of First Amendment protection. The Court recently reaffirmed its commitment to protecting offensive speech in *Snyder*. The case, brought by the father of a deceased military service member, involved claims for intentional infliction of emotional distress, invasion of privacy by intrusion on seclusion, and civil conspiracy.[168] The claims were based on the Westboro Baptist Church's picketing of the soldier's funeral with signs such as "Thank God for Dead Soldiers" and "You're Going to Hell."[169] The picketing caused the father to suffer physical illness along with extensive emotional anguish.

The Court first held that the speech at issue was in a public place on a matter of public concern, and thus, entitled to special protection under the

162. *Compare id*. (noting that the lack of a pre-existing relationship or conflict contributed to finding the speech to be of public concern), *with* Connick v. Myers, 461 U.S. 138, 153 (1983) (finding an employee's speech of private concern when it seemed to be motivated by a personal dispute).

163. David Weinberger, *How the Web Changed Fame*, CNN.COM (Feb. 17, 2012), http://www.cnn.com/2012/02/17/opinion/Weinberger-famous-web/index.html?hpt=hp_bn9 ("[O]n the Internet, everyone will be famous to 15 people. In fact, everything important about fame has changed.").

164. Because of this personal-attack nature, this speech does not contribute to the marketplace of ideas, mirroring part of the justification for fighting words' lack of protection under the First Amendment. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

165. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

166. Boos v. Barry, 485 U.S. 312, 322 (1988).

167. Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995).

168. Snyder v. Phelps, 131 S. Ct. 1207, 1214 (2011).

169. *Id.* at 1217.

First Amendment.[170] It went on to hold that "outrageousness," which was the standard for finding the picketers liable for intentional infliction of emotional distress, was a "highly malleable standard" with a level of inherent subjectivity.[171] This inherent subjectivity created a risk that speech would be criminalized because of the unpleasantness of its message. The Court found such a risk unacceptable. Thus, the speech was protected because "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[172]

While this holding seems to undermine the cyberstalking statute, Justice Breyer's concurrence quells this fear somewhat. Justice Breyer stressed the narrowness of the opinion and stated explicitly that it "does [not] say anything about Internet postings."[173] Further, Justice Breyer implied that *Snyder* does not leave the government "powerless to protect the individual against invasions of . . . personal privacy."[174] Rather, he stressed that the majority in *Snyder* simply "reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict."[175] Thus, though distressing speech is clearly protected by the First Amendment, the government may still protect individuals' privacy interests.

E. UNPROTECTED SPEECH: "TRUE THREATS"

Notably, some of the speech targeted by the cyberstalking statute may not be entitled to First Amendment protection. Though the First Amendment protects much offensive speech, it does not protect true threats.[176] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[177] It could be argued that much of the speech captured by the cyberstalking statute rises to the level of a true threat and thus is not protected by the First

170. *Id.* at 1218. See *supra* Part IV.C, for the distinction between matters of public and private concern.

171. *Id.* at 1219.

172. *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)) (internal quotation marks omitted).

173. *Id.* at 1221 (Breyer, J., concurring).

174. *Id.*

175. *Id.*

176. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

177. *Id.* at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)).

Amendment.[178] In *Virginia v. Black*, the Court held that cross burning constituted a true threat given that an individual burning a cross intends to provoke fear of bodily harm or death.[179] The Court noted that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[180] Similarly, the history of stalking shows that speech meant to cause substantial emotional distress often preludes physical violence to victims.[181] Indeed, a barrage of threatening remarks that intend to cause substantial emotional distress may be as emotionally unsettling to a stalking victim as the cross burning in *Black*.

However, the true threats category of unprotected speech does not absolve all concerns as to the constitutionality of the cyberstalking statute. First, it is unclear whether the Tweets in many cases, including Mr. Cassidy's case, will rise to the level of true threats.[182] Second, and more generally, cyberstalking can consist of seemingly innocuous acts,[183] and thus, the lack of First Amendment protection for true threats will not encapsulate enough speech to give the statute its intended effect. Third, the Court in *Stevens* showed strong reluctance to establish new categories of unprotected speech, and thus, an argument to expand the true-threats category to encapsulate more speech would likely fail.[184] Thus, while the true-threats category of unprotected speech removes concerns as to some speech covered by the cyberstalking statute, it is insufficient to protect it entirely from constitutional scrutiny.

178. *See* Eugene Volokh, *Federal Government Prosecuting Man for Writing Many Insulting Tweets and Blog Posts About Religious Leader*, THE VOLOKH CONSPIRACY (Aug. 27, 2011, 3:18 PM), http://www.volokh.com/2011/08/27/federal-government-prosecuting-man-for-writing-many-insulting-tweets-and-blog-posts-about-religious-leader/ ("Naturally, if the prosecution was brought under a statute that banned threats, and the prosecution was focused on those tweets and blog posts that might be seen as true threats, which are emotionally distressing because they are threatening, then the prosecution would be constitutionally permissible.").

179. *Black*, 538 U.S. at 360.

180. *Id.*

181. *See 1999 Report on Cyberstalking*, *supra* note 55 ("[O]nline harassment and threats may be a prelude to more serious behavior, including physical violence.").

182. *See* Volokh, *supra* note 178 ("[T]his prosecution appears to go far beyond . . . threatening statements.").

183. *See supra* Part III.A.

184. *See* United States v. Stevens, 130 S. Ct. 1577, 1586 (2010) ("Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."); Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications About Military Medals*, 42 U. TOL. L. REV. 1, 1 (2010) ("In [*Stevens*], the high court was extremely reluctant to carve out new categories of unprotected expression.").

F. THE CONTENT BASED / CONTENT NEUTRAL DISTINCTION

Determining whether a law is content based or content neutral is "enormously important, for it often effectively determines the outcome of First Amendment litigation."[185] While content-based restrictions are subject to strict scrutiny—and thus almost always struck down—content-neutral restrictions are subject to merely intermediate scrutiny.[186] The central inquiry in determining whether a law is content based or content neutral is whether the government has adopted the law with reference to the message conveyed by the speech.[187] This section will analyze whether the cyberstalking statute is content based or content neutral first by looking to the above noted central inquiry. It will then discuss two major cases in which the Court concluded that seemingly content-based statutes were content neutral—*Hill v. Colorado* and *Renton v. Playtime Theaters*—and weigh their relevance to this statute. Arguments for content neutrality based on the central inquiry; a *Hill*-based logic; and a secondary effects, *Renton*-based logic certainly vary in persuasiveness. Nonetheless, they each may demonstrate routes through which the Court could apply less exacting scrutiny to the cyberstalking statute.

1. Content Neutrality Based on the Central Inquiry

Laws that regulate "without reference to the ideas or views expressed" are generally content neutral, whereas laws that prohibit speech based on the ideas or views expressed are content based.[188] Under this inquiry, it is clear that the cyberstalking statute could be viewed as content based. Indeed, the government is singling out a type of speech—speech that causes substantial emotional distress—for proscription.[189] Looking to other cases that found that restrictions were content based is instructive. In *United States v. Playboy Entertainment Group, Inc.*, the Court found a provision requiring cable operators to either scramble sexually explicit

185. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:1 (2012).

186. These standards, and their application to the statute at issue, are discussed *infra* Part IV.H.

187. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994). For an explanation of the content based / content neutral distinction, see generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

188. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

189. The larger point here is that content addresses many levels of abstraction. The government need not target clear propositional or ideational content; rather, many elements within the anatomy of a communication can involve content in the constitutional sense. *Cf.* Volokh, *supra* note 25 (manuscript at 17) ("[R]estricting . . . a communication because of its annoying content is a form of content-based speech restriction.").

programming or limit it to certain hours to be content based.[190] The provision applied only to channels dedicated to sexual or indecent programming, making it "the essence of content-based regulation."[191] Similarly, in *Boos v. Barry*, the Court found a regulation making it unlawful to display any sign that tends to bring a foreign government into "public odium" within five hundred feet of a foreign embassy to be content based.[192] In each of these cases, the government had to look to the content of the speech to determine whether it was prohibited: in *Playboy*, it had to see the programming; in *Boos*, it had to see the signs. In each case, the prohibition had a clear basis in content: in *Playboy*, the provision related to sexually explicit programming; in *Boos*, the provision related to signs that tended to bring a foreign government into public odium.

Even with these cases in mind, the cyberstalking statute may be content neutral because there is no such clear basis within the cyberstalking statute. Rather than targeting the content of speech, the cyberstalking statute targets the consequences of speech. Indeed, from the face of the statute, an individual could be punished without any reference to the content of the speech. Consider the following scenario: a man beats a woman for years, causing her extraordinary pain and hardship. Eventually, she runs away from him. However, he begins Tweeting at her (though ostensibly to the public). He, in shocking clarity, indicates to an FBI agent that the intent of his Tweets is to "cause her substantial emotional distress." And he does in fact succeed: she sees these Tweets and suffers substantial emotional distress. Without ever looking at his Tweets, or their content, he has violated the statute. John Hart Ely articulates a similar idea in discussing *Cohen v. California*.[193] Ely notes that the regulation in *Cohen* was found to be content based because "the dangers on which the state relied were dangers that flowed entirely from the communicative content of Cohen's behavior. Had his audience been unable to read English, there would have been no occasion for the regulation."[194] This example is illuminating here: even if an individual were unable to read English, a constant assault on Twitter would remain intimidating and could cause substantial emotional distress. This underscores that the statute could be

190. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806–07 (2000).

191. *Id.* at 812.

192. Boos v. Barry, 485 U.S. 312, 316–18 (1988).

193. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975) (discussing *Cohen v. California*, 403 U.S. 15, 26 (1971), in which the Court reversed the conviction of a man who walked through a Los Angeles County Courthouse wearing a jacket bearing the words, "Fuck the Draft")).

194. *Id.*

violated without reference to content.

2. Content Neutrality Based on *Hill v. Colorado*

There is also a tenuous argument that under *Hill v. Colorado*, the statute is content neutral. The statute in *Hill* made it unlawful for any person within one hundred feet of a health care facility's entrance to "knowingly approach" (within eight feet of) another person without that person's consent to pass them a leaflet; display a sign; or engage in oral protest, education, or counseling.[195] The statute was challenged on First Amendment grounds as facially invalid. The Court found the statute content neutral for three independent reasons: (1) the statute was not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the statute was not adopted because of disagreement with the message conveyed, and the statute makes no reference to the content of the speech; and (3) the State's interests in protecting access and privacy are unrelated to the content of the speech.[196] The Court made this finding despite the fact that a statement's content may need to be examined to determine if it is prohibited, observing that "[i]t is common in the law to examine the content of a communication to determine the speaker's purpose."[197]

A similar line of reasoning may apply to the cyberstalking statute. Indeed, two of the three grounds on which the finding of content neutrality was based in *Hill* can be loosely adapted to the cyberstalking statute. The parallels to the second independent ground for finding content neutrality—a lack of disagreement with the message conveyed—are most forceful. Similar to the statute in *Hill*, the cyberstalking statute equally applies to all speakers, regardless of the language they employ or their viewpoint. Just as *Hill* targeted speech with a specific deleterious effect, prevention of access to healthcare,[198] the cyberstalking statute targets speech that causes the deleterious effects associated with cyberstalking.[199] Parallels to the third ground for finding content neutrality—interests in protecting privacy unrelated to the content of the speech—are also discernible. Similar to the access and privacy concerns in *Hill*, the cyberstalking statute is concerned with the privacy and safety of stalking victims.

However, finding content neutrality based on *Hill* also presents

195. Hill v. Colorado, 530 U.S. 703, 707 (2000).
196. *Id.* at 719–20 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).
197. *Id.* at 721.
198. *Id.* at 707.
199. For a discussion of the harms caused by cyberstalking, see *supra* Part III.A.

persuasive analytical challenges. First, the statute in *Hill* was directed at speech within close physical proximity to another, regardless of the effect or content of the speech. But the cyberstalking statute only applies to speech that intends to cause substantial emotional distress. Further, the sort of "access and privacy" being protected in *Hill* differs from the interests being protected by the cyberstalking statute. In *Hill*, the state was protecting literal access to medical care and physical privacy; conversely, the cyberstalking statute protects a more abstract sense of privacy.[200]

Nonetheless, the Court's indication that a law may be content neutral despite looking to content to determine a speaker's purpose is significant. This allows courts, in determining whether a specific instance of cyberstalking intended to cause substantial emotional distress, to consider the content of associated speech without finding the law to be content based.

3. Content Neutrality Based on Regulation of "Secondary Effects"

The Court also sometimes treats facially content-based statutes as content neutral if they target the secondary effects of speech. However, this doctrine is unlikely to apply outside of the realm of sexually explicit speech,[201] and it does not apply to regulations that focus on the direct impact speech has on its audience.[202]

The secondary-effects doctrine arose out of adult-business zoning cases. For example, in *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court found a zoning ordinance prohibiting adult-motion-picture theaters from locating within one thousand feet of various types of buildings to be content neutral.[203] The ordinance was content neutral because it was not justified by reference to the content of the adult films but rather by the secondary effects the theaters had on the surrounding community, such as crime and decreased property values.[204]

The secondary effects doctrine later emerged with regard to a statute more analogous to the cyberstalking statute. In *Boos v. Barry*, the Court

200. *See* Volokh, *supra* note 25 (manuscript at 20) ("Coming within eight feet of someone without that person's consent is an intrusion into their personal space because of the speaker's physical proximity, quite apart from whether the speaker's message is offensive or simply unwanted.").

201. *See* Elizabeth L. Kinsella, Note, *A Crushing Blow:* United States v. Stevens *and the Freedom to Profit from Animal Cruelty*, 43 U.C. DAVIS L. REV. 347, 371 (2009) ("[T]he Court has only applied the [secondary effects] doctrine to uphold regulations restricting sexually graphic expression.").

202. Boos v. Barry, 485 U.S. 312, 320–21 (1988).

203. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

204. *Id.*

noted that "[r]egulations that focus on the direct impact of speech on its audience" are not content neutral under *Renton*.[205] The Court went on to specify that "[l]isteners' reactions to speech are not the type of 'secondary effects'" referred to in *Renton*.[206] Stressing that the prohibition of signs tending to bring a foreign government into public odium was "justified *only* by reference to the content of speech," the Court found the statute in *Boos* to be content based.[207] The secondary effect at issue here—protecting stalking victims from substantial emotional distress caused by certain speech—is extremely similar to the secondary-effect argument deemed inadequate in *Boos*. Thus, the secondary-effects doctrine is unlikely to grant the cyberstalking statute content neutrality.

G. THE "CAPTIVE AUDIENCE" DOCTRINE[208]

The speech criminalized by the cyberstalking statute may be particularly regulatable under the captive audience doctrine.[209] The captive audience doctrine "reflects a judgment that, in [certain contexts], . . . [a] person should not be compelled to listen to certain undesired speech."[210] Accordingly, though the government generally has no role in protecting unwilling listeners from offensive speech,[211] this general principle has important exceptions: speech may be limited when the speaker intrudes on the privacy of the home,[212] or when the degree of captivity makes it impractical for the unwilling viewer to avoid exposure.[213] These exceptions allow regulation of speech that "unreasonably invades the privacy interests

205. *Boos*, 485 U.S. at 320–21.

206. *Id.* at 321.

207. *Id.*

208. How the captive audience doctrine fits into the First Amendment framework is not clearly established, as the precise contours of the doctrine are unclear. Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 86 (1991). The doctrine affects both content-neutrality principles, *id.* at 105, as well as the government interest involved in regulating speech, *id.* at 108–09.

209. *See id.* at 104–05 ("[T]his solicitude for offensive speech ends if the court determines that a captive audience is present. Although in a few other circumstances courts have regulated offensive speech, it is primarily when the offensive message is delivered to a captive audience that courts permit such speech to be regulated.").

210. William D. Araiza, *Captive Audiences, Children and the Internet*, 41 BRANDEIS L.J. 397, 403–04 (2003).

211. The Court has noted,

> [T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975) (internal quotation marks omitted).

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

213. Lehman v. City of Shaker Heights, 418 U.S. 298, 302, 304 (1974) (plurality opinion).

of listeners."[214] Justice Powell, dissenting in *Rosenfeld v. New Jersey*, encapsulated a similar sentiment: "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription."[215] Further, and importantly, "the captive audience doctrine allows courts to ignore the traditional requirement of content neutrality; courts inevitably engage in viewpoint- or content-based discrimination when applying the doctrine."[216]

Along these lines, the Court applied the captive audience doctrine in *Frisby v. Schultz*.[217] In *Frisby*, abortion protesters brought suit seeking to enjoin enforcement of a municipal ordinance prohibiting picketing before or about the residence or dwelling of any individual.[218] The Court accepted the lower court's conclusion that the statute was content neutral, and thus analyzed the statute under intermediate scrutiny, asking whether the ordinance was "narrowly tailored to serve a significant government interest and whether it leave[s] open ample alternative channels of communication."[219] The Court first construed the picketing ban as a limited one, applying only to "focused picketing" in front of a particular residence.[220] Given this construction, the Court held that "ample alternative channels of communication" remained available.[221] The Court then moved on to analyze the government interest at issue and found that the protection of residential privacy was clearly a substantial interest:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that [p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.[222]

Lastly, the Court held that the statute was narrowly tailored because the "type of picketers banned by the . . . ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the

214. Christina Wells, *Regulating Offensiveness:* Snyder v. Phelps, *Emotion, and the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 77 (2010).

215. Rosenfeld v. New Jersey, 408 U.S. 901, 906 (1972) (Powell, J., dissenting).

216. Strauss, *supra* note 208, at 86–87.

217. Frisby v. Schultz, 487 U.S. 474 (1988).

218. *Id.* at 476.

219. *Id.* at 482 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)) (internal quotation marks omitted).

220. *Id.* at 483.

221. *Id.* at 484.

222. *Id.* (citations omitted) (internal quotation marks omitted).

targeted resident, . . . in an especially offensive way."[223]

The Supreme Court in *Rowan v. United States Post Office Department* applied the captive audience doctrine to the delivery of offensive mail to an individual's home.[224] The Court stated that "[n]othing in the Constitution compels us to listen to or view any unwanted communication" that enters the home by mail.[225] *Rowan* also exemplifies that "[t]he government . . . can protect the individual at home when that person has taken affirmative steps to avoid the unwanted message."[226] Along similar lines, Caroline Corbin posits that two requirements must be met in order for the captive audience doctrine to apply.[227] The first requirement is empirical, asking whether the audience is unable to readily avoid the message.[228] The second is normative, looking to whether the audience should "not have to quit the space to avoid the message."[229] And Marcy Strauss, in seeking to construct a more cohesive captive audience doctrine, concludes that courts should weigh three factors in determining its application: the justification for protecting the unwilling audience, the difficulty to avoid the speech, and the significance of the infringement on free expression.[230]

With this backdrop in mind, cyberstalkers on the Internet may create a captive audience.[231] A similar analysis to that undertaken by the *Frisby* Court applies, albeit to a different medium. First, there are ample permissible alternative channels of communication for speech covered by the cyberstalking statute—all those that do not intend to cause substantial emotional distress. Further, the government may have a strong interest in protecting individuals from cyberstalking. Lastly, the type of communication encapsulated by the cyberstalking statute—that which intends to cause substantial emotional distress and then does so—generally does not seek to disseminate a message to the general public but rather targets a specific individual. As the Court in *Frisby* noted, "even if some such picketers have a broader communicative purpose, their activity

223. *Id.* at 486.

224. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736–38 (1970).

225. *Id.* at 737.

226. Strauss, *supra* note 208, at 91.

227. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943 (2009).

228. *Id.*

229. *Id.* at 943–44.

230. Strauss, *supra* note 208, at 116.

231. Though a truly captive audience on the Internet is likely rare, when an individual is made captive to speech on the Internet, the captive audience doctrine can, and should, apply. *See infra* text accompanying notes 239–41.

nonetheless inherently and offensively intrudes on residential privacy."[232] The same holds true here: even if there is some broader communicative purpose to a cyberstalker's speech, the speech nonetheless intrudes on the privacy of victims. *Frisby* is also instructive in that even though the picketing at issue was clearly on matters of public concern—abortion and its moral implications—it could still be regulated. That is important in cases, such as *Cassidy*, in which matters of public concern may be interwoven with harassing speech.

The captive audience doctrine is especially applicable to cyberstalking when cyberstalkers go out of their way to make their speech unavoidable, such as through the use of multiple usernames. Further, when cyberstalkers attempt to make their speech unavoidable, they shift from one-to-many to, more functionally, one-to-one communication, thereby weakening the rationale for protecting their speech.[233] As noted earlier, forgoing the Internet is not a viable option in today's Internet-centric world.[234] In *Rowan*, an individual was clearly free to not receive mail, yet the Court seemed unwilling to force victims of unwanted mailings to accept this option.[235] Here, cyberstalking victims should not be forced off Twitter.[236] Indeed, "it could be argued that the inability to filter out undesirable speech creates an unacceptable dilemma for a would-be user: use the Internet and subject yourself to the risk of encountering [undesirable] speech, or abstain altogether from using the medium."[237] Rather than face this dilemma, users should have the right to not be a captive audience to a verbal assault.

Corbin's captive audience requirements further support the doctrine's

232. Frisby v. Schultz, 487 U.S. 474, 486 (1988).

233. *See* Volokh, *supra* note 25 (manuscript at 7) ("When the laws apply to one-[to-]one unwanted speech, they interfere only slightly with debate and argument . . . . [A one-to-one unwanted statement's] 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.").

234. *See supra* text accompanying note 68.

235. *Cf.* Araiza, *supra* note 210, at 407 ("Again recall the character of a home dweller 'captive' to a residential picket. The dweller always has the option of installing soundproof walls and closing her curtains. We might call it unreasonable to impose such a requirement on the picketing target. Is it unreasonable to require a radio listener always to keep her radio off, to avoid hearing offensive speech? Is it unreasonable to force an employee to leave her job, to avoid a hostile working environment based on gender? Is it unreasonable to force a would-be user not to use the Internet to avoid encountering offensive speech?").

236. *See* United States v. Sayer, No. 2:11-CR-113-DBH, 2012 U.S. Dist. LEXIS 67684, at *27–28 n.17 (D. Me. May 15, 2012) ("It will not do to say, as the defendants seem to, that victims can choose not to open mail or can ignore electronic communications such as email, Facebook postings, tweets, and text messages. The First Amendment does not give stalkers a license to place special conditions on how their victims use modern forms of communication as the price of avoiding hateful attention.").

237. Araiza, *supra* note 210, at 404.

application to Twitter. Empirically, cyberstalkers can remove the ability to avoid the message. And normatively, the victims of cyberstalking should not have to quit Twitter to avoid that message. Similarly, under Strauss's proposed framework, cyberstalking victims are an appropriate captive audience when speech is unavoidable: the justification for protecting them is great given the damage caused; the cyberstalker can make the speech nearly impossible to avoid; and the infringement on the First Amendment right to expression is low if it only inhibits making unavoidable speech.

The captive audience nature of Twitter is buttressed by the importance of search functions on Twitter[238] and the growing importance of self-Googling and monitoring of one's online reputation.[239] Because of these aspects, an individual may confront speech intended to cause them substantial emotional distress without seeking it out.

The same logic that applies to Twitter generally is exemplified by *Cassidy*. While Mr. Cassidy may have had a right to criticize Ms. Zeoli's religious qualifications, he had no right to make her a captive audience. Further, his repeated changing of usernames suggests he was chasing her around Twitter as she attempted to avoid him.[240] She has a right to use Twitter as well, and as noted above, Twitter represents an important mode of communication in today's society.[241] Indeed, because of Twitter's importance, Ms. Zeoli's use of the medium may functionally be a necessity in today's modern world.[242] Thus, Mr. Cassidy may have made Ms. Zeoli a captive audience.

If Twitter creates a captive audience, this affects the cyberstalking statute's First Amendment fate in two ways: First, in situations involving a captive audience, courts sometimes "ignore the traditional requirement of content neutrality" and allow content-based regulations of speech.[243]

238. *See supra* text accompanying notes 50–53.

239. *See supra* text accompanying notes 69–71.

240. *See supra* text accompanying notes 2–22.

241. *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (plurality opinion) (finding that commuters on public transportation were a "captive audience" because they used public transportation "as a matter of necessity, not of choice") (quoting Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)).

242. Notably, in *Lehman*, the Court did not require literal necessity—individuals could have walked, carpooled, or found other means to get to work. The same functional necessity approach applies to Twitter. Rachel Wilkes Barchie, *Creepy Tweeters Have Speech Rights Too*, LAW LAW LAND (Jan. 10, 2012), http://www.lawlawlandblog.com/2012/01/creepy-tweeters-have-speech-rights-too.html ("[I]n our social media age, where so many use Twitter as their regular platform, [arguing that it is unnecessary to use Twitter at all] can't realistically stand up.").

243. Strauss, *supra* note 208, at 86, 105–06 (discussing how the captive audience doctrine affects the content based / content neutral distinction).

Second, the protection of a captive audience from offensive speech provides the government with an interest justifying speech regulation.[244]

H. HOW THE CYBERSTALKING STATUTE HOLDS UP TO CONSTITUTIONAL SCRUTINY

If the statute is found to be content based, it is "presumptively invalid" and will have to meet strict scrutiny. Thus, the statute will be upheld only if it is narrowly tailored to promote a compelling government interest.[245] On the other hand, if it is content neutral, it must meet only intermediate scrutiny by furthering an important or substantial governmental interest unrelated to the suppression of free speech, and reaching no broader than necessary to further that interest.

1. Strict Scrutiny

As nearly all laws fail strict scrutiny, it seems likely that the cyberstalking statute would be struck down if subjected to this standard.[246] The cyberstalking statute would likely satisfy neither the compelling interest nor the narrowly tailored prong of strict scrutiny. In *Playboy Entertainment Group* the Court addressed, and disapproved of, the possibility of protecting listeners from sexual programming as a compelling interest. The Court found that where a regulation seeks to "shield the sensibilities of listeners, the general rule is that the right of expression prevails" and that "[w]e are expected to protect our own sensibilities 'simply by averting [our] eyes.'"[247] There may be an argument that the government's interest in preventing a course of conduct such as Mr. Cassidy's, which seemingly intended to prevent Ms. Zeoli from avoiding his speech simply by averting her eyes, is more compelling. However, this would be a steep hill to climb given the Supreme Court's reluctance to recognize similar interests as compelling.

244. *Id.* at 96 (discussing the Court's recognition that speech can be regulated where "substantial privacy interests are being invaded in an essentially intolerable manner") (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

245. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817 (2000).

246. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 49 (2000) ("[I]n almost every free speech case decided by the Supreme Court in the recently completed Term, the outcome depended, in large part, on whether the Court characterized the law as content based or content neutral."). For an empirical study as to how strict scrutiny has been applied in federal courts, see generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

247. *Playboy Entm't Grp.*, 529 U.S. at 813 (quoting *Cohen*, 403 U.S. at 21).

Further, the Court would likely not find the cyberstalking statute to be narrowly tailored. Though the statute may require great breadth to be effective, similar arguments were advanced and rejected in *Ashcroft v. ACLU*.[248] The Court's preference for noncriminal means of regulating speech, such as filtering software, would likely lead it to require a less restrictive alternative, as it did in *Ashcroft*. The Court would also likely point to the fact that some speech intended to cause substantial emotional distress is entirely protected by the First Amendment: political discourse, harshly worded debate, criticism of celebrities, and so forth.

However, it should be noted that if the Court were inclined to uphold the cyberstalking statute, there are facts that could allow it to meet strict scrutiny. First, as discussed in Part III, the harms from cyberstalking are extremely serious, and therefore, preventing these harms could be a compelling interest.[249] Indeed, as shown in *Cassidy*, cyberstalking can completely derail victims' lives for months at a time.[250] And unlike the shielding of sensibilities disapproved of in *Playboy Entertainment Group*, this statute has a narrower focus: preventing substantial emotional distress caused by cyberstalking. Further, the breadth of the statute may be narrowly tailored because its breadth may be necessary to encapsulate seemingly innocuous acts that can cause the harm from cyberstalking. While the statute is broad, it is as narrowly tailored as possible to the expansive and amorphous problem it targets, and no less restrictive alternative could effectively achieve the statute's goals.

2. Intermediate Scrutiny

If the cyberstalking statute were found to be content neutral, it could possibly meet intermediate scrutiny. Given the logic of *Frisby v. Schultz* and *Colorado v. Hill*, it seems clear that the government has an important interest in preventing the conduct at issue here. In *Frisby*, protecting residential privacy was held to be an important interest.[251] Here, the Tweets do in a sense "enter the home" as they come up on the computer screen of the victim.[252] Further, the state may "protect the health and safety" of its

248. Ashcroft v. ACLU, 542 U.S. 656, 668–69 (2004) (concluding that the statute was not narrowly tailored because of the government's failure to show that proposed alternatives were less effective).

249. *See supra* Part III.A.

250. *See supra* text accompanying notes 2–22.

251. Frisby v. Schultz, 487 U.S. 474, 483 (1988).

252. Araiza, *supra* note 210, at 398 ("The Internet, like broadcasting, can also be characterized as a medium that intrudes into the home.").

citizens,[253] and as noted above, stalking can have devastating and concrete negative health and safety impacts. Moreover, preventing the use of the Internet to inflict emotional distress may be an important interest by analogy to telephone-harassment statutes.[254] Lastly, the government may have an important interest in protecting the captive audience that cyberstalking can create. Consider, as occurred in the *Cassidy* case, a course of conduct that prevents individuals from averting their eyes unless they cease use of the Internet altogether.

Though it may be argued that victims should simply avert their eyes, weakening the government interest in protecting such victims, this sort of admonition finds its roots in a different media paradigm from the present one. Old media communicated to the listener. Its message was generally a one-way transmission. New media is interactive. To fully participate in new media, individuals search for each other, interact, monitor their online identities, and engage in public-private communication (that is, communication that is sent publicly but functions like person-to-person communication).[255] This shift in media's role has two doctrinally significant effects: First, it lessens the ability to avoid harassing messages. Second, it reinforces the government's interest in regulating the speech.

The next question would be whether the law burdens substantially more speech than is necessary to further the interest. As noted above, stalking can take many forms. Thus, any statute effectively criminalizing it will have to be broad and encompass a potentially large amount of speech. One possible criticism of the statute is that it does not exempt political or religious speech, or speech on matters of public concern. However, this sort of speech likely should not fall within the statute. The statute is clearly not meant to target political or religious speech. And as noted in Part IV, a limiting construction—one that very reasonably could apply to this statute—could ameliorate these concerns.[256]

There are also alternative channels for the communication at issue. Indeed, all channels used without the intent to cause substantial emotional distress remain open. For example, a single Twitter account (which would

253. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (discussing the government's interest in matters of "public health and safety" in the context of regulating medical devices).

254. *See* Thorne v. Bailey, 846 F.2d 241, 243–44 (4th Cir. 1988) ("The government has a strong and legitimate interest in preventing the harassment of individuals. The telephone, a device used primarily for communication, presents to some people a unique instrument through which to harass and abuse others.").

255. *See* Walther et al., *supra* note 24, at 34 (discussing the merger between interpersonal communication and mass communication).

256. *See supra* Part IV.B.1.

not be unavoidable) may remain an alternative mode of communication. Similarly, offline modes of communication and other methods that do not reach the victim remain open—for example, speaking with friends or giving speeches. These alternatives quell lingering First Amendment doubts.

I. CRITIQUE OF THE DISTRICT COURT OPINION

In *Cassidy*, Mr. Cassidy brought a motion to dismiss on several grounds: the statute was overbroad and implicated a large amount of protected speech; the statute was unconstitutional as applied to him; the statute was unconstitutionally vague; and the statute failed to state a criminal offense.[257]

The district court dismissed the case, finding the statute unconstitutional as applied to Mr. Cassidy.[258] The court couched the dispute in terminology to which the Framers could have related.[259] Thus, the court likened Twitter to an elaborate bulletin-board system, with users (or colonists) erecting bulletin boards in their front yards. In the court's analogy, Twitter allows posts from one colonist's bulletin board to be automatically posted on another colonist's bulletin board. Such interconnectedness, the court noted, is entirely up to the two colonists. The most important aspect of this analogy for First Amendment purposes was that "[i]f one Colonist wants to see what is on another's bulletin board, he would need to walk over to his neighbor's yard and look at what is posted, or hire someone else to do so. Now, one can inspect a neighbor's Blog by simply turning on a computer."[260] The court found this fact key to its analysis, noting that "in sharp contrast to a telephone call, letter or e-mail," a Twitter user does not have to see what is posted on another person's Twitter account.[261]

257. United States v. Cassidy, 814 F. Supp. 2d 574, 581 (D. Md. 2011).

258. *Id.* at 588. This decision had been appealed to the Fourth Circuit. Notice of Appeal, United States v. Cassidy, No. 8:11-CR-00091-RWT (D. Md. Jan. 17, 2012). However, this appeal was later abandoned. Order, United States v. Cassidy, No. 12-4048 (4th Cir. Apr. 12, 2012) (granting voluntary motion to dismiss).

259. *Cassidy*, 814 F. Supp. 2d at 577–78. However, unlike many areas of the Constitution, historical analysis is of limited utility in the First Amendment context. *See* CHEMERINSKY, *supra* note 88, at 923–24 (noting that beyond preventing licensing of publication and punishment of seditious libel, "there is little indication of what the framers intended" the First Amendment to encapsulate).

260. *Cassidy*, 814 F. Supp. 2d at 577.

261. *Id.* at 578. The court opined that the interest involved is stronger when communication is one-to-one, noting that "Twitter . . . [is] today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim." *Id.* at 585–86.

With this backdrop, the statute was held to be content based and unable to survive strict scrutiny.[262] Because Ms. Zeoli could simply avert her eyes to protect her own sensibilities, the statute failed the first prong of the strict scrutiny analysis—it did not serve a compelling state interest. As the statute was unconstitutional as applied, the court did not reach the question of whether it was overbroad or void for vagueness.

The court further opined, in dictum, that even if the statute were subject to intermediate scrutiny, it would likely not meet constitutional muster.[263] In the court's view, though preventing this sort of harm may be an important governmental interest, the statute sweeps too broadly to meet even intermediate scrutiny. In making this determination, the court looked to Ms. Zeoli's status as a public figure, finding the statute prohibits speech on matters of public concern.[264]

The court's analysis in *Cassidy* was flawed for a few reasons: it mischaracterized the Twitter forum; it wrongly concluded that Mr. Cassidy's Tweets touched on matters of public concern; and it failed to consider aspects of the case that make Mr. Cassidy's speech particularly appropriate for government regulation.

The Twitter forum, though ostensibly comparable to a bulletin-board system, has nuances that make it far more complex. First, the importance of search functions (and their availability) eliminate the need to walk over to others' bulletin boards to see their posts. Rather, in searching for bulletin boards with relevant information, a cyberstalker's bulletin board can ambush a victim. Further, unlike a bulletin board, which intends merely to communicate to the viewer, Twitter is an interactive and social medium. This interactive nature changes the interest at issue on Twitter and adds to the importance of searching for other users. And it creates an increased likelihood of indirect transmission: other users may pass along distressing Tweets or ask a victim if they saw what a cyberstalker said.

Further, the court's categorization of Mr. Cassidy's speech as of public concern misses the mark in a few ways. First, the court overlooked the fact that what makes a public figure may be different in today's world and in the context of Twitter. As one judge recently noted, "In a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a 'celebrity' and 'non-celebrity'

262. *Id.* at 584–85.
263. *Id.* at 586–87.
264. *Id.*

seems to be an increasingly arbitrary one."[265] Thus, in a world in which matters may become of public concern more easily, public-concern status should not be granted without careful consideration. The court also failed to properly look to *Snyder*. The messages in this case are of far less public concern than the signs in *Snyder*.[266] Further, in *Snyder*, the Court stressed that there was no pre-existing conflict indicating an attempt to mask a private attack over a private matter.[267] Here, the opposite is true: the prior relationship between Mr. Cassidy and Ms. Zeoli is clearly the impetus for the attacks. This diminishes any incidental religious significance that the Tweets may have.

Lastly, the court failed to examine the effect of Mr. Cassidy's multiple usernames on the government interest in regulating his speech. First, by constantly changing usernames, he shifted from public discourse into more purposeful, directed harassment, like a telephone call. Second, this behavior reinforces his intent, which was not merely to communicate his views, but also to ensure that they would be seen by Ms. Zeoli and would cause her substantial distress. Each of these aspects of Mr. Cassidy's speech strengthens the government's interest in regulation. As experts on cyberstalking have pointed out, supposing that "a simple solution to avoiding [cyberstalking is to] simply turn off the computer" leads to "misconceptions or minimalization about cyberstalking, and puts individuals at greater risk for being victimized."[268] The court here did just that: it left a cyberstalking victim unprotected by minimalizing the behavior involved.

V. REFINEMENTS TO ADDRESS FIRST AMENDMENT CONCERNS

As seen in *Stevens*, the Court will not "rewrite a . . . law to conform it to constitutional requirements"[269] as this "would constitute a serious invasion of the legislative domain."[270] Thus, if the cyberstalking statute is deemed invalid, or if Congress seeks to amend it in light of a legal challenge, there are a few changes that could make it more likely to comport with the First Amendment. Preliminarily, note that redrafting the

265. Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011).

266. *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215–17 (2011).

267. *Id.* at 1217.

268. Parsons-Pollard & Moriarty, *supra* note 61, at 103.

269. United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (quoting Reno v. ACLU, 521 U.S. 844, 884–85 (1997)) (internal quotations marks omitted).

270. *Id.* (quoting United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 n.26 (1995)) (internal quotation marks omitted).

statute so that it comports with the First Amendment is important for several reasons.[271] First, cyberstalking is a growing phenomenon that causes extensive harm to victims.[272] Second, the speech at issue here should be proscribable if Congress drafts a statute with First Amendment concerns in mind.[273] And third, though some of Congress's previous attempts to regulate the Internet have failed, the Internet is a growing forum that the Court may readdress in light of its now pervasive nature.[274]

Four potential changes would make the statute more likely to be found constitutional. First, the statute could explicitly include an objective requirement (that is, that the substantial emotional distress must be reasonable), rather than forcing the courts to read this in as a narrowing construction.[275] This would address both vagueness and overbreadth concerns, and would also increase the vitality of the state interest at issue.

Second, the statute could include a stronger intent element. It seems clear that Congress did not take into account that the amended statute could conceivably criminalize some religious or political speech. Indeed, as noted in *Bowker*, the previous version of the statute would be unlikely to prohibit any speech of this sort.[276] However, in light of the necessary breadth this statute now has, more explicit intent language may be necessary. Rather than requiring intent to cause substantial emotional distress, the statute could require a higher bar with regard to this type of offense. For example, the requisite intent could be "intent to cause substantial emotional distress by intentionally communicating with the victim."[277] This would exclude cases in which individuals merely post on Twitter to communicate their

271. Timothy L. Allsup, in examining *Cassidy*, concludes that "the best solutions to protect cyberstalking victims are extralegal." Timothy L. Allsup, Note, United States v. Cassidy*: The Federal Interstate Stalking Statute and Freedom of Speech*, 13 N.C. J.L. & TECH. ON. 227, 256 (2012). However, while extra-legal alternatives are a necessary part of any enforcement scheme, adequate legal protection "serve[s] an important expressive function and may apply to certain kinds of cyber-abuses." Lipton, *supra* note 62, at 1139. As discussed in this Note, egregious instances of cyberstalking are likely a type of cyber abuse to which laws could apply. Regardless, Allsup's discussion of various possible extra-legal alternatives represents an important part of the multimodal approach needed to combat cyberstalking.

272. *See supra* Part III.A.

273. *See supra* Part IV.

274. *See supra* note 101 and accompanying text.

275. Indeed, a proposed amendment to the statute explicitly adds an objective standard. *See* Simplifying the Ambiguous Law, Keeping Everyone Reliably Safe Act of 2011, H.R. 196, 112th Cong. § 2 (2011) (punishing conduct "reasonably expected" to cause serious emotional distress).

276. United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1182 (2005).

277. This would make the statute more likely to be considered content based, and would also more narrowly tailor it and allow it to serve an even more compelling interest.

views without any intent to cause emotional distress. But it would allow the statute to continue to cover cases, like *Cassidy*, in which cyberstalkers seemingly intend their communications to reach the victim, even though they were made through an ostensibly public forum.

Third, the statute could contain an exceptions clause. One possible exceptions clause could eliminate matters of public concern from the statute's coverage.[278] As seen in *Snyder*, the Court remains extremely committed to the protection of speech involving matters of public concern, even when that speech causes emotional harm. However, the *Snyder* decision left the door open for regulation of matters of private concern, as Justice Breyer's concurrence underscores.[279] Another possible exceptions clause could exclude from the statute's coverage speech with serious religious, political, scientific, educational, journalistic, historical, or artistic value. Though this sort of clause was insufficient in *Stevens*, the much narrower reach of a properly construed statute here would allow this exception to protect any speech we otherwise might worry could be prohibited by the cyberstalking statute. The qualifier, "serious," would allow the statute to proscribe speech that has some, but merely marginal or incidental, value.

Lastly, and potentially most promisingly, the statute could attempt to protect captive audience cyberstalking victims, an ideal the First Amendment readily accepts. Thus, the law could additionally require that the victim has attempted to avoid the communication and that the cyberstalker has acted with the intent to make the communication unavoidable. Such a modification punishes speech only where the intent of the speech is one-to-one, even if it is made ostensibly one-to-many. Though this narrows the statute significantly, it still prevents egregious instances of cyberstalking. It targets cyberstalkers when their communication shifts from one-to-many communication to effectively one-to-one communication. But it ensures that the suppression of one-to-many speech does not "unacceptably restrict communication to potentially willing listeners."[280]

VI. CONCLUSION

While the First Amendment concerns regarding the cyberstalking

278. While this sort of refinement may allow some cyberstalking to go unpunished, it assuages worries that worthwhile views are being excluded from the marketplace of ideas.

279. Snyder v. Phelps, 131 S. Ct. 1207, 1221 (2011) (Breyer, J., concurring).

280. Volokh, *supra* note 25 (manuscript at 8).

statute are real, they are not insurmountable. Rather, in applying principles that permeate numerous cases involving speech, the Court could find that the cyberstalking statute is a valid, albeit perhaps sloppy, congressional attempt to protect citizens from a particularly troubling form of speech. Further, if the statute is struck down, Congress should attempt to rewrite it with the greater precision that the regulation of speech requires in the shadow of the First Amendment. This challenge may seem daunting in the face of a Supreme Court that seems determined to create "incentive[s] to draft a narrowly tailored law in the first place."[281] But the cost, as seen in *Cassidy*, is daunting as well: the harm caused by speech can ruin victims' lives. Given the various alternatives discussed within this Note, laws tailored to protect the captive audience are the most promising avenue through which cyberstalking laws can protect victims without offending the First Amendment.

Though much of this Note focuses on particular doctrines and their application to a specific statute, the larger questions flagged earlier in the Note—how and if First Amendment principles can adapt to new technology—merits further discussion. First, as exemplified by the application of the cyberstalking statute to Twitter, new technology generates novel interests, which need to be carefully defined and adequately recognized. Individuals have strong ties to social media, use new technology extensively in their personal lives, and even create vibrant online identities. Second, new technology requires an increased focus on policy considerations underlying speech protection. It allows for speech on an entirely new scale by allowing ideas to be communicated at almost no cost. This can flood the marketplace with ideas, which has both positive and negative implications. Lastly, and perhaps most importantly, new technology makes overzealous protections of speech more concerning because of the extensive damage that can be caused when new technology and harassing speech combine. Online speech has a permanence that much other speech lacks, since once something is online, it is very difficult to remove. Further, new technology allows speech to reach individuals from great distances and to be constantly within their view.[282]

With these thoughts in mind, it is unclear whether the First Amendment jurisprudence can adequately adapt to regulate new technology. On the one hand, new technology may expose serious problems with First Amendment doctrines. With the Court hesitant to deem

281. Osborne v. Ohio, 495 U.S. 103, 121 (1990).

282. *See supra* text accompanying notes 62–63.

interests compelling, some regulations of speech and new technology may be struck down because of a failure to adequately recognize new interests. Further, with speech on such a massive scale, requiring extremely narrow tailoring may make regulation of speech involving new technology nearly impossible. Last, the formerly appealing marketplace-of-ideas justification for expansive protection of speech may be eroded given how new technology affects that marketplace. On the other hand, First Amendment doctrines most likely can adapt to effectively regulate new technology. By applying existing doctrines liberally,[283] recognizing new applications of firmly rooted doctrines,[284] or applying First Amendment scrutiny with a careful eye to the interests involved and breadth required,[285] the Court can continue to adequately safeguard free speech without overprotecting it.

283. *See supra* Part IV.F.
284. *See supra* Part IV.G.
285. *See supra* Part IV.H.1.