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

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

I. INTRODUCTION

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

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

It was a silly flyer, from someone who wasn't a serious candidate, and it likely didn't impress the voters. But it did impress the police, who in June 2011 issued Speulda a criminal summons for "harassment." Under New Jersey law, it is a crime to, "with purpose to harass another, . . . [m]ake[], or cause[] to be made, a communication . . . anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm."[2] The police theory was apparently that the flyer was made with the "purpose to harass," and was "likely to cause annoyance or alarm." Some months later, the charges were dismissed, though with no precedent being set foreclosing similar future uses of the statute.

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

The city prosecutor concluded that the videos might constitute "cyberstalking," which is defined under Washington law as "mak[ing] an electronic communication to such other person or a third party" "with intent to harass, intimidate, torment, or embarrass any other person" "[u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[3] The theory was that some of the sexual references used "lewd" or "indecent" words, and that the video was created "with intent to harass, intimidate, torment, or embarrass" its subjects. The prosecutor got a search warrant aimed at figuring out MrFiddlesticks' identity, though after a public outcry the warrant was stayed and later withdrawn, and the city decided not to press charges.[4]

3. Around the same time, Johanna Hamrick—who runs the Berea Post blog in Berea, Ohio, and had been candidate for Berea mayor and city council

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[1] [Cite.]

[2] N.J. STAT. ANN. § 2C:33-4.

[3] REV. CODE WASH. § 9.61.260.

[4] [Cite.]

president—posted various things critical of Norma Kleem. Kleem was the sister of the Berea mayor Cyril Kleem, as well as being a member of the Berea Commission on Aging and the organizer of the Berea July Fourth parade. One of Hamrick's posts on her blog read,

> DON'T FORGET YOUR TOMATOES!
>
> As the Fourth of July Parade is approaching we are getting so excited here at The Berea Post. It is sure to be a special year as we have heard of only one parade participant having a discriminatory letter.
>
> All persons receive a letter to be a part of the parade. As you guessed it, you have to return your form to Norma Kleem. In prior years she has limited who is allowed in the gate, what vehicles, and many other obstacles have been put up. This year the letter was the same as prior years, all except one. One persons letter stated that only Berea City Fire Trucks were allowed in. Why? Well if the City Club gets their donated fire truck in, someone could look better on the fire truck. Yes, one letter stated this information. How low can you go? Well the little dictator wants control. Little dictator wants to make sure any opponent is denied like in past years.
>
> Please Sunday July 3rd, DO NOT FORGET YOUR TOMATOES!!! I truly would love to chuck one right at someone in THAT camp. It would be quite enjoyable. Happy Independence Day Berea.

Now if Hamrick had thrown a tomato at Kleem, she would have been guilty of a crime. Perhaps if Hamrick's post were seen as serious (likely not the most sensible way of interpreting it), she might be guilty of punishable solicitation of crime.[5] But the Ohio legal system's response to Hamrick's post was something else: Norma Kleem sought a protection order against Hamrick based on this post and other conduct (including, allegedly, following Kleem in her car, and trying to hit Kleem with her car), and Judge Nancy Russo entered the following order:

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

So Hamrick was barred from saying *anything* on her own blog or in the comments to the Cleveland.com blog, either about local commissioner and parade organizer Norma Kleem or about her brother Mayor Cyril Kleem.

4. One week later, federal prosecutors started a criminal harassment prosecution in Maryland. Alyce Zeoli is the leading American Tibetan Buddhist religious leader, the subject of a somewhat critical book-length biog-

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

raphy written by a *Washington Post* writer,[6] and a Twitter poster with 23,000 followers. William Lawrence Cassidy had gotten involved with Zeoli's Buddhist group (Kunzang Palyul Choling), to the point of becoming Chief Operating Officer of the group; but he was then expelled, because he apparently lied to them about having had cancer and because "they came to doubt his reincarnation credentials." After he left, Cassidy begun to post insulting Twitter messages about Zeoli, eventually producing "over 8000 tweets over the span of several months."[7]

A few could be seen as potentially threatening, e.g., "ya like haiku? Here's one for ya: 'Long, Limb, Sharp Saw, Hard Drop' ROFLMAO."[8] But others were criticisms of Zeoli, for instance, "[Zeoli] is a demonic force who tries to destroy Buddhism" and "[Zeoli] is no dakini: shes a grossly overweight 61 yer old burnt out freak with bad bowels & a lousy outlook: her 'crown' is a joke." And federal prosecutors prosecuted Cassidy not under the threat provision of the statute,[9] but rather on the theory that Cassidy's messages constituted the federal crime of "engag[ing] in a course of conduct [using the mail or interactive computer services] that causes substantial emotional distress to [a] person" "with the intent to … harass … or cause substantial emotional distress to [that] person."[10] The district judge eventually threw out the prosecution on First Amendment grounds.[11]

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

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[6] MARTHA SHERRILL, THE BUDDHA FROM BROOKLYN (2000).

[7] [Cite.]

[8] Careful readers will notice that this is not actually a haiku.

[9] United States v. Cassidy, 814 F. Supp. 2d 574, 583 n.11 (D. Md. 2011).

[10] Cassidy apparently deliberately copied Zeoli on his tweets, by including the text @ZeoliUserName feature, which would lead those tweets to show up in Zeoli's @Mentions tab in Twitter. This, the theory goes, makes that decision (to include the @ sign followed by Zeoli's user name) into an instance of one-to-one speech sent to Zeoli as well as one-to-many speech about Zeoli.

But this wasn't the government's theory. The indictment doesn't refer to sending messages to Zeoli; it says Cassidy is guilty for "us[ing] an interactive computer service … to engage in a course of conduct that caused emotional distress to that person, to wit: the posting of messages on www.twitter.com and other Internet websites concerning [Alyce Zeoli]" (emphasis added). The criminal complaint filed by the FBI agent doesn't note any use of the @ feature by Cassidy; indeed, it lists Cassidy's anti-Zeoli blog posts alongside his Twitter messages — blog posts, of course, don't have an analog to the @ feature. And the statute under which Cassidy is being prosecuted doesn't impose any such limitation.

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

But, increasingly, these laws have been reworded[12] or interpreted in ways that also cover speech *about* a person, even when that speech is communicated to potentially willing listeners; this is especially true with regard to recent proposals to ban "cyber-harassment" or "cyber-bullying."[13] And, as the examples given above show, such laws are indeed being used in precisely these ways.

Sometimes the laws are applied to speech about an ex-spouse or a neighbor,[14] or about someone with whom one has had business dealings,[15] but sometimes they are applied to speech about government officials. They could equally be applied to speech about media figures, university professors, businesspeople, and the like. The question is whether such laws and restraining orders are constitutional, when applied to speech that's outside the traditional First Amendment exceptions (chiefly threats and "fighting words," plus perhaps libel and other knowing falsehoods), and speech that is said about the target rather than just to the target. This article will argue that the answer is generally "no."

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

A. Restrictions on Unwanted One-to-One Speech

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

1. State and federal telephone harassment have long laws banned calls made to people with the intent to "abuse," "annoy," "harass," or "offend."
2. More recently, stalking laws have banned (among other things) repeated annoying letters, phone calls, or personal contacts with a person.
3. Federal law has let any householder ban further mailings to his home of "advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[16] I will call this the *Rowan* law, after the case, *Rowan v. United*

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[12] Cite new statutes. Cite also the Tennessee statute, which was broadened and then narrowed in response to public criticism, and the Arizona bill, which passed both houses of the legislature but was then narrowed in response to public criticism.

[13] [Cite.]

[14] [Cite.]

[15] *See, e.g.*, Lamont v. Gilday, 2008 WL 4448652 (Wash. Super. Ct. Mar. 5) (concluding that defendant's statements accusing plaintiff, a small businesswoman for whom he had worked as a handyman, were false and defamatory, and enjoining plaintiff from making *any* statements about plaintiff "and/or [this] lawsuit or anyone who testified in the trial, either directly by name, or indirectly by reference, via . . . any . . . form of communication").

[16] Rowan v. United States Post Office Dep't, 397 U.S. 728, 730 (1970).

States Post Office Dep't, that upheld the statute. Some states have likewise barred unwanted mailings or unwanted telephone calls under such circumstances.[17]

4. Restraining order laws have allowed people to get court orders barring further letters, phone calls, or personal contacts from a particular person.

Some of these laws have been struck down in some states,[18] but on balance they have generally been upheld by lower courts;[19] and the Supreme Court has upheld the federal ban on repeated unwanted mailings.[20]

But all these laws have one thing in common: In the great bulk of their applications, they restrict what one may call "unwanted one-to-one" speech—speech said to a particular person, in a context where the recipient appears not to want to hear it, whether because he has expressly demanded that the

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[17] *See, e.g.*, Ramsey v. Edgepark, Inc., 583 N.E.2d 443, 452 (Ohio Ct. App. 1990) (upholding an injunction against repeated unwanted mailings, citing *Rowan*); OHIO REV. CODE §§ 2913.01, 2917.21(A)(5) (banning any "telecommunications," including telephone calls and e-mails, after the recipient "has told the caller not to make a telecommunication to those premises or to any persons at those premises"); State v. Rettig, 1992 WL 19326 (Ohio Ct. App. Feb. 3) (upolding this provision, citing *Rowan*).

[18] *See* People v. Klick, 362 N.E.2d 329 (Ill. 1977) (striking down a telephone harassment statute that banned "mak[ing] a telephone call" "[w]ith intent to annoy another"); Bolles v. People, 541 P.2d 80 (Colo. 1975) (striking down a telephone harassment statute that banned "communicat[ing] with a person . . . by telephone, telegraph, mail, or any other form of communication, in a manner likely to harass or cause alarm"); City of Everett v. Moore, 683 P.2d 617 (Wash. Ct. App. 1984) (striking down a law banning "communicat[ing] with a person . . . in a manner likely to [and intended to] cause annoyance or alarm" or "engage[ing] in a courtse of conduct that [intentionally] alarms or seriously annoys another person and which serves no legitimate purpose"); People v. Gomez, 843 P.2d 1321 (Colo. 1993) (striking down as unconstitutionally vague a ban on any conduct that intentionally "harasses, threatens or abuses another person"); State v. Dronso, 279 N.W.2d 710 (Wisc. Ct. App. 1979) (striking down a ban on "mak[ing] a telephone call" "[w]ith intent to annoy another"); State v. Blair, 601 P.2d 766 (Ore. 1979) (striking down a ban on "communicat[ing] with a person" "in a manner [intended to and] likely to cause annoyance or alarm"); *cf.* Gormley v. Director, 449 U.S. 1023 (1980) (White, J., dissenting from denial of certiorari) (suggesting that a statute that bans telephone calls that are intended to and likely to "cause annoyance or alarm" is likely unconstitutional).

[19] *See, e.g.*, State v. Meunier, 354 So. 2d 535 (La. 1978); People v. Weeks, 591 P.2d 91 (Colo. 1979); State v. Elder, 382 So. 2d 687 (Fla. 1980); Constantino v. State, 255 S.E.2d 710 (Ga. 1979); United States v. Lapmley, 573 F.2d 783 (3d Cir. 1978); City of Montgomery v. Zgouvas, 953 So. 2d 434 (Ala. Ct. Crim. App. 2006); State v. Mott, 692 A.2d 360 (Vt. 1997); Rzeszutek v. Beck, 649 N.E.2d 673, 680–81 (Ind. Ct. App. 1995); Gilbert v. State, 765 P.2d 1208, 1210 (Okla. Ct. Crim. App. 1988); People v. Blackwood, 476 N.E.2d 742, 746 (Ill. Ct. App. 195); State v. Hauge, 547 N.W.2d 173, 175–76 (S.D. 1996); South v. City of Mountain Brook, 688 So. 292 (Ala. Ct. Crim. App. 1996); Yates v. Commonwealth, 753 S.W.2d 874 (Ky. Ct. App. 1988); State v. Roesch, 1995 WL 356776, *5 (Conn. Super. Ct. June 6); State v. Richards, 896 P.2d 357 (Idaho 1995).

[20] *Rowan.*

speech stop, or because the speaker intends to annoy or offend the recipient.[21] The laws are aimed at restricting speech *to* a person, not speech *about* a person. And that is the context in which they have generally been upheld against First Amendment challenge.[22]

This is especially clear with regard to traditional telephone harassment law and unwanted postal contact law, because the telephone and the letter are one-to-one media: Each phone call or letter has one particular recipient.[23] In principle, stalking laws and harassment orders could be broader, and could apply to speech said to the public (or to individual willing listeners) but that annoys the subject of the speech. Indeed, those are the applications that this article criticizes. But when the stalking and harassment laws have been upheld, this has almost invariably been in one-to-one speech cases, and with arguments that made sense because of the one-to-one nature of the speech.[24]

When the laws apply to one-one unwanted speech, they interfere only slightly with debate and argument—both big political debates and everyday conversations among friends and acquaintances about what is happening in their social circle.[25] A one-to-one unwanted statement is highly unlikely to persuade or inform anyone, precisely because the listener doesn't want to hear it. Its only effect is likely to be to offend or annoy. And restricting such statements thus leaves speakers free to communicate to other, potentially willing listeners.[26]

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[21] *See, e.g.*, People v. Dupont, 107 A.D.2d 247, 252 (1985) (stating that the harassment statute focuses on "annoying and harassing communications transmitted directly to the present complainant," rather than "dissemination . . . [or] publication[] of vexatious material about an individual"); Towner v. Ridgway, 182 P.3d 347, 352–53 (Utah 2008) (upholding an anti-stalking injunction because it bars "communications from [defendant] to [plaintiffs], not communications by [defendant] about [plaintiffs] to others"); Kramer v. State, 605 S.W.2d 861 (Tex. Ct. Crim. App. 1980) (upholding a statute banning annoying telephone or written communications in vulgar language because "[n]o provision is made in [the statute] for punishing acts not directed to a private recipient," and relying on *Rowan*).

[22] [Cite.]

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

[24] *See* cases cited *supra* note 19.

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

[26] *Cf.* MARTIN H. REDISH, THE LOGIC OF PERSECUTION 124 (2005) (reasoning that the freedom of speech is "about the freedom to persuade" and "the freedom to inform"); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of View-*

But one-to-many speech—such as picketing, signs, drive-in movie screens, inscriptions on clothing, and the like—is generally constitutionally protected even when some of its viewers are likely to be offended.[27] So long as some of the viewers are likely to be open to the message, the message remains protected, precisely because restricting the message would cut off constitutionally valuable communication to willing listeners as well as constitutionally valueless communication to unwilling listeners.

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

Of course, this presupposes a First Amendment theory in which either (1) the value of speech stems from its value as a means of persuading, informing, or entertaining listeners or (2) the value of speech also stems from its value as a means for the speaker's self-expression, but only when both the speaker and listener consent to such self-expression.[28] One can imagine a contrary theory under which speakers have the power to remonstrate with individual listeners (at least using some one-to-one media), even when the listeners want those communications to stop.

But this is not the view that the Court has arrived at (as I will discuss in Part II.C), or that lower courts have arrived at, given the general trend of

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point Discrimination, 41 LOY. L.A. L. REV. 67, 116 n.134 (2007) (noting that speech may sometimes be restricted to protect "unwilling listeners").

[27] *See, e.g.*, Hague v. CIO; Boos v. Barry; Erznoznik v. City of Jacksonville; Cohen v. California.

[28] *See, e.g.*, Seana V. Shiffrin, *Reply to Critics*, 27 CONST. COMM. 417, 434–35 (2011):

> [A free speech theory that focuses on the rights of speakers and thinkers] may readily . . . distinguish harassing speech on the grounds that it does not involve a consensual communicative relation. Although as thinkers we have an interest in expressing our thoughts and in being known, we do not have a right to command the personal audience of any other thinkers we like, irrespective of their interests in hearing us out. That would not be compatible with the other's autonomy as a thinker since each of us also has an interest qua thinker in being left alone and maintaining a sphere of privacy free from unwanted intrusion by others. One cannot be a free thinker while being subject to intrusions that overtake one's mental agenda. Protecting opportunities to satisfy thinkers' interests both in privacy and in forging relationships with others can be done by permitting restrictions on nonconsensual but targeted and intrusive contact, even that contact that solely involves speech, while still protecting consensual interpersonal communication as well as public proclamations and revelations, even if offensive and even if they concern particular individuals.

upholding telephone harassment and stalking laws. And I think the Court's conclusion is likely to correct. To the extent the First Amendment protects speech as a tool for advancing the search for truth, marketplace of ideas, or self-government, unwanted one-to-one speech does little to promote these goals. And to the extent that the First Amendment protects speakers' self-expression, it should also protect listeners' freedom not to be intruded on by that self-expression (at least when preventing such intrusion leaves speakers free to communicate with willing listeners). As the Court unanimously concluded in *Rowan*, "no one has a right to press even 'good' ideas on an unwilling recipient."[29]

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

To be sure, there are some important limitations on this principle. First, unwanted speech to some recipients—for instance, government officials, candidates for office, and possibly businesses that serve the public—might have constitutional value even when the listener doesn't want to hear it. People may have the right to remonstrate with government agencies, and petition for redress of grievances even when the target doesn't want to hear the petitions, or the petitions are put in an offensive way.[30]

The exact scope of this exception is not clear. It doesn't extend to threats,[31] and it might not extend to telephone calls to an official's home.[32] It's also not clear whether at some point repeated contacts could be restricted because they tie up phone lines or otherwise interfere with government officials' duties in ways that go beyond just the offensiveness of the communication.[33] But some such exception for some unwanted one-to-one speech to government officials should exist.

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[29] 397 U.S. 728, 738 (1970).

[30] State v. Drahota (Neb.); United States v. Popa (D.C. Cir.); State v. Fratzke, 446 N.W.2d 781 (Iowa 1989) (letter to police officer is an attempt to "protest[] governmental action" even when it contains vulgarities and is "inten[ded] to annoy," and is thus not covered by a statute that applies only to communications "without legitimate purpose"); Hustler v. USPS (D.D.C.).

[31] City of San Jose v. Webster, 2004 WL 2904438 (Cal. Ct. App. Dec. 16) (upholding "an injunction prohibiting [defendant] from contacting Hebert [a police department lieutenant] and ordering him to stay at least 300 yards away from Hebert, her home, and her workplace," even though the injunction limited Webster's speech claiming that Hebert had mishandled a past criminal case against him, because Webster's past conduct would lead "[a] reasonable person [to] fear for her safety"); State v. Roesch, 1995 WL 356776 (Conn. Super. Ct. June 6) (upholding conviction for threatening letters sent to police officers);

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

[33] Even speech to government officials might, of course, be unprotected if, in context, it seems to threaten violence, or perhaps if it involves telephone calls to an offical's home.

Second, some attempts to identify unwanted speech might be unconstitutionally vague or overbroad. This is especially so when the speech is defined using terms such as "intent to annoy," which are potentially broad enough to cover what should be permissible attempts to explain to people what they've done wrong—calls to businesses to tell them off about poor product quality, e-mails to acquaintances or former friends to tell them how they've hurt you, and the like.[34] Nonetheless, suitably narrow and clear harassment statutes limited to one-to-one speech ought to be constitutional, for reasons given in the preceding subsection.

C. The Supreme Court Doctrine

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

1. Mailings to Unwilling Recipients' Homes

Most clearly, *Rowan v. United States Post Office Department* upheld the ban on mailings sent to people who demanded that the mailer stop sending them things, and in the process relied heavily on the fact that the restriction was on speech said specifically *to* an unwilling listener. "[N]o one has a right to press even 'good' ideas on an unwilling recipient," the Court held, and noted that the listener who said no to future mailings was entitled to protection as an "unreceptive addressee."[35]

Indeed, just a year after *Rowan*, *Organization for a Better Austin v. Keefe* made explicit the distinction between speech to an unwilling listener and speech about an unwilling subject.[36] In holding that plaintiffs couldn't enjoined from distributing in Keefe's neighborhood leaflets that criticized Keefe's business practices, the Court concluded that, "Among other important distinctions" between *Organization for a Better Austin* and *Rowan*, Keefe "was not attempting to stop the flow of information into his own household, but to the public."[37] If someone wanted to send things *to* Keefe, the law might well have protected Keefe from such speech. But the law may not protect Keefe from things said *about* him.

Likewise, *Consolidated Edison Co. v. Public Serv. Comm'n*[38] struck down a ban on utilities' mailing advocacy to people's homes, and *Bolger v. Youngs Drug Products*[39] struck down a ban on the mailing of contraceptive adver-

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[34] [Cite cases.]

[35] *Id.* at 737, 738.

[36] 402 U.S. 415 (1971).

[37] *Id.* at __.

[38] 447 U.S. 530 (1980).

[39] 463 U.S. 60 (1983).

tisements. Both laws were defended on the grounds that they protected householders from unwanted speech, but in both instances the Court rejected the argument. Though *Rowan* let individual householders block continued unwanted speech into *their own* homes, the government couldn't protect unwilling householders by restricting mass speech that could reach willing listeners.

"[W]e have never held," the Court reasoned in *Bolger*, "that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended."[40] Likewise, in *Consolidated Edison*, the Court relied on *Martin v. City of Struthers*, a case that held that cities couldn't categorically ban all house-to-house political or religious leafleting, but could enforce "No Soliciting" signs put up by the householders.[41] So a restriction on speech that leaves speakers free to speak to willing listeners (e.g., the law in *Rowan*, or a law enforcing "No Soliciting" signs) is constitutional. A restriction on speech that interferes with speakers' ability to speak to potentially willing listeners (e.g., the laws in *Keefe*, *Bolger*, and *Consolidated Edison*) is unconstitutional. And this is so even when—as in *Keefe*—the restrictions focuses on speech that's about an *unwilling target* though it is said to potentially *willing listeners*.

2. Physical Approaches to People and Continued Physical Presence Outside Their Homes

Likewise, in *Hill v. Colorado*,[42] the Court upheld a law that banned people from approaching within eight feet of others to give them leaflets, unless the recipient specifically consented to such an approach. (The law was limited to speech within 100 feet of a health care facility.) The law, the Court held, was constitutional because it focused on speech that was "so intrusive that the unwilling audience cannot avoid it"[43] and yet left open "ample alternative channels" for reaching potentially willing listeners.[44] The Court reaffirmed the *Rowan* principle that "no one has a right to press even 'good' ideas on an unwilling recipient," in a context where the speech was being targeted to particular individual listeners. But it also stressed that people remained free to speak in a one-to-many way to the public at large, even if some unwilling listeners were included.[45]

Frisby v. Schultz takes a similar approach. In *Frisby*, the Court upheld a content-neutral ban on residential picketing, on the theory that residential picketing "is narrowly directed at the household, not the public. The type of

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[40] *Id.* at 72.

[41] [Cite.]

[42] 530 U.S. 703 (2000).

[43] 530 U.S. at 716.

[44] *Id.* at 726.

[45] *Id.* at __.

picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[46] And when the speakers retain "ample alternative channels" for speaking to the rest of the public—such as marching through the neighborhood, going door-to-door to express their views to the target's neighbors, and the like—the restriction is permissible.[47]

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

3. Radio Broadcasts

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

In *Pacifica*, five Justices upheld the ban on the broadcast of the "seven dirty words" on radio, relying partly on *Rowan*,[48] which they characterized as generally allowing people to be protected from offensive message in their homes. Justice Brennan's dissent responded—in my view, correctly—that the *Rowan* law was quite different. In *Rowan*, "householders who wished to receive the sender's communications were not prevented from doing so."[49] But in *Pacifica*, which dealt with a one-to-many medium rather than a one-to-one medium, protecting those who are offended by vulgarity on the radio meant restricting speech to willing listeners as well.[50]

Nonetheless, this *Pacifica* exception was distinctly limited. The three-Justice lead opinion made clear that its rationale rested on the "low-value" status of vulgarities, so the result would have presumably been different because of speech that is offensive but doesn't "depict[] sexual and excretory activities."[51] And the three Justices also stressed that "if it is the speaker's

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[46] 487 U.S. 474, 486 (1988).

[47] *Id.* at 483–84.

[48] 438 U.S. 726, 748 (1978) (Stevens, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 759 (Powell, J., joined by Blackmun, J.).

[49] *Id.* at 766 (Brennan, J., dissenting).

[50] *Id.*

[51] *Id.* at 731–32.

opinion that gives offensive, that consequence is a reason for according it constitutional protection."[52]

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

4. No Limitation to Speech That Reaches into the Home

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

Conversely, *Pacifica* stated that much speech—including speech that contains ideas that many people might find offensive—was constitutionally protected even when it used media that reach into the home (broadcast radio and television). The Court has also expressly declined to extend *Pacifica* to World Wide Web communications, even though they tend to reach into the home to the same extent that radio does.[53] And the *Pacifica* lead opinion distinguished radio from newspapers, even though newspapers are often delivered to the home.[54]

5. The Common Threads: Intrusiveness, Plus One-to-One Speech

There are instead two common threads in the speech that can be restricted, at least in all the cases except *Pacifica*. First, the speech is seen as physically intruding into the listener's private space. That literally happens when a leafleter refuses to honor a "No Soliciting" sign.[55] It happens when an unwanted letter makes its way into a recipient's mailbox.[56] It happens in some sense when a person receives an unwanted telephone call in his home,[57] or even in his office (or, these days, on his cell phone even when he is in a public place). It also happens when someone approaches someone else too closely, as in *Colorado v. Hill*, or repeatedly follows someone even at a longer distance. The law plausibly treats all these sorts of speech as intruding onto a person physically, by using the person's real or personal property or coming too close to that person.

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[52] *Id.* at 745–46.

[53] Reno v. ACLU.

[54] 438 U.S. at __.

[55] Martin v. City of Struthers.

[56] Rowan.

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

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

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

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

The justly controversial *Pacifica*, though, has to be seen as a narrow case that was limited from the outset and has remained limited since. First, the lead opinion relies heavily on the judgment that the particular speech at issue in that case—vulgarities—is of low value.[58] Second, and relatedly, the lead opinion stresses that the speech was offensive only because of the particular words that were chosen, and not because of the offensive message.[59] Third, the lead opinion and the concurrences stress the accessibility of radio to children,[60] "even those too young to read."[61]

Fourth, the lead opinion noted that the material was broadcast during the day, and left open the possibility that the same speech would be constitution-

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[58] 438 U.S. at __.

[59] *Id.* at __.

[60] *Id.* at 749 (Stevens, J.); *id.* at 756–58 (Powell, J., concurring).

[61] 438 U.S. at 749 (Stevens, J.).

ality protected if broadcast at night,[62] something that the D.C. Circuit later specifically held;[63] this further highlights the focus on protecting small children rather than protecting unwilling listeners, since unwilling listeners may be present at night and not just during the day. Fifth, the lead opinion noted that the case didn't involve a criminal prosecution.[64] And since *Pacifica*, the Court has refused to extend *Pacifica*, treating it as inapplicable to the Internet.[65]

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

III. INSULTING SPEECH ABOUT PEOPLE AND THE FIRST AMENDMENT

A. The General Protection of Speech About People

Restrictions on public speech *about* a person, then, stand on very different First Amendment footing from restrictions on unwanted speech *to* the person. And such restrictions should generally be unconstitutional, except when limited to speech that falls within the First Amendment exceptions, such as threats[66] and libel.[67]

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

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[62] *Id.*

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

[64] *Id.* at 750.

[65] Reno v. ACLU.

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

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

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

B. Content-Based Speech Restrictions

1. Generally

To begin with, all the restrictions I describe here are content-based speech restrictions. Many expressly target speech based on content: Consider, for instance, the Washington statute that makes it a crime to, "with intent to harass, intimidate, torment, or embarrass any other person, . . . mak[e] an electronic communication to such other person or a third party . . . [u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[68] Likewise, consider the Berea, Kentucky order that "[Joanna Hamrick] is prohibited from posting any information/comments/threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family."[69]

Some of the statutes don't mention content, but punish speech or conduct done with the intent to "annoy," "harass," or cause "substantial emotional distress," e.g., "with purpose to harass another" "mak[ing] . . . a communication . . . [in any] manner likely to cause annoyance or alarm."[70] Yet when the communication causes annoyance because of its offensive content, rather than for other reasons (for instance, because it causes a phone to ring in the

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[68] REV. CODE WASH. § 9.61.260.

[69] Cite.

Some courts have reasoned that harassment laws restrict "the manner and means" of speech—e.g., an unwanted telephone call—"rather than [the] content." *E.g.,* State v. Anonymous, 389 A.2d 1270 (Conn. Super. Ct. 1978); State v. Neames, 377 So. 2d 1018 (La. 1979); State v. Brown, 85 P.3d 109 (Ariz. Ct. App. 2004). But this is not the case when a communication is found to be "likely to cause annoyance or alarm" precisely because of what it says, rather than (say) its waking someone up in the middle of the night. And the fact that a content-based restriction applies only to some media or some places doesn't keep it from being content-based. *See, e.g.*, Carey v. Brown, __ (1980) (concluding that a ban on residential picketing that had an exception for labor picketing was unconstitutionally content-based, even though it applied only to picketing outside people's homes); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (likewise as to a content-based ban on picketing outside schools); Forsyth County v. Nationalist Movement (likewise as to a content-based permit fee for demonstrations).

[70] Cite.

middle of the night[71]), restricting such a communication because of its annoying content is a form of content-based speech restriction.[72]

Indeed, many of the leading cases striking down restrictions on offensive speech involved laws that on their face didn't mention content, but focused on the offensive purpose and effect of the defendant's behavior. Consider, for instance, *Snyder v. Phelps* and *Hustler Magazine v. Falwell*, which relied on the First Amendment to reverse intentional infliction of emotional distress judgments that were based on the content of speech. Though emotional distress tort claims are often based on speech, speech isn't an element of the tort. Both speech and nonspeech conduct can be actionable if they recklessly or purposefully inflict severe emotional distress through "outrageous" conduct. But when the distress and the outrageousness "turn[] on the content and viewpoint of the message conveyed"—when it is "what [defendant] said that exposed it to tort damages"—the application of the tort is treated as content-based, and therefore unconstitutional.[73]

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[71] Cite.

[72] *See* United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011) ("The portion of Section 2261A(2)(A) relied on in the Indictment amounts to a content-based restriction because it limits speech on the basis of whether that speech is emotionally distressing to A.Z."); 18 U.S.C. § 2261A(2)(A) (making it a crime to, "with the intent . . . to . . . cause substantial emotional distress to a person in another State . . . use[] the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that causes substantial emotional distress to that person").

Asgian v. Schnorr, 1996 WL 557410 (Minn. Ct. App. Oct. 1), reasoned that a restraining order barring all contact with a person was content-neutral, "because it prohibits all communication with respondent and serves purposes unrelated to the content of the expression," namely "the well-being, tranquility, and privacy of the home." *Id.* at *3 (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)). But I think this is mistaken: The order was entered based on a finding that the person had engaged in speech that was seen as "an intentional invasion of privacy," *id.* at *2, because of its content—repeated letters seeking donations to the university, or offering supermarket coupons couldn't have led to such an order—and the order was aimed at preventing the repetition of such intrusive, offensive, and frightening content. The order, which barred future one-to-one contact, may well have been constitutional for the reasons described in Part II. But it was justified by the content of speech, not by content-neutral factors that were unrelated to the content.

[73] 131 S. Ct. 1207, 1218–19 (2011) ("We have identified a few limited situations where the location of targeted picketing can be regulated under provisions that the Court has determined to be content neutral. . . . . The facts here are obviously quite different, both with respect to the activity being regulated and the means of restricting those activities. . . . The record confirms that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself."); *see also id.* at 1218 ("To the extent [certain funeral picketing restrictions] are content neutral, they raise very different questions from the tort verdict at issue in this case."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. See . . . *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988) . . . .").

Likewise, in *Cohen v. California*, *Hess v. Indiana*, *Edwards v. South Carolina*, *Terminiello v. City of Chicago*, and *Cantwell v. Connecticut*, defendants were found guilty of breach of the peace and disorderly conduct, crimes that cover nonspeech conduct as well as speech.[74] Yet the Court focused on how the speech restrictions applied to the speech because of "the effect of [the speaker's] communication upon his hearers"[75] and struck them down as unconstitutional.[76]

Some courts have upheld the laws in part by calling them restrictions on the "conduct" of "harassment" or "stalking" rather than "speech"[77] (though only when dealing with restrictions on one-to-one speech). Such attempts to evade free speech protection by labeling are reminiscent of Justice Blackmun's dissent in *Cohen v. California*, in which the entirety of the First Amendment discussion consisted of this paragraph:

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[74] Cite.

[75] *See* Cantwell v. Connecticut, 310 U.S. 296, 308–09 (1940); *see also* Feiner v. New York, 340 U.S. 315, 318 n.1 (1951) (involving a statute that defined "the offense of disorderly conduct" to cover "[using] offensive, disorderly, threatening, abusive or insulting language, conduct or behavior," "[acting] in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others," or "[congregating] with others on a public street and refus[ing] to move on when ordered by the police," "with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned"). The Court upheld the conviction in *Feiner*, but only on the grounds that the speech was unprotected by the First Amendment because it posed a "clear and present danger of . . . immediate threat to public safety." *Id.* at 320.

[76] *See also* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities 'simply by averting [our] eyes.' *Cohen v. California*."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, see, *e.g.*, *Cantwell v. Connecticut*, . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid."); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation . . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. See . . . *Terminiello v. Chicago*."); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Cohen v. California . . . ; Terminiello v. Chicago . . ."); Street v. New York, 394 U.S. 576, 586 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers. See, *e.g.*, . . . Edwards v. South Carolina; Terminiello v. City of Chicago; cf. Cantwell v. Connecticut.").

[77] *See, e.g.*, State v. Brown, 85 P.3d 109 (Ariz. Ct. App. 2004); State v. Musser, 977 P.2d 131 (1999); Thorne v. Bailey, 846 F.2d 241, 243 (4th Cir. 1988); Gormley v. Director, 632 F.2d 938, 941–42 (2d Cir. 1980); McKillop v. State, 857 P.2d 358, 363 (Alaska Ct. App. 1993); State v. Elder, 382 So. 2d 687 (Fla. 1980); Baker v. State, 494 P.2d 68 (Ariz. Ct. App. 1972); State v. Roesch, 1995 WL 356776, *5 (Conn. Super. Ct. June 6); State v. Richards, 896 P.2d 357 (Idaho 1995).

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

Justice Blackmun was, I think, mistaken in concluding that vulgarities should be substantively unprotected by the First Amendment (that's what the *Chaplinsky* reference was suggesting). But he was even more clearly mistaken in dismissing Cohen's wearing of the jacket as "mainly conduct and little speech." The noncommunicative part of the conduct—simply wearing a jacket, any jacket—was not why Cohen was being punished. The reason why Cohen was being punished was precisely the speech written on his jacket. That's a speech restriction, and labeling it "conduct" or "disturbing the peace" shouldn't strip it of constitutional protection.

The same true is as to "harassment." The government may not "foreclose the exercise of constitutional rights by mere labels,"[78] such as "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression."[79] Likewise, it may not eliminate First Amendment scrutiny by just labeling communication as the "conduct" of "harassment."

2. "Secondary Effects"

The Court has, controversially, concluded that some facially content-based laws should be treated as content-neutral if they are justified with reference to the "secondary effects" of speech (such as the supposed tendency of adult bookstores and movie theaters to attract the crime-prone).[80] But the tendency of speech to distress people is not treated as a secondary effect, and neither is the tendency of speech to cause harms that flow from such distress—for in-

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

[79] New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (internal citations and footnotes omitted) ("In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations.").

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

stance, potential fights,[81] policing costs needed to prevent fights,[82] and injury to international relations caused by protests outside foreign embassies.[83]

Restrictions justified by such harms are thus seen as content-based, not content-neutral. "'The emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself."[84] "Listeners' reaction to speech is not a content-neutral basis for regulation."[85]

3. Hill v. Colorado

In *Hill v. Colorado*,[86] the Court upheld as content-neutral a restriction on "knowingly approach[ing]" within eight feet of another person (and within one hundred feet of a health care facility), without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." This too was a controversial judgment, both among the Justices and among scholars.[87] As the dissent pointed out, under the statute, a "speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent," and "[w]hether a speaker must obtain permission before approaching within eight feet—and whether he will be sent to prison for failing to do so—depends entirely on *what he intends to say* when he gets there."[88]

Nonetheless, even under *Hill* the harassment laws that I describe remain content-based. *Hill*'s judgment of content-neutrality rested on the premise that "the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech."[89] 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.

Harassment statutes that restrict speech about a person, on the other hand, apply to speech that is physically far removed from the subject of the speech. To the extent that they aim at protecting "privacy," they aim at protecting against intrusions that stem precisely from the "content of the [defendant's] speech"—the insulting or otherwise offensive nature of the speech,

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[81] R.A.V. v. City of St. Paul (1992).

[82] Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

[83] Boos v. Barry, 485 U.S. 312 (1988).

[84] *Johnson*, quoting *Boos*; see also *R.A.V.*

[85] *Nationalist Movement*; see also *R.A.V.*

[86] 530 U.S. 703 (2000).

[87] Cite dissent; cite articles.

[88] Cite.

[89] Cite.

or the information revealed by the speech—and not the physical intrusiveness of the speech.

This distinction is also visible in the Court's observation that the law was a "minor place restriction on an extremely broad category of communications with unwilling listeners." To be sure, the narrowness of the restriction is generally not an aspect of the content discrimination analysis.[90] Even a minor place restriction on speech with a certain content is generally seen as content-based.[91] Nonetheless, the physical narrowness and topical breadth of the restriction, coupled with the focus on the intrusion on unwilling listeners, reinforces the judgment that the law focuses on the physical intrusiveness of the speech: intrusiveness that is present only in a particular place, intrusiveness that is present without regard to the subject matter of the speech, and intrusiveness that stems from the fact that the speech is speech to an unwilling listener.

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

C. Bad Purposes

1. Generally

Most of the restrictions I describe apply only to speech that is said with a purpose to "annoy," "embarrass," "harass," "torment," or produce "substantial emotional distress." This, though, doesn't strip the speech of constitutional protection. And it doesn't so limit the practical effect of the laws that they stop being "substantially" overbroad.

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

Not all speakers take this view. Some might genuinely speak "in sorrow, not in anger." Some might have an emotional or philosophical attitude that lets them wish that the subjects of their criticism reform without the subjects' feeling bad in the process. And some might have a purely instrumental focus,

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[90] Cite dissent.

[91] *See supra* note 69.

in which they (for instance) seek only that listeners vote against the subject of the speech and genuinely don't care how the subject feels about it.

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

Nor is it a purpose that strips the speech of constitutional protection. As a general matter, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection,"[92] at least outside the narrow First Amendment exceptions, such as incitement.[93] This is so for three reasons.

First, speech remains valuable to public debate even when the speaker is motivated by hostility. Often much of the most useful criticism of a person comes from people who have good reason to wish that person ill. To be sure, those people's motivations may make the criticism less credible, just like praise is made less credible when the speaker has good reason to wish the person well. But the criticisms may nonetheless be apt, despite the bias of the source. And if all those who wish a person ill were excluded from discussion of the person's qualities, many accurate criticisms would never be aired.

Second, speech remains an important part of a speaker's self-expression even when the speaker is motivated by hostility to the target of the speech. Those who feel themselves wronged by someone may have powerful emotional and moral reasons to complain about the alleged mistreatment, and to warn others to be wary of the target. People whose ex-spouses or ex-lovers have cheated on them, beat them, emotionally abused them, defrauded them, or infected them with sexually transmitted diseases are just as much engaged in self-expression when talking to their friends impartially—to the extent such a thing is possible—as when talking their her friends with the desire that the ex be banished from their social circle.[94]

Third, precisely because people who intend to inform listeners about a person's misdeeds often also intend to make the listener feel bad, even speakers who lack any hostile intent might be deterred by the fear that a prosecu-

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[92] FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007).

[93] Brandenburg v. Ohio.

[94] I assume here that the speech consists of true statements or of opinions, albeit ones that might have been motivated by hostility. If it consists of falsehoods, and especially knowing or reckless falsehoods, then it would be unprotected by the First Amendment regardless of the speaker's motivation.

tor will think they were speaking out of hostility. Say you have long battled a politician, a religious figure, a journalist, an academic, a lawyer, or a businessperson, and each of you have hurt the other politically and economically. You now want to harshly criticize the person, not because of any desire to annoy, embarrass, or harass the person, but simply because of a desire to inform the public of the person's latest misbehavior.

Yet you know that a prosecutor, judge, and jury might infer that you are motivated by a desire to annoy the other person, simply because such a desire is so common in situations like this (even if you know it's absent in your own mind).[95] This is what *Wisconsin Right to Life* referred to when it wrote that, "an intent-based test"—there, a test focused on an intent to urge people to vote for or against a candidate—

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

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

Note also that many of these laws define petty offenses for which the maximum sentence is six months or less,[96] which means there isn't a constitutional right to a jury trial,[97] and others call for injunctions and contempt pro-

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[95] Consider, for instance, *R.D. v. P.M.*, 202 Cal. App. 4th 181, 191–92 & n.11 (2011), which upheld an injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace. Defendant argued that she had distributed these leaflets "to inform consumers about her negative experience with [defendant] as a clinical social worker," but "[t]he trial court concluded . . . that [plaintiff's] intention was less to address an issue of public importance than to harass [defendant]." Perhaps the trial court was correct in this instance. But even someone who has a legitimate grievance against a professional, businessperson, or government official—and who, as a result of this grievance, is obviously angry with the target—might reasonably worry that a court will find that his mixed intentions were mostly "to harass" rather than to criticize.

[96] Cite example.

[97] Cite.

ceedings for violating injunctions, for which a jury trial is likewise unavailable.[98] A speaker might thus rightly worry that a misjudgment of motive on the part of a prosecutor and a judge—or just a judge acting alone—could lead to jail time for his speech.

2. "Solely" Bad Purposes / "No Legitimate Purpose"

Some statutes try to minimize the problems that a purpose test creates by covering only behavior that is "solely" intended to annoy, embarrass, and the like.[99] This, the theory goes, would focus only on an especially narrow range of speech that deserves to be unprotected;[100] and even if some instances of such speech should still be protected, at least they will be rare enough that the law wouldn't be unconstitutionally overbroad.

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

Speakers who condemn someone to the public, or to their acquaintances, may also want to get the emotional reward that comes from expressing their true feelings.[101] Speakers who cruelly mock someone might also want "to amuse and gain approval or notoriety" from some of their listeners.[102] They may also want to shame the target into not repeating the target's alleged misbehavior, whether towards the speakers or others.[103]

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[98] Cite.

[99] *See, e.g.*, 47 U.S.C. § 223(a)(1)(E) (outlawing "mak[ing] repeated telephone calls or repeatedly initiat[ing] communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication"); State v. Richards, 896 P.2d 357 (Idaho 1995) (interpreting the telephone harassment statute as "requiring that the sole intent of the call be to annoy, terrify, threaten, intimidate, harass or offend").

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

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

[102] *Id.*

[103] Some nonspeech conduct might come closer to having a sole purpose to annoy—calling someone in the middle of the night and then hanging up might qualify, since it doesn't inform any third parties of anything, doesn't provide the catharsis of telling someone how you really feel about his alleged mistreatment of you, and doesn't even communicate to the listener the message that he should feel ashamed or remorseful. Even there, the caller would have the purpose of enjoying himself, or perhaps even laughing with his friends about it, but one might see those as stemming from the annoyance of the listener. But speech, especially

So any law that is limited to speakers who have a "sole purpose" to annoy could be applied in one of three possible ways. First, it could be basically a dead letter, and known to be such, at least as to one-to-many speech, for the reasons I just mentioned.

Second, prosecutors, judges, and juries might ignore the "sole purpose" requirement, and apply the law whenever they see annoying the target as the "main" or "predominant" purpose of the speech. But such a judgment is so vague and subjective that it necessarily creates all the problems that the Court has identified as endemic to vague laws:[104] It doesn't provide speakers with guidance about what is and what isn't a crime. It opens the door to viewpoint-discriminatory enforcement, as prosecutors, judges, and jurors fall into the normal human habit of applying vague rules more favorably towards those they like than towards those they dislike. And it causes people to "steer far wide of the unlawful zone,"[105] for fear that they would be wrongly found to have spoken with an improper "predominant" purpose.

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

Much the same is true of statutory provisions that seek to narrow a statute's coverage by limiting it to behavior that lacks a "legitimate purpose."[106] What constitutes a legitimate purpose, especially when it comes to speech, is a matter of obvious dispute—and dispute that often relates to the viewpoint of the speech involved.[107]

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

Likewise, is it a legitimate purpose to try to get your friends and acquaintances to shun someone who has cheated on you? Has been promiscuous but not unfaithful? Has engaged in unsafe sex? Has engaged in male homo-

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speech to people other than just the person being criticized, generally has many more purposes.

[104] Grayned v. City of Rockford.

[105] Baggett v. Bullitt.

[106] Cite examples.

[107] *Lafaro v. Cahill*, 56 P.3d 56 (Ariz. Ct. App. 2002), upheld one such statute by reasoning that the "serves no legitimate purpose" proviso "exclude[s] pure political speech" from the scope of the statute. *Id.* at 62. But this does little to cure the problem, because the First Amendment protects much more speech than just "pure political speech." Cite.

sexual sex? Has had an abortion? Has aborted what would have been your child, and might do the same with other lovers in the future?[108] Secretly belongs to a religious group that holds racially prejudiced beliefs?

Does "no purpose of legitimate communication" only cover speech that consists of "threats and/or intimidating or coercive utterances," as New York's highest court held?[109] Or does mailing a torn-up copy of a support order to one's ex-wife—which seems likely to have been motivated by a desire to express one's feelings about the order, and perhaps also one's plans not to abide by it—also qualify as conduct that "serve[s] no legitimate purpose," as New Jersey's highest court held?[110]

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

> Adding a phrase "without any legitimate purpose" to that subsection injects a vagueness into the statute which cannot withstand First Amendment scrutiny. Such a "limiting construction" disguises the constitutional difficulties of the statute but does nothing to resolve them. A judge or a jury still has to determine whether or not the particular speech of the defendant was "for a legitimate purpose." This delegation of power to judges or juries with no ascertainable standards does not give sufficient breathing room to the constitutionally guaranteed freedoms of speech and press.[111]

Judgments about the legitimacy of a speaker's purpose are troublesome enough in tort lawsuits, such as lawsuits for interference with business relations through ill-motivated true statements and statements of opinion, or for disclosure of private facts. This is one reason why these torts have sometimes been held to be constitutionally precluded,[112] and have generally been read quite narrowly.[113] But I think the constitutional vagueness problem—stemming from the lack of guidance to speakers, the risk of viewpoint discrimination in enforcement, and the risk of deterring even speech that is

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[108] Cite sources from http://volokh.com/2011/06/07/when-facts-about-anothers-life-are-also-facts-about-your-life/ .

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

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

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

[112] Penn. true statements case; N.C. disclosure tort case.

[113] Restatement of Torts; California interference with business relations case; narrow disclosure tort cases.

well-motivated—becomes insuperable when it comes to criminal punishment for speech that allegedly lacks "legitimate purpose."[114]

D. Unprotected Categories of Speech

1. Generally

To be sure, even one-to-many speech can be restricted if it fits within one of the First Amendment exceptions. False statements about a person can generally be restricted (subject to the First Amendment *mens rea* requirements), whether they are defamatory or merely offensive because of their falsehood.[115] Threats of illegal conduct can likewise be restricted.[116] So-called "fighting words"—personal face-to-face insults that are likely to provoke a fight—can be restricted as well.[117] Some stalking and harassment statutes are facially limited to unprotected speech, such as threats.[118]

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[114] *See* State v. Norris-Romine, 894 P.2d 1221 (Ore. Ct. App. 1995) (striking down a state stalking statute on those grounds). *But see* State v. Fratzke, 446 N.W.2d 781 (Iowa 1989) (concluding that the presence of a "without legitimate purpose" proviso in a statute reading, "A person commits harassment when, with intent to intimidate, annoy or alarm another person, the person . . . [c]ommunicates with another by telephone, telegraph, or writing without legitimate purpose and in a manner likely to cause the other person annoyance or harm" "eliminates any constitutional impediment to application of the 'intent to annoy' element"). Some courts have upheld statutes that ban conduct that poses as "credible threat with the intent to place such person in reasonable fear for such person's safety" and at the same time lacks a "legitimate purpose." State v. Rucker, 987 P.2d 1080, 1094–95 (Kan. 1999); People v. Tran, 47 Cal. App. 4th 253, 259 (1996); Johnson v. State, 449 S.E.2d 94, 96 (Ga. 1994); Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995); *see also* Woolfolk v. Commonwealth, 447 S.E.2d 530, 533 (Va. Ct. App. 1994) (same, as to statute that required conduct that purposefully or knowingly places the target "in reasonable fear of death, criminal sexual assault, or bodily injury," where the "no legitimate purpose" proviso was added by the court as a limiting construction, rather than appearing in the statute); Pallas v. State, 636 So. 2d 1358, 1359–60, 1363 (Fla. Ct. App. 1994) (same, as to statute that required a "credible threat" and excluded "constitutonally protected activity"); Bouters v. State, 659 So. 2d 235, 237–38 (Fla. 1995) (same). The "threat" requirement, however, materially narrows the scope of the statute—indeed, likely limits it to constitutionally unprotected true threats—and thus the potential deterrent effect of the vague "legitimate purpose" constraint. This Essay discusses laws that restrict speech that does *not* fall within the First Amendment exception for threats.

[115] Time v. Hill; Cantrell. Note dispute about injunctions in libel cases. Several harassment cases have involved defendants impersonating their ex-girlfriends—either on Web sites or in responses to personal ads—and saying, in this persona, that they are interested in casual sex. This can cause others to contact the ex-girlfriend in a distressing and frightening way, and could also injure her reputation. United States v. Sayer, 2012 WL 1714746 (D. Me. 2012); People v. Kochanowski, 719 N.Y.S.2d 461 (Sup. Ct. 2000); People v. Johnson, 617 N.Y.S.2d 577 (App. Div. 1994). Such speech could constitutionally be restricted precisely because it involves knowingly false statements.

[116] Black; Watts.

[117] Chaplinsky.

[118] Arizona, Arkansas statutes. *See, e.g.*, State v. Rucker, 987 P.2d 1080, 1094–95 (Kan. 1999); People v. Tran, 47 Cal. App. 4th 253, 259 (1996); Johnson v. State, 449 S.E.2d 94, 96

But outside those exceptions, the speech is protected, and can't be criminalized as supposed "harassment." Indeed, this is precisely what some state supreme courts have held, in limiting their stalking or harassment laws to speech that fits within the First Amendment exceptions.[119]

2. Exceptions for "Constitutionally Protected Activity"

Some stalking and cyber-harassment statutes expressly "constitutionally protected activity" from their scope. Thus, for instance, D.C. law provides,

> (a) It is [a crime] for a person to purposefully engage in a course of conduct directed at a specific individual [that intentionally, knowingly, or negligently] cause[s] that individual to … [s]uffer [significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling] ….
>
> (b) *This section does not apply to constitutionally protected activity*.[120]
>
> "To engage in a course of conduct" means directly or indirectly, or through one or more third persons, in person or by any means, on 2 or more occasions, to:
>
> (A) Follow, monitor, place under surveillance, threaten, or *communicate* to or *about another individual*;
>
> (B) Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so; or
>
> (C) Use another individual's personal identifying information [defined to include a person's name]….[121]

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

"Constitutionally protected activity" and "constitutionally protected speech" are not clearly defined terms. One important difficulty is that First Amendment cases generally ask whether *a particular law* restricting speech is constitutionally permissible, not whether *a particular kind of speech* is constitutionally protected. The same speech might be constitutionally protected against one law but not against another. Picketing fifty feet from a person's house, for instance, is constitutionally protected against content-based restrictions.[122] It is constitutionally protected against a content-neutral restriction on picketing within three hundred feet of a house.[123] It may or may

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(Ga. 1994); Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995); Bouters v. State, 659 So. 2d 235, 237–38 (Fla. 1995); Woolfolk v. Commonwealth, 447 S.E.2d 530, 533 (Va. Ct. App. 1994).

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

[120] *Id.* § 22-3133 (emphasis added).

[121] D.C. CODE ANN. § 22-3132 (emphasis added).

[122] Carey v. Brown.

[123] Madsen.

not be constitutionally protected against a content-neutral restriction on picketing within fifty feet of a house.[124] Likewise, Cohen's actions in wearing a "Fuck the Draft" jacket in a courthouse was speech that was constitutionally protected against punishment under a disturbing the peace law.[125] But it's not clear whether it would be constitutionally protected against punishment under a narrower law limited to vulgarities in courthouses.[126]

Indeed, the premise of many defenses of criminal harassment laws is precisely that these laws may constitutionally punish even speech that would be protected against other laws.[127] If those defenses are right, then perhaps no speech that intentionally annoys or harasses the subject is constitutionally protected, when it is being punished through a harassment law or being restricted through a restraining order.

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

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

To be sure, such speech that's not within an exception could still in some situations be restricted through content-neutral speech restrictions that pass the *Ward v. Rock Against Racism* test, or content-based speech restrictions that pass strict scrutiny. But it would still be "constitutionally protected speech" and thus exempted from the D.C. statute. So, for instance, under this interpretation residential picketing immediate outside a person's home would *not* be covered by the statute, because it would be "constitutionally protected activity" (absent some threats or fighting words or defamation by the picketers). And this would be so even though the residential picketing could have been restricted by a narrow content-neutral residential picketing ban.[128]

Under such an interpretation of the D.C. statute, the statute would be constitutional. It wouldn't be unconstitutionally overbroad, because it would apply only to speech that fits within the existing exception.[129] And it wouldn't

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[124] Frisby v. Schultz.

[125] Cohen v. California.

[126] *See id.* at __ (noting that the case didn't involve a restriction limited to courthouses); ISKCON v. Lee (holding that viewpoint-neutral and reasonable restrictions on speech in government buildings are generally constitutional).

[127] Cite.

[128] Frisby v. Schultz.

[129] *See, e.g.*, O'Brien v. Borowski, 961 N.E.2d 547, 554–57 (Mass. 2012) (interpreting the state harassment prevention order statute as limited to the constitutionally unprotected cat-

be unconstitutionally vague, because—as so interpreted—the statute would be a combination of a criminal libel statute, a threat statute, a fighting words statute, and the like, though limited to situations where the defendant made at least two statements, and purposefully, knowingly, or negligently caused "significant mental suffering or distress."[130]

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

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

To be sure, the provision might have one substantive goal: to immunize the statute from a First Amendment overbreadth challenge, by definitionally preventing the statute from being overbroad. An overbreadth challenge is a challenge to a statute on its face, not just as applied to the challenger. The challenger is arguing that the statute is invalid as to everyone, because it covers a substantial amount of constitutionally protected speech.[131] By expressly stating that the statute doesn't apply to constitutionally protected speech, the enacters of the law might have wanted to preclude such a finding of overbreadth.

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

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egories of "fighting words" and threats, though doing so even in the absence of an express "constitutionally protected activity" exclusion).

[130] The statute wouldn't violate the rule of *R.A.V. v. City of St. Paul*, because there is "no realistic possibility that official suppression of ideas is afoot."

[131] *See, e.g.*, United States v. Stevens.

wide range of constitutionally protected speech, the existence of the statute deters such constitutionally protected speech.[132] Even people who believe their speech will ultimately be found to be constitutionally protected, and who thus think they have a good First Amendment defense to the statute, may reasonably worry that they will be prosecuted and even convicted under the statute before they ultimately prevail in court. Defendants—even ones whose own speech might be punishable by a narrower statute—are thus allowed to raise the overbreadth of a statute in trying to get the statute struck down on its face, so that this "chilling effect" caused by the overbroad statute is eliminated.[133]

A tautological statement that a statute shouldn't be read to cover constitutionally protected activity—which merely restates the general principle that constitutionally protected activity is protected by the Constitution against punishment—does nothing to mitigate the chilling effect posed by the statute's facial breadth. Despite such a statement, even people who believe their speech will ultimately be found to be constitutionally protected (and therefore exempted by the "constitutionally protected activity" clause), and who thus think they have a good statutory defense under that clause, may reasonably worry that they will be prosecuted and even convicted under the statute, before they ultimately prevail in court.

To prevent this, people have to still be able to raise the overbreadth of the statute—notwithstanding the statutory "constitutionally protected activity" exception—in trying to get the statute struck down on its face, so that this "chilling effect" is eliminated. In the words of the Minnesota Supreme Court, "a savings clause that provides that conduct protected by the state or federal constitutions is not a crime under this section" "cannot substantively operate to save an otherwise invalid statute."[134]

Another way of reaching the same result is through the void-for-vagueness doctrine. First Amendment doctrine is complicated and uncertain, especially once one reaches beyond the historically defined First Amendment exceptions (for incitement, obscenity, threats, fighting words, and defamation). The Court has never expressly defined what it takes for an interest to

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

[133] Alexander v. United States, 509 U.S. 544, 555 (1993).

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

be "compelling" or even "substantial." It has never decided whether there ought to be First Amendment exceptions for, say, speech that discloses private facts about another person, or speech that uses another's name without that person's permission, and what the scope of those exceptions would be. A speaker who is considering whether his speech could get him sent to prison needs more guidance than that offered by an assurance that "constitutionally protected [speech]" is immunized from prosecution.[135]

And this vagueness also has the effect of making the law overbroad. What the Court held in *Reno v. ACLU* about a ban on speech that is "indecent" and "patently offensive" (even when limited to "sexual or excretory activities or organs") is equally true here: A law that covers otherwise protected speech but excludes "constitutionally protected activity" still has an unacceptable "chilling effect," poses a substantial "threat of censoring speech that, in fact, falls outside the statute's scope," and "unquestionably silences some speakers whose messages would be entitled to constitutional protection."[136]

So of these two interpretations of the "constitutionally protected activity" clause, the second, broader, interpretation poses very serious constitutional problems (and is indeed, I believe, unconstitutional). The better approach then is to use the first, narrower, interpretation.[137] Under this interpretation, a statute that excludes "constitutionally protected speech" or "constitutionally protected activity" would cover only speech that falls within the existing, well-established First Amendment exceptions (such as incitement, threats, fighting words, and libel).[138] It would not cover speech that falls outside those exceptions.

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[135] *See also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-29, at 1031 (2d ed. 1988) (arguing that a hypothetical statute that reads, "It shall be a crime to say anything in public unless the speech is protected by the first and fourteenth amendments," "simply exchanges overbreadth for [unconstitutional] vagueness"). "[T]he premise underlying *any* instance of facial invalidation for overbreadth must be that *the Constitution does not, in and of itself, provide a bright enough line to guide primary conduct*, and that a law whose reach into protected spheres is limited *only* by the background assurance that unconstitutional applications will eventually be set aside is a law that will deter too much that is in fact protected." *Id.*

[136] 521 U.S. 844 (1997).

[137] *See* DeBartolo (concluding that statutes should be interpreted, when possible, to avoid serious constitutional problems).

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

3. Speech on Matters of Purely Private Concern

The examples that I gave in the Introduction all involved speech related to politics, religion, or government conduct. What if a harassment statute were limited to speech about people that is on matters of "purely private concern"? No harassment statutes currently embody such a limitation, but what if one did?[139]

The Court has indeed held that false statements of fact are less protected against civil defamation liability when they deal with matters of "purely private concern," and that the government acting as employer has broad power to fire and discipline employees when they speak on matters of "purely private concern."[140] And in *Snyder v. Phelps*, the Court suggested that statements on matters of purely private concern could lead to liability under the "intentional infliction of emotional distress" tort, which allows such liability for statements that are "outrageous" and that recklessly or purposefully inflict "severe emotional distress."[141]

But the Court has long resisted the notion that such speech can be criminally punished. We see this in *United States v. Stevens*, which struck down a ban on certain depictions of violence towards animals.[142] The statute had a specific exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," and the government stressed that exception in defending the statute. But the Court concluded that the exception did not save the statute.

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order to make the speech into "constitutionally [un]protected activity"—even though it would only have to prove negligence as to the causing of significant mental distress.

[139] *Cf.* Johnson v. Arlotta, 2011 WL 6141651, *5 (Minn. Ct. App. Dec. 12) (upholding injunction against speech that "affects or intends to adversely affect the . . . privacy of" the plaintiff, partly because the speech "did not implicate matters of public concern"); R.D. v. P.M., 202 Cal. App. 4th 181, 191–92 (2011) (upholding injunction that barred defendant from, among other things, distributing leaflets critical of plaintiff near plaintiff's workplace, partly because the speech had "only slight apparent relationship to any issue of public interest"); State v. Brown, 85 P.3d 109 (Ariz. Ct. App. 2004) (rejecting First Amendment challenge to ban on "conduct directed at a specific person which would cause a reasonable person to be seriously alarmed, annoyed or harassed and [which] in fact seriously alarms, annoys or harasses the person" because "Brown's repeated entreaties to [his ex-girlfriend] that they resume their relationship do not contain any such particularized political or social message warranting First Amendment protection"); Rzeszutek v. Beck, 649 N.E.2d 673, 680–81 (Ind. Ct. App. 1995) (rejecting challenge to protective order entered on behalf of a young woman against her family, partly because "person to person conversations between Lucy and her family members are largely unrelated to the market in ideas, and they are not protected by the first amendment"). Note that the law in *Brown* may well be a permissible restriction on unwanted one-to-one speech, see Part II, whether or not the speech includes a "particularized political or social message."

[140] Dun & Bradstreet; Connick v. Myers.

[141] Cite.

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

"*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value)," the Court held, "but it is still sheltered from government regulation."[143] "Even '[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons.'"[144] The Court was thus not willing to limit constitutional protection to that speech which relates to matters of "public concern."

And the examples to which the Court pointed in reasoning that the statute was overbroad were indeed not much connected to political, religious, scientific, or artistic matters. "[T]he constitutionality of [the statute] hinges on how broadly it is construed," the Court began, and went on to say, "[w]e read [the statute] to create a criminal prohibition of alarming breadth."[145] What alarmed the Court was the statute's coverage of, among other things, videos and photographs of hunting, depictions of certain livestock management and slaughter practices, and videos of cockfighting taken in places (such as Puerto Rico) where cockfighting is legal.[146]

I think the Court was right to hold that such images were protected by the First Amendment and that the statute was overbroad because it tried to restrict such images. But this simply reflects the Justices' view that the First Amendment protects more than just speech that is on matters of "public concern" in the sense of matters relating to politics, religion, science, art, economics, or government conduct.

Likewise, consider, for instance, *Sable Communications v. FCC*, which struck down a ban on dial-a-porn.[147] Dial-a-porn, even non-obscene dial-a-porn, seems pretty far removed from matters of "public concern." *San Diego v. Roe*,[148] cited by *Snyder v. Phelps*,[149] expressly viewed pornography as not being speech on matters of "public concern," and thus concluded that the government could fire an employee for producing pornography. Yet the *Sable* Court unanimously applied the same "strict scrutiny" test to a criminal law restricting dial-a-porn as it does to criminal laws restriction speech on matters of "public concern."[150] Other pornography cases, such as *United States v. Playboy Enterprises* and *Ashcroft v. ACLU (II)*, have done the same.[151]

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[143] Cite.

[144] Cite (quoting Cohen v. California, 403 U.S. 15, 25 (1971) (quoting Winters v. New York, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting))).

[145] Cite.

[146] Cite.

[147] 492 U.S. 115 (1989).

[148] Cite.

[149] Cite.

[150] Id. at 126.

[151] Cite.

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

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "The First Amendment does not protect speech and assembly only to the extent it can be characterized as political . . . ." We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction . . . .We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[152]

So the cases that authorize lower protection for speech on matters of private concern—*Connick v. Myers*, *Dun & Bradstreet v. Greenmoss Builders*, and *Snyder v. Phelps*—are the exception rather than the rule. And they are exceptions that seem limited to civil lawsuits, or other noncriminal punishment (such as loss of a job).

Such a limitation to civil cases is especially apt given the vagueness of the public concern/private concern line, which the Court has never defined with any clarity, and which has often been applied in surprising ways that seem quite inapt as to criminal liability for true statements. For instance, *Connick v. Myers* held that an assistant prosecutor's criticism of her managers was generally speech that was not on a matter of "public concern." Yet—as *Connick* itself suggests—surely such criticism of prosecutors couldn't be made a crime, even when it is said with the "intent to annoy" the prosecutors. Likewise, *Dun & Bradstreet* held that an erroneous and narrowly communicated credit report statement that a small business had declared bankruptcy was not con a matter of "public concern" and could thus more easily lead to libel liability. Yet true statements that a business had declared bankruptcy can't be criminally punished (or for that matter can't even lead to civil liability).[153]

Similarly, lower court libel and government employee speech opinions apply the "public concern" test in inconsistent ways. For instance, the New Jersey Supreme Court held that a person's allegation that his uncle had molested him when the person was a child was a matter of purely "private concern"[154] for libel law purposes. On the other hand, the California Court of Appeal concluded that the inclusion of a claim that a particular man had at-

[152] Connick v. Myers, 461 U.S. 138, 147 (1983) (internal citations omitted).

[153] Florida Star v. B.J.F.; Gates (Cal. Sup. Ct.).

[154] W.J.A. v. D.A., 2012 WL 1820878 (N.J. 2012).

tempted to rape a woman, in a leaflet posted around town listing alleged sexual attackers, was a matter of "public concern."[155]

The California opinion noted that the specific allegation was included as part of a newsletter that discussed sexual assault, but I doubt that this would yield much of a distinction: The allegation in the New Jersey case was part of a discussion in which the nephew complained about what he saw as the miscarriage of justice in an earlier libel case arising from the same allegation, including "allegations of perjury and intimidation of a witness."[156] The bottom line is that when an allegation of a crime is a matter of "public concern" is a matter on which lower courts haven't reached any clear answer. A statute that defined punishable speech in terms of "public concern" would thus not give speakers, prosecutors, judges, or juries enough guidance about what speech is punishable.

And, more importantly, regardless of how such allegations should be treated for libel purposes when they are *false*, surely such allegations can't lead to liability—including criminal punishment—when they are true. People ought to be free to discuss serious crimes that others have committed, even though naturally such discussion would annoy and distress the criminals (who would rather remain unknown), and may even be partly intended to distress the criminals.[157]

Likewise, consider the Mississippi Supreme Court's decision in *Mississippi Commission on Judicial Performance v. Osborne*.[158] Solomon Osborne was a black trial court judge who was running for reelection; at one campaign speech before a predominantly black political organization Osborne said, "White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." The Mississippi Supreme Court suspended Os-

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[155] Carney v. Santa Cruz Women Against Rape, 271 Cal.Rptr. 30 (Cal. Ct. App. 1990).

[156] Cite.

[157] For an example of a "harassment" prosecution for alleging that someone committed child molestation—with no requirement of a proof of falsity—see *State v. Ellison*, 900 N.E.2d 228 (Ohio Ct. App. 2008). Ellison and Gerhard were girls who had been friends, but their friendship stopped in seventh grade, when Ellison's younger brother alleged that Gerhard had molested him. (The police "investigated . . . and determined that [they] did not have enough evidence to substantiate" the claim.) In high school, Ellison posted a message to her MySpace page, alleging that Gerhard had "[m]olested a little boy." *Id.* at 239.

For this, Ellison was prosecuted and convicted of "mak[ing] . . . a telecommunication . . . with purpose to abuse, threaten, or harass another person," *id.* at 230; no showing of falsehood is required under the statute. The Ohio Court of Appeals reversed, holding that the statute didn't apply here, apparently partly because it read the term "harass" as implicitly requiring that the conduct "serve[] no legitimate purpose." *Id.* at 737. The court concluded that the prosecution didn't sufficiently disprove the theory that Ellison was motivated by "the legitimate purpose of warning others of what Ellison believed to be criminal behavior." *Id.* at 231.

[158] 11 So. 3d 107 (2009).

borne for a year, on the grounds that "conduct prejudicial to the administration of justice which brought the judicial office into disrepute," and it rejected Osborne's First Amendment defense by concluding that the speech was unprotected under the "legitimate public concern" test applicable to speech by government employees: Osborne's statement, the Court held, "is not worthy of being deemed a matter of legitimate political concern in his reelection campaign, but merely an expression of his personal animosity."[159]

It's not clear to me that speech by elected officials, such as judges, should be subject to the same First Amendment standards as speech by ordinary government employees. I also doubt that the speech here was rightly described as not "of legitimate political concern," since Osborne's statement—however prejudiced—was directly related to political power and race relations. And it seems to me that the Mississippi Supreme Court's decision is hard to reconcile with the same court's decision just a few years earlier, in *Mississippi Commission on Judicial Performance v. Wilkerson*,[160] which held that sharply anti-homosexual statements by a sitting judge (made in a letter to the editor and then in a radio interview) *were* on a matter of public concern.[161] Again, a "public concern" standard in a criminal harassment law would leave speakers, prosecutors, judges, and juries uncertain about what speech is protected.

But more importantly, whatever the right answer when it comes to the firing of government employees or the discipline of government-employed judges, surely the "public concern" standard as applied in these cases is an unconstitutional basis for criminal punishment for the expression of opinion. Even if Solomon Osborne was rightly disciplined for his statements about whites, he couldn't be criminally punished for such statements, even if he made the statements with the purpose of annoying, embarrassing, or distressing some people.

A "public concern"/"private concern" line may be acceptable in the circumstances in which it has operated for the last few decades, the government acting as employer and the imposition of liability for false statements (though even there it has been controversial).[162] And perhaps such a line is acceptable when it comes to civil liability—an area where vagueness concerns have been seen as less significant, though by no means insignificant—in the narrow zone of cases that involve "outrageous" conduct that recklessly causes severe emotional distress.[163] But given the vagueness and breadth of what courts have been willing to label "private concern," that line shouldn't be transplanted to criminal punishments for true statements.

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[159] *Id.* at 113.

[160] 876 So. 2d 1006 (2004).

[161] *Id.* at 1011–12.

[162] Cite Connick and Dun & Bradstreet dissents, articles criticizing those opinions.

[163] Snyder v. Phelps.

E. Harm

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

The answer, I think, is generally "no." This is particularly so as to speech on political, religious, or social matters—even when the speech is deliberately offensive and annoying to its target. *Snyder v. Phelps* and *Hustler v. Falwell* held that such speech can't lead to civil liability even when it is "outrageous" and purposefully causes severe emotional distress[164] (historically a highly demanding standard[165]). It thus can't lead to criminal liability under the considerably lower standards of criminal harassment laws.[166]

As Part III.D.3 noted, *Snyder* did suggest that speech that is "outrageous" and recklessly or purposefully causes severe emotional distress could lead to civil liability when it is on matter of purely "private concern." But, as I argued in that Part, I think the public/private concern line is too ill-defined to adequately protect free speech, both in the sense that it is vague and in the sense that past attempts to define the distinction have yielded results that are unsuited to restraints on accurate speech imposed by the government as sovereign. Perhaps District Attorney Harry Connick should be able to fire Sheila Myers for her criticisms of the D.A.'s office, on the grounds that such employment grievances are not on a matter of "private concern." But surely he shouldn't be able to prosecute her for "criminal harassment" if she blogs her criticisms in a way that is supposedly intended to annoy or embarrass her higher-ups.

More broadly, the existing First Amendment exceptions already recognize certain kinds of injuries to individual people that can be inflicted by speech. If false statements defame people, they may be unprotected libel.[167] If impersonating someone and claiming that she is seeking casual sex leads people to contact the victim of impersonation in distressing and frightening ways, such false speech may likewise be unprotected.[168] If statements threaten someone, they may fit within the "true threats" exception. If they offend someone and are sent directly to that person, they might be restrictable one-to-one speech,

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[164] Cite Hustler, Snyder.

[165] Cite Restatement.

[166] *See also* United States v. Cassidy, 814 F. Supp. 2d 574, 585 (D. Md. 2011) (rejecting the claim that a ban on one-to-many speech that causes substantial emotional distress is justified by a "compelling interest in protecting victims from emotional distress sustained through an interactive computer service").

[167] *See, e.g.*, Evans v. Evans, 162 Cal. App. 4th 1157, 1168 (2008) (stating that a court could enjoin an ex-wife's false and defamatory communications about her ex-husband, if those "specific statements [have been] found at trial to be defamatory").

[168] *See supra* note 115.

as discussed in Part II. Perhaps if they reveal highly embarrassing information about others' medical history or sex life, they could be covered by some possible exception that would authorize a disclosure of private facts tort (though that is not settled).[169]

But outside those exceptions, speech about a person—however offensive—consists simply of people expressing opinions and communicates facts about each other. "As a general matter, Americans are free to say and to write bad things about each other."[170] Even when the one-to-many speech is not on matters of public concern, it has value to listeners and to the speaker. And however much we might dislike people saying bad things about us, it doesn't follow that we should have a legal right to stop such gossip or criticism, especially by imposing criminal liability.[171]

Consider, for instance, a woman whose boyfriend or husband cheated on her, frequently and cruelly berated her, or even beat her.[172] (Recall that some courts treat even allegations of crime as matters of purely "private concern" for libel law purposes.[173]) She leaves him, and announces this in several posts to her friends on Facebook—or even on a publicly accessible blog that she runs for her acquaintances and other readers. She wants her friends to understand what's happening in her life. She wants to warn them against trusting her ex. She wants to feel that she's being open and honest with her friends. And she also wants her ex to feel ashamed of himself, and to feel that he has lost many of his friends as a result of his bad conduct.

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

[170] People v. Bethea, 1 Misc. 3d 909(A), *1 (N.Y. City Crim. Ct. 2004); *see also* State v. Machholz, 574 N.W.2d 415 (Minn. 1998) (striking down a ban on any conduct that "would cause a reasonable person . . . to feel oppressed, persecuted, or intimated" and does cause such a reaction, so long as the conduct "interferes with another person or intrudes on the person's privacy or liberty," partly because the law "criminalizes any number of day-to-day interactions between people," including ones that have no connection to political or social debates); State v. Dronso, 279 N.W.2d 710 (Wisc. Ct. App. 1979) (striking down a ban on "mak[ing] a telephone call" "[w]ith intent to annoy another" because it would punish, among other things, "a consumer calling the seller or producer of a product to express dissatisfaction" and "a businessman calling another to protest failure to perform a contractual obligation").

[171] *See, e.g.*, Evans v. Evans, 162 Cal. App. 4th 1157, 1170–71 (2008) (reversing an injunction against an ex-wife's publishing on the Internet "confidential personal information" about her ex-husband, on the grounds that the term was unconstitutionally vague and overbroad, and suggesting that such speech could be restricted

[172] *See, e.g.*, People v. Bethea, 1 Misc. 3d 909(A), *1 (N.Y. City Crim. Ct. 2004) (holding that defendant had the right to post offensive and vulgar flyers condemning her ex-boyfriend for refusing to pay child support).

[173] *See, e.g.*, W.J.A. v. D.A., 2012 WL 1820878 (N.J. 2012).

Under many of the laws I discuss in this essay, the woman's speech would be a crime. Consider, for instance, the New Jersey law involved in the Speulda case, with which the Introduction began. The law—which the prosecutor interpreted as covering one-to-many speech and not just one-to-one speech—makes it a crime to make "a communication . . . in offensively coarse language, or any other manner likely to cause annoyance or alarm" "with purpose to harass another."[174] And the Facebook posts or blog posts would indeed likely cause annoyance or alarm, and might well be said with the purpose "to harass" in the sense of having, as one of its purposes, the purpose to make the ex feel upset. (A parallel provision of the law also covers "any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person," which suggests that "purpose to . . . seriously annoy" is seen as interchangeable with "purpose to harass" under the statute.[175])

Likewise, the Washington law involved in the Renton cartoon case makes it a crime to, "with intent to harass, intimidate, torment, or embarrass any other person, . . . make an electronic communication to such other person or a third party . . . [u]sing any lewd, lascivious, indecent, or obscene words, images, or language."[176] If the woman's post used "indecent" or "lewd" words to describe the ex's cheating, and part of her intent was to "embarrass" her ex, her speech would likewise be criminal.

Yet such speech, it seems to me, should remain constitutionally protected (again, if it's not a falsehood or a threat or some other sort of speech that falls within an existing First Amendment exception). As I've argued elsewhere,[177] such speech on "daily life matters" is at least as worthy as the movies, art, jokes, and reviews of stereo systems that the First Amendment has been repeatedly held to protect.[178]

At least as much as those kinds of protected speech, daily life matters speech—communication related to "the real, everyday experience of ordinary people"[179]—indirectly but deeply affects the way we view the world, deal with others, evaluate their moral claims on us, and even vote; and its effect is probably greater than that of most of the paintings we see or the editorials

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[174] Cite.

[175] Cite.

[176] REV. CODE WASH. § 9.61.260.

[177] Volokh, *supra* note 169, at __.

[178] *See, e.g.*, Winters v. New York, 333 U.S. 507 (1948) (treating entertainment as fully protected); Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) (treating product review of stereo equipment as fully protected); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.").

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

we read. That "the personal is political" may sometimes be an overstatement, but sometimes it's quite right: Consider how our understanding of domestic violence, the justice or injustice of divorce law, and more can be influenced by learning what has concretely happened with our own friends, rather than just what we see written in newspapers about strangers.

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