
The Federal Cyberstalking Statute, Content Discrimination and the First Amendment

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* Copyright © 2021 James Weinstein. Dan Cracchiolo Chair in Constitutional Law, Sandra Day O'Connor College of Law, Arizona State University. I am grateful to Arthur Hellman, Robert Post, and the participants in the online symposium on "Cheap Speech Twenty-Five Years Later: Democracy & Public Discourse in the Digital Age" for their helpful comments and suggestions, and to law students Emiley Pagrabs and Lauren Walter and librarians Beth DiFelice and Tara Mospan for their valuable research assistance. On a very different note, I would like to register my objection to the Statement by Editors and Members of Volume 54 of the UC Davis Law Review appended to this Symposium issue condemning Eugene Volokh for quoting "the N-word in the classroom, as well as [for] his continued defense of such speech under the First Amendment." Neither this Symposium nor Professor Volokh's contribution to it even remotely involves the propriety of mentioning racial epithets in the classroom. The Statement therefore is in my view inappropriate in this setting.

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INTRODUCTION

In a recent work, I explored the “exceedingly difficult challenge” of how to effectively combat cyberharassment without impairing the freedom of expression essential to liberal democracy.¹ Due to that publication’s format and audience — a short chapter in a volume aimed at an international readership — the opportunity for detailed discussion of First Amendment issues was necessarily limited. I am therefore grateful for the opportunity to expand upon these issues in this Symposium. I particularly regretted that in this prior work I was unable to explore at length my disagreement with my friend Professor Eugene Volokh’s view that the First Amendment generally prohibits punishment of Internet harassment involving “one-to-many” as opposed to “one-to-one” speech.² It is, therefore, a delightful coincidence that I will be able to return to this discussion in a Symposium recognizing the twenty-fifth anniversary of the publication of Volokh’s article *Cheap Speech and What It Will Do*.³

As demonstrated by numerous commentators, cyberharassment has become a widespread phenomenon with devastating consequences for people’s lives, including loss of employment, severe emotional distress, and even suicide.⁴ Cyberharassment, moreover, disproportionately harms women, often driving them from participation in online communication.⁵ A prominent example is the devastating cyberattack on Kathy Sierra, a highly successful software design blogger. As

¹ James Weinstein, *Cyber Harassment and Free Speech: Drawing the Line Online*, in *FREE SPEECH IN THE DIGITAL AGE* 52, 52 (Susan J. Brison & Katharine Gelber eds., 2019) [hereinafter *Cyber Harassment and Free Speech*].

² *Id.* at 64-65; Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 *NW. U. L. REV.* 731, 731 (2013) [hereinafter *One-to-One Speech vs. One-to-Many Speech*].

³ Eugene Volokh, *Cheap Speech and What It Will Do*, 104 *YALE L.J.* 1805 (1995).

⁴ See, e.g., Winhkong Hua, Note, *Cybermobs, Civil Conspiracy, and Tort Liability*, 44 *FORDHAM URB. L.J.* 1217, 1223-24 (2017) (stating that “[i]nternet harassment inflicts emotional, reputational, and pecuniary harm on its victims” including employment difficulties and suicide); Kara Powell, Comment, *Cyberstalking: Holding Perpetrators Accountable and Providing Relief for Victims*, 25 *RICH. J.L. & TECH.*, no. 3, 2019, at 7 (noting that “victims of cyberstalking can be affected emotionally, mentally, physically, and financially”); *Bullying, Cyberbullying, & Suicide Statistics*, MEGAN MEIER FOUND., <https://www.meganmeierfoundation.org/statistics> (last visited Jan. 20, 2021) [<https://perma.cc/4GRY-HJPB>] (noting that cyberbullying victims are more likely to self-harm or display suicidal behaviors).

⁵ See Mary Anne Franks, *Sexual Harassment 2.0*, 71 *MD. L. REV.* 655, 657-59 (2012); JoAnne Sweeny, *Trapped in Public: The Regulation of Street Harassment and Cyber-Harassment Under the Captive Audience Doctrine*, 17 *NEV. L.J.* 651, 655 (2017).

chillingly recounted by Professor Danielle Citron in her pioneering book *Hate Crimes in Cyberspace*:

In one email [“siftee”] wrote, “Fuck off you boring slut . . . i hope someone slits your throat and cums down your gob.” In a comment on [Sierra’s] blog, “Rev ED” said he wanted to have “open season” on her with “flex memory foam allowing you to beat this bitch with a bat, raise really big welts that go away after an hour, so you can start again.” Someone commenting under the name “Hitler” wrote, “Better watch your back on the streets whore. . . . Be a pity if you turned up in the gutter where you belong, with a machete shoved in the self-righteous little cunt of yours.” Others said she deserved to be raped and strangled.⁶

The abuse extended to [other] blogs. . . [one of which] uploaded a picture of [Sierra] with a noose beside her neck to which the commenter “joey” responded, “The only thing Kathy Sierra has to offer me is that noose in her neck size.” Another doctored photograph [on a different blog]. . . depicted her screaming while being suffocated by red-and-black lingerie.⁷

As a result of these communications, Sierra canceled a talk she was scheduled to give at a technology conference.⁸ After blogging about her experience, the online attacks began anew, this time making false claims about Sierra, including that she cheated on her former husband and had become a prostitute to pay her debts. One member of this cybermob was the notorious Internet troll “weev” who posted Sierra’s social security number and home address because he didn’t like her “touchy reaction” to the harassment. Bloggers and commentators expressed similar views, telling her that she was being a “silly girl” and that such harmless “roughhousing” was just part of life on the Internet. Due to this cyberbullying, Sierra decided to give up blogging. In her final post, she wrote that “I do not want to be part of a culture — the Blogosphere — where this is considered acceptable.”⁹

Another common and often extremely injurious species of cyberharassment, and one that also disproportionately affects women, is cyberstalking by former amorous partners. An unnerving example was at issue in *United States v. Osinger*,¹⁰ a case that we shall return to in Part

⁶ DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 35-36 (2014).

⁷ *Id.* at 36.

⁸ *Id.*

⁹ *Id.* at 37.

¹⁰ 753 F.3d 939 (9th Cir. 2014).

III.C.2 of this Article. A woman referred to in the case by the initials V.B. had been involved in a nine-month relationship with a man named Christopher Osinger, which ended when V.B. discovered that Osinger was married. After repeated entreaties by Osinger, V.B. and Osinger briefly reconciled. But the relationship again ended when V.B. discovered that the divorce papers Osinger had shown her were fraudulent and that he was seeing other women. V.B. told Osinger that she was not interested in continuing the relationship and moved in with her sister.¹¹

After V.B. received a job offer in California, she informed Osinger that she was leaving Illinois but did not give him her new address.¹² Months later V.B. received a spate of text messages from Osinger that “started out with declarations of love, but . . . quickly turned nasty.”¹³ When V.B. made it clear that she was not interested in giving Osinger another chance, the messages became ominous, such as one that declared “am about to pull the rug rite under ur sexxy lil feet!!!”¹⁴ Soon thereafter V.B. was informed by a friend about what appeared to him to be a fake Facebook account set up under V.B.’s name with sexually explicit pictures of V.B. As described in the decision:

[O]rganized into two volumes titled “WHORE” and “WHORE2” . . . some of the photos showed V.B. topless and bottomless. Others showed her partially or fully nude and masturbating. Still others showed performing oral sex. The statements posted on the page, purportedly made by V.B. included: “I like to go out and be the whore I am I ussly get a job and fuck my bosses rite now I work for [company name redacted] look me up pass my pix around”¹⁵

V.B. recognized the photographs as ones that Osinger had taken of her during their relationship. Crying hysterically, V.B. called her supervisor for help in removing the Facebook page. The supervisor did so but informed V.B. that he had been contacted by another employee who had received an email at work through the company’s webmail with many of these pictures. In addition, one of V.B.’s former co-workers in Chicago received a similar email.¹⁶

¹¹ *Id.* at 941.

¹² *Id.*

¹³ *Id.* at 952 (Watford, J., concurring).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

The federal cyberstalking statute criminalizes online harassment that “causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress” to another person.¹⁷ This Article will argue that expression involved in the typical cyberharassment of former amorous partners such as Osinger’s attack on V.B. can be criminally punished under the federal cyberstalking statute consistent with the First Amendment. Whether cyberharassment of bloggers and others expressing their views online as typified by the vicious and frightening attacks on Kathy Sierra is punishable under the federal cyberstalking statute, and if so, whether such a sanction comports with the First Amendment, is a more difficult question. I will argue, however, that at least some expression commonly involved in such cyberharassment can also be constitutionally punished under this statute.

Resolution of the First Amendment issues raised by these examples and similar instances of cyberharassment is, regrettably, not as straightforward as it should be. The is because in recent years the Supreme Court has bedeviled First Amendment doctrine by proclaiming what I shall refer to as the “All-Inclusive Approach” to the rule against content discrimination.¹⁸ On this view, except for a few, traditional exceptions, government is constitutionally forbidden to punish speech based on its content. Punishing expression because of the emotional distress it inflicts does so on the basis of the content of the speech. Expression inflicting substantial emotional distress, however, is not among the exceptions to this supposed rule against content regulation. Nonetheless, and contrary to the urging of Professor Volokh,¹⁹ lower courts have uniformly upheld convictions for cyberharassment of ex-lovers exemplified by the *Osinger* case even when it involves “one-to-many” speech.²⁰ Unfortunately, in trying to comply with the Supreme Court’s dicta generally forbidding content discrimination, these decisions invoke an exception to the All-Inclusive approach that threatens to undermine the rigorous protection that the First Amendment currently affords expression with core free speech value, such as political dissent.

Part I of this Article will critically examine the All-Inclusive Approach and introduce an alternative view, which I dub the Democratic Self-Governance Model. Part II discusses the tension between the All-Inclusive Approach and the Court’s jurisprudence on First Amendment

¹⁷ 18 U.S.C. § 2261A(2)(B) (2018).

¹⁸ See *infra* Part I.

¹⁹ See Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 731.

²⁰ See *infra* Part III.C.2.

limitations on intentional infliction of emotional distress suits. It notes how the Court essentially ignores the All-Inclusive Approach in suggesting that, in contrast to intentional infliction of emotional distress suits based on speech on matters of public concern, claims based on expression on matters of purely private concern would not offend the First Amendment. This Part also takes issue with Professor Volokh's claim that the First Amendment protects "one-to-many" speech inflicting emotional distress. Additionally, this Part disputes his argument that even such expression may be constitutionally subject to civil liability, imposition of criminal punishment is forbidden by the First Amendment. Part III of this Article demonstrates how cases decided under the federal cyberstalking statute hold unconstitutional prosecutions for speech on matters of public concern but uniformly reject such challenges to prosecutions for speech on private concern. As such, these decisions align with the Democratic Self-Governance Model. Part IV discusses the speech integral to criminal conduct rationale, an exception to the All-Inclusive Approach frequently invoked by courts to uphold cyberstalking prosecutions on matters of private concern. It demonstrates how use of this exception threatens to undermine First Amendment protection of speech with core free speech value, including political dissent. The Article concludes by urging courts faced with First Amendment challenges to prosecutions under the federal cyberstalking statute for speech on matters of private concern to eschew the All-Inclusive Approach and its pernicious speech integral to criminal conduct exception. Instead, courts should rely on Supreme Court dicta and lower court holdings that the First Amendment does not provide a defense in tort actions for intentional infliction of emotional distress involving speech on matters of private concern. Based on these decisions, courts should conclude that criminal penalties imposed by the federal cyberstalking statute on speech of private concern similarly comport with the First Amendment.

I. THE CONTESTED SCOPE OF THE RULE AGAINST CONTENT DISCRIMINATION

The cornerstone of contemporary American free speech doctrine is indisputably the rule against content discrimination. The scope of that rule, in contrast, is highly disputed. There are two major competing views about the scope of this rule: the All-Inclusive Approach and the Democratic Self-Governance Model.

A. *The All-Inclusive Approach v. The Democratic Self-Governance Model*

Under a commonly held view, aptly dubbed the All-Inclusive Approach,²¹ the First Amendment generally shields the entirety of human expression in all of its manifestations, wherever it may occur, from government-imposed content regulation. On this view, except in a “few limited areas,”²² content-based regulation of speech is subject to strict scrutiny and thus “near-automatic condemnation.”²³ An alternative view, which I shall refer to as the Democratic Self-Governance Model, primarily reserves the stringent protection provided by the rule against content discrimination to speech by which people in a democracy govern themselves.²⁴

In a recent decision, the United States Supreme Court sharply divided as to which of these views should govern First Amendment doctrine.²⁵ *Barr v. American Association of Political Consultants* involved a First Amendment challenge to the federal Telephone Consumer Protection Act of 1991 (“the TPCA”).²⁶ The TPCA imposed a general ban on robocalls to cell phones but contained an exception for calls “collect[ing] a debt owed to or guaranteed by the United States.”²⁷ The

²¹ See Barry P. McDonald, *Government Regulation or Other “Abridgments” of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment*, 54 EMORY L.J. 979, 1009 (2005).

²² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

²³ *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring).

²⁴ Dean Robert Post has long suggested that the rule against content discrimination be confined to speech essential to democratic self-governance. See, e.g., Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255-56 (1995) [hereinafter *Recuperating First Amendment Doctrine*]. Other commentators, including me, have also expressed this view. See, e.g., Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1450-53 (2017); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493-500 (2011) [hereinafter *Participatory Democracy*]. In *Reed v. Town of Gilbert*, Justices Stephen Breyer and Elena Kagan criticized the All-Inclusive Approach. See *Reed v. Town of Gilbert*, 576 U.S. 155, 178-79 (2015) (Breyer, J., concurring); *id.* at 182-83 (Kagan, J., concurring); *infra* note 44. However, it was not until Justice Breyer’s concurring opinion in *Barr v. American Association of Political Consultants* that any Justice explicated in detail an alternative approach that would confine the rule against content discrimination to speech essential to democratic self-governance. See *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2357-59 (2020) (Breyer, J., concurring in part and dissenting in part); *infra* text accompanying notes 32–37.

²⁵ *Political Consultants*, 140 S. Ct. at 2341.

²⁶ 47 U.S.C. § 227(b)(1)(A)(iii) (2018).

²⁷ *Id.* This exception was added in 2015. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 588 (codified as amended at 47 U.S.C. § 227(b)(1)(A)(iii)).

Court unanimously agreed that this exemption rendered the law content based, but vigorously disagreed whether the exception should be subject to strict scrutiny or to some less rigorous standard of review. Justice Brett Kavanaugh’s plurality opinion, joined by Chief Justice John Roberts, and Justices Clarence Thomas and Samuel Alito, enunciated a stark version of the All-Inclusive Approach, which Kavanaugh claimed had been established in the Court’s First Amendment jurisprudence. “[T]he Court’s precedents,” Kavanaugh declared,

allow the government to constitutionally impose reasonable time, place, and manner regulations on speech, but the precedents restrict the government from discriminating in the regulation of expression on the basis of the content of that expression. Content-based laws are subject to strict scrutiny. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–164 (2015). By contrast, content-neutral laws are subject to a lower level of scrutiny.²⁸

Because the government conceded that its justification of the government-debt collection exception could not withstand strict scrutiny,²⁹ the plurality found the government-debt collection exception unconstitutional.³⁰

Justice Stephen Breyer’s partial dissent, joined by Justices Ruth Bader Ginsburg and Elena Kagan, criticized the plurality’s approach for “reflexively appl[ying] strict scrutiny to all content-based speech distinctions” in a way “divorced from First Amendment values.”³¹ As an alternative, he offered a version of the Democratic Self-Governance Model. Justice Breyer began by explaining that to appreciate why the application of strict scrutiny is inappropriate in a case such as this, but is the proper standard of review in other cases, “it is important to

²⁸ *Political Consultants*, 140 S. Ct. at 2346 (plurality opinion).

²⁹ *Id.* at 2347. Justice Neil Gorsuch agreed that the ban on cellphone robocalls “is a content-based restriction that fails strict scrutiny” but did not join the plurality’s First Amendment discussion. See *id.* at 2364 (Gorsuch, J., concurring in part and dissenting in part).

³⁰ *Id.* at 2347-48 (plurality opinion). The plurality then decided that proper remedy was to invalidate and sever the government-debt exception rather than to invalidate the TPCA in entirety. *Id.* at 2353-54. The plurality was joined in this conclusion by three other Justices. *Id.* at 2343-44. In contrast, Justices Gorsuch and Thomas would have invalidated the entire law as applied to the challengers, political and nonprofit organizations wanting to make political robocalls to cell phones. See *id.* at 2363 (Gorsuch, J., concurring in part and dissenting in part).

³¹ *Id.* at 2358 (Breyer, J., joined by Ginsburg & Kagan, JJ., concurring in part and dissenting in part).

understand at least one set of values that underlie” the First Amendment:

The concept is abstract but simple: “We the People of the United States” have created a government of laws enacted by elected representatives. For our government to remain a *democratic* republic, the people must be free to generate, debate, and discuss both general and specific ideas, hopes, and experiences. The people must then be able to transmit their resulting views and conclusions to their elected representatives, which they may do directly, or indirectly through the shaping of public opinion. The object of that transmission is to influence the public policy enacted by elected representatives. As this Court has explained, “[t]he First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (internal quotation marks omitted). See generally R. Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* 1–25 (2012).³²

Breyer continued by noting that the Court’s free speech jurisprudence has long embodied these core values by providing “heightened judicial protection for political speech, public forums, and the expression of all viewpoints on any given issue.”³³ He cautioned, however, that from “a democratic perspective” it is crucial “that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse.”³⁴ Otherwise, “our democratic system would fail, not through the inability of the people to speak or to transmit their views to government, but because of an elected government’s inability to translate those views into action.”³⁵ Breyer explained that for this reason, the Court has applied less rigorous scrutiny to content-based restrictions of speech embodied in government regulatory programs,³⁶ and intermediate scrutiny to

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2359.

³⁵ *Id.*

³⁶ See *id.* Justice Breyer here cites *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 469-70, 477 (1997) as applying a “rational basis” standard for reviewing restrictions that “have only indirect impacts on speech.” *Id.*

regulation of commercial speech.³⁷ Because regulation of debt collection “has next to nothing to do with the free marketplace of ideas or the transmission of the people’s thoughts and will to the government,” but “everything to do with . . . government response to the public will through ordinary commercial regulation,” he found the application of strict scrutiny in this case “remarkable.”³⁸

Breyer recognized that the TPCA’s restriction “primarily concerns a means of communication,” and for this reason concluded that intermediate scrutiny was the proper level of judicial review.³⁹ Under this standard, a court should examine “the seriousness of the speech-related harm, the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so.”⁴⁰ Breyer found that TPCA exception comported with this standard.⁴¹ Justice Sonia Sotomayor agreed with Justice Breyer’s argument “that strict scrutiny should not apply to all content-based distinctions,”⁴² but found that the exception did not pass intermediate scrutiny.⁴³

In response to what he refers to as Justice Breyer’s “scholarly separate opinion,” Justice Kavanaugh insisted that his plurality opinion follows

³⁷ *Id.* (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561-64 (1980)).

³⁸ *Id.*

³⁹ *Id.* at 2359-60.

⁴⁰ *Id.* at 2362.

⁴¹ Breyer found that the First Amendment harm was to “put non-government debt collectors at a disadvantage.” *Id.* But because debt-collection speech “is both commercial and highly regulated,” he concluded that this First Amendment harm, and “any related effect on the marketplace of ideas,” was “modest.” *Id.* Conversely, he found that justification for this harm — “protection of the public fisc” — was “an important governmental interest.” *Id.* And because by its express terms the exception is limited to communication “made *solely* to collect Government debt,” the provision was in his view “narrowly tailored.” *Id.* at 2263.

⁴² *Id.* at 2356 (Sotomayor, J., concurring).

⁴³ Sotomayor objected that “the Government has not explained how a debt-collection robocall about a government-backed debt is any less intrusive or could be any less harassing than a debt-collection robocall about a privately backed debt.” *Id.* at 2356-57. Nor in her view had the Government “sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.” *Id.* at 2357 (quoting plurality opinion, *id.* at 2347). In addition, she agreed with the finding of the Court of Appeals that the Government could have employed “far less restrictive means to further its interest in collecting debt, such as ‘secur[ing] consent from the debtors to make debt-collection calls’ or ‘plac[ing] the calls itself.’” *Id.* (quoting *Am. Ass’n of Pol. Consultants, Inc. v. FCC*, 923 F.3d 159, 169 n.10 (4th Cir. 2019)).

the Court's "longstanding precedents." In contrast, he claimed that adopting Justice Breyer's position on the scope of the rule against content discrimination would require "overruling several of the Court's First Amendment cases, including the recent 2015 decision in *Reed v. Town of Gilbert*."⁴⁴ He added that no party in this case had asked for overruling, and that Justice Breyer's opinion "does not analyze the usual *stare decisis* factors."⁴⁵ In reply, Justice Breyer insisted that the Court's "First Amendment jurisprudence has always been contextual and has defied straightforward reduction to unyielding categorical rules."⁴⁶ Accordingly, the contention that broad language in any one case has authoritatively determined the scope of the rule against content discrimination in every context "reflects an oversimplification and over-reading of our precedent."⁴⁷ Presumably referring to Justices Sotomayor's and Gorsuch's separate concurring opinions, as well as his dissenting one, Breyer points to the "diversity of approaches in this very case" as proof that the scope of the rule against content discrimination

⁴⁴ *Id.* at 2347 n.5. *Reed v. Town of Gilbert* involved a challenge to a town ordinance that regulated, on the basis of their subject matter, the size of outdoor signs and the duration that they could be displayed. *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015). In finding the law unconstitutional, Justice Thomas' majority opinion declared: "Content-based laws — those that target speech based on its communicative content — are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. Presaging his dissent in *Political Consultants*, Justice Breyer filed a concurring opinion in which he wrote:

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification.

Id. at 178-79 (Breyer, J., concurring). Similarly, Justice Kagan, in a concurring opinion joined by Justices Ginsburg and Breyer, explained that strict scrutiny is required when a speech restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 182-83. But when there is no realistic possibility of viewpoint discrimination, we should "relax our guard" lest "entirely reasonable laws [be] imperiled by strict scrutiny." *Id.* at 183 (Kagan, J., concurring).

It is interesting to note that although in *Reed* Justice Sotomayor joined Justice Thomas' majority opinion and its statement of the All-Inclusive Approach, she has apparently since abandoned this view and is now in general agreement with Justice Breyer's Democratic Self-Governance Model as expressed in *Political Consultants*. See *supra* text accompany note 42.

⁴⁵ *Political Consultants*, 140 S. Ct. at 2347 n.5.

⁴⁶ *Id.* at 2361 (Breyer, J., concurring in part and dissenting in part).

⁴⁷ *Id.*

“is far from settled.”⁴⁸ Finally, he notes that the plurality’s denial that the capacious rule it argues is applicable would “unsettle ‘traditional or ordinary economic regulation of commercial activity,’” shows that that it too “presumably thinks there are some outer bounds to its broad language.”⁴⁹

Justice Breyer is surely correct that the broad language of the All-Inclusive Approach in *Reed*, or any other case, does not as a matter of precedent mark the boundaries of that rule. Indeed, the authority that *Reed* relies on makes clear that the All-Inclusive Approach is not in fact as all-encompassing as stated by the Court in *Reed* or by the plurality in *Political Consultants*. In support of its statement of the All-Inclusive Approach, *Reed* cites Justice Antonin Scalia’s 1992 majority opinion in *R.A.V. v. City of St. Paul*.⁵⁰ In *R.A.V.*, however, after stating that content-based regulations of speech are “presumptively invalid,” Scalia noted that “[f]rom the ratification of the First Amendment in 1791 to present” the First Amendment has allowed content-based speech restrictions “in a few limited areas.”⁵¹ He lists obscenity, defamation, and fighting words as expression not included with “the freedom of speech” referred to in the First Amendment. While acknowledging that the Court’s decisions since the 1960s have narrowed the scope of the categorical exceptions for defamation and obscenity, Scalia observed that “a limited categorical approach has remained an important part of our First Amendment jurisprudence.”⁵² Nearly two decades later, in *United States v. Stevens*,⁵³ the Court added fraud, incitement and speech integral to criminal conduct to this list of speech categorically excluded from First Amendment protection. The following year, however, in *Brown v. Entertainment Merchants*, speech integral to criminal conduct was omitted from the exceptions mentioned in *Stevens*.⁵⁴ But just two years after *Brown*, the plurality opinion in *United States v. Alvarez*,⁵⁵ restored speech integral to criminal conduct as one of “the few historic and traditional categories of expression” with respect to which content regulation was permissible.⁵⁶ The plurality opinion also added child pornography, true threats, as well as a catch-all provision, “speech

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting *id.* at 2347 (plurality opinion)).

⁵⁰ 505 U.S. 377 (1992).

⁵¹ *Id.* at 382-83.

⁵² *Id.* at 383.

⁵³ See *United States v. Stevens*, 559 U.S. 460, 468-69 (2010).

⁵⁴ *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790-91 (2011).

⁵⁵ 567 U.S. 709, 717 (2012).

⁵⁶ *Id.* (internal brackets omitted).

presenting some grave and imminent threat the government has the power to prevent,” to the categories listed in *Stevens*.⁵⁷

B. Criticism of the All-Inclusive Approach

Along with Dean Robert Post,⁵⁸ and Professors Frederick Schauer⁵⁹ and Ashutosh Bhagwat,⁶⁰ I have long been critical of the All-Inclusive Approach.⁶¹ For one, it is not an accurate description of the protection that the First Amendment actually provides speech in American society. Human expression is far too ubiquitous with too many real-world consequences for it sensibly to be generally immunized from content regulation.⁶² In addition to the purportedly “few limited areas” of expression that the Court has recognized as exceptions to the All-Inclusive Approach, there is in fact an enormous range of speech routinely regulated based on its content, all without a hint of interference from the First Amendment. This includes expression regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract and negligence.⁶³ In addition, there are

⁵⁷ *Id.* Although Justices Ginsburg and Sotomayor joined Justice Kennedy’s statement of the rule against content discrimination in *Alvarez*, their agreement with Justice Breyer’s criticism of the plurality’s opinion in *Political Consultants* reveals that they no longer agree with the All-Inclusive Approach. This change of heart supports Justice Breyer’s contention in that case that the scope of the rule against content discrimination is “far from settled.” See *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2361 (2020) (Breyer, J., concurring in part and dissenting in part).

⁵⁸ See Post, *Recuperating First Amendment Doctrine*, *supra* note 24, at 1255-56.

⁵⁹ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768, 1778-84 (2004) [hereinafter *The Boundaries of the First Amendment*].

⁶⁰ See Bhagwat, *supra* note 24, at 1450-53.

⁶¹ See James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493, 535-36 (2007) (referring to the All-Inclusive Approach as a “commonly held but seriously mistaken view” and noting the “multitude of ‘exceptions’ beyond the few recognized” under that view).

⁶² “Because many, perhaps most, activities of human beings living together in communities take place through speech,” the Court has distinguished “among different contexts in which speech takes place.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582 (2011) (Breyer, J., dissenting). The First Amendment thus “imposes tight constraints upon government efforts to restrict, e.g., ‘core’ political speech, while imposing looser constraints when the government seeks to restrict, e.g., commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.” *Id.*

⁶³ See Schauer, *The Boundaries of the First Amendment*, *supra* note 59, at 1778-84; James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1097-98 (2004) [hereinafter

numerous Supreme Court holdings providing less-than-strict scrutiny to content-based regulation of expression beyond the “narrow exceptions” recognized by the All-Inclusive Approach, including commercial speech and sexually explicit (but non-obscene) speech.⁶⁴ Moreover, government routinely regulates the content of speech in settings over which it exercises managerial control, such as the courtroom, the government workplace, and the public school classroom.⁶⁵ Contrary to the All-Inclusive Approach, then, there is in fact no general rule against content regulation of speech.

Not only is the All-Inclusive Approach descriptively inaccurate, it is normatively problematic. As Justice Breyer has warned, this approach “threaten[s] the workings of ordinary regulatory programs”⁶⁶ restricting expression that does not implicate any significant free speech interests. This approach, however, will give judges hostile to what they see as the overreach of the regulatory state grounds to invalidate regulations that they deem inimical to economic liberty or otherwise offend their ideological predispositions. But even the most activist of these judges will be loath to invalidate most of the vast array of content-based speech regulations discussed in the preceding paragraph that have never been thought to even raise a First Amendment issue. The problem is that even if the government can demonstrate that a content-based regulation is both “entirely reasonable”⁶⁷ and does not implicate any significant free speech value, under the All-Inclusive Approach such a showing will not prevent the regulation from being invalidated under strict scrutiny, at least as this test is currently applied by the Court. Rather, strict scrutiny as it now exists, far from being a “rule of reason,” is “ordinarily the kiss

Speech Categorization]; see also, *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in part and dissenting in part) (noting that “the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection” all involve regulation of speech based on its content). To adopt Schauer’s useful terminology, this speech is not just devoid of protection, but because its regulation “does not present a First Amendment issue at all,” it is outside First Amendment coverage. Schauer, *The Boundaries of the First Amendment*, *supra* note 59, at 1769.

⁶⁴ See Weinstein, *Participatory Democracy*, *supra* note 24, at 492.

⁶⁵ See Weinstein, *Speech Categorization*, *supra* note 63, at 1097.

⁶⁶ *Political Consultants*, 140 S. Ct. at 2359 (Breyer, J., concurring in part and dissenting in part).

⁶⁷ See *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O’Connor, J., concurring) (noting that under strict scrutiny “regulations are occasionally struck down because of their content-based nature, even though common sense may suggest that they are entirely reasonable”).

of death”⁶⁸ leading to “near-automatic condemnation.”⁶⁹ It is therefore “the rare case” that survives strict scrutiny.⁷⁰ But because courts will want to uphold reasonable regulations not implicating any significant free speech interests, they will purport to apply strict scrutiny but in fact apply a rule of reason.⁷¹ Such dilution of strict scrutiny could have dire consequences for First Amendment doctrine.

As it is currently applied, strict scrutiny rigorously protects political dissent in this country. “[T]o the end that government may be responsive to the will of the people,”⁷² Americans currently have a right to say virtually anything they want when engaging in public discourse. We thus have a First Amendment right to vehemently criticize our country’s involvement in a war, even though such dissent will likely interfere with the war effort by dispiriting our troops and encouraging those of the enemy. A crucial part of the bulwark protecting this right of dissent is strict scrutiny as it is now applied. But if strict scrutiny is reduced to essentially a rule of reason, dissent in this country will be imperiled.⁷³

⁶⁸ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting).

⁶⁹ *United States v. Alvarez*, 567 U.S. 709, 731 (2012) (Breyer, J., concurring).

⁷⁰ *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion)). There are currently just two Supreme Court cases that remain good law in which a speech prohibition has survived the application of strict scrutiny, *Williams-Yulee* and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

⁷¹ Justice Breyer has similarly warned of the potential of the All-Inclusive Approach to “water down” strict scrutiny. See *Political Consultants*, 140 S. Ct. at 2360 (Breyer, J., concurring in part and dissenting in part); *Reed v. Town of Gilbert*, 576 U.S. 155, 178 (2015) (Breyer, J., concurring).

⁷² *Stromberg v. California*, 283 U.S. 359, 369 (1931).

⁷³ The potential of the All-Inclusive Approach to weaken strict scrutiny is demonstrated by the two cases mentioned *supra* note 70 that upheld content-based laws under that standard. For a detailed discussion of the faux strict scrutiny the Court applied in *Holder v. Humanitarian Law Project*, see James Weinstein & Ashutosh Bhagwat, *Bad Law: How the United States Supreme Court Mishandled the Free Speech Issue in Holder v. Humanitarian Law Project*, in *EXTREMISM, FREE SPEECH AND COUNTER-TERRORISM LAW AND POLICY* 158, 162-64 (Ian Cram ed., 2019). Similarly, Justice Scalia’s dissent in *Williams-Yulee v. Florida Bar* demonstrates that the test that the majority applied in that case is but “the appearance of strict scrutiny.” 575 U.S. at 464 (Scalia, J., dissenting). Another example of such dilution is provided by the district court’s decision in *Political Consultants*. The court held that because the government had a compelling interest in collecting debt, the content-based government debt collection exception survived strict scrutiny. See *Political Consultants*, 140 S. Ct. at 2345 (plurality opinion). Proving how severely the district court had diluted strict scrutiny in order to uphold the exception, in the Supreme Court the Government did not even argue that the exception could survive strict scrutiny but conceded that it could not. *Id.* at 2347.

A related way in which adherence to the All-Inclusive Approach will likely undermine the strong protection of dissent currently provided by the First Amendment is through the elastic and uncertain exceptions to the rule against content discrimination such as exceptions for “speech integral to criminal conduct” and for “speech presenting some grave and imminent threat the government has the power to prevent.”⁷⁴ As will be discussed in Part III.C.2, below, lower courts have used the former exception to uphold federal cyberstalking convictions. But as Professor Volokh has aptly observed, and will also be discussed in more detail below, the speech integral to the criminal conduct exception is “indeterminate, dangerous, and inconsistent with more recent cases.”⁷⁵ Finally, aside from potentially weakening the strength of First Amendment protection, trying to reconcile the broad array of speech that must be regulated on the basis of its content in any modern society with the dictates of the All-Inclusive Approach will lead to doctrinal incoherence. A prime example of this threat to doctrinal coherence is demonstrated by lower court decisions that dutifully invoke the All-Inclusive Approach but reject First Amendment challenges to cyberstalking prosecutions involving speech on matters of private concern.

II. THE FEDERAL CYBERSTALKING STATUTE AND THE ALL-INCLUSIVE APPROACH

Section 2261A(2)(B) of the federal cyberstalking statute makes it crime for anyone “with the intent to . . . harass [or] intimidate . . . another person” to use an interactive computer service “to engage in a course of conduct that . . . causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress” to that

⁷⁴ *Alvarez*, 567 U.S. at 717 (plurality opinion).

⁷⁵ Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, Situation-Altering Utterances, and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1285 (2005) [hereinafter *Speech as Conduct*].

person.⁷⁶ “Course of conduct” is defined as “a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.”⁷⁷

If cyberharassment involves true threats,⁷⁸ unprotected defamation, or incitement to criminal activity, the expression would fall within an exception to the All-Inclusive Approach and thus could be criminally punished on the basis of its content consistent with the First Amendment.⁷⁹ But neither of these exceptions would permit punishment of the type of expression noted in the Introduction that typically pervades the Internet. Cyberharassment often expresses a desire that violence befall the target of the cyberattack, as did the email to Kathy Sierra stating that “[I] hope someone slits your throat and cums down your gob” or the comment on Sierra’s blog wishing for “open season” on her so that people could “beat this bitch with a bat, rais[ing] really big welts.”⁸⁰ Neither of these comments, however, constitutes incitement within the exception, which requires both that

⁷⁶ 18 U.S.C. § 2261A(2)(B) (2018). Several states have laws criminalizing online harassment. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2921 (2020) (criminalizing communication “with another person by . . . electronic . . . [or] telephonic or written means in a manner that harasses”); MD. CODE ANN., CRIM. LAW § 3-805 (2020) (criminalizing “maliciously engag[ing] in a course of conduct, through the use of electronic communication . . . with the intent to harass” another person); N.J. STAT. ANN. § 2C:33-4.1 (2020) (criminalizing sending online communication “with the intent to emotionally harm a reasonable person”); OR. REV. STAT. § 166.065 (2020) (criminalizing the use of “electronic device under the person’s control” for harassment); *see also* Steven D. Hazelwood & Sarah Koon-Magnin, *Cyber Stalking and Cyber Harassment Legislation in the United States: A Qualitative Analysis*, 7 INT’L J. CYBER CRIMINOLOGY 155, 160 (2013).

⁷⁷ 18 U.S.C. § 2266(2) (2018).

⁷⁸ Although true threats are included on the *Alvarez* plurality opinion’s list of speech whose content may be permissibly regulated, *Alvarez*, 567 U.S. at 717, such an exception has yet to be listed in a Supreme Court majority opinion. *See supra* text accompanying notes 51-54. Other Supreme Court cases, however, make abundantly clear that the First Amendment “permits a State to ban a ‘true threat.’” *See Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992); *Watts v. United States*, 394 U.S. 705, 707 (1969). 18 U.S.C. § 875 criminalizes communication in interstate commerce of threats to harm a person or their property, to kidnap a person, or to damage a person’s reputation. *See* 18 U.S.C. § 875 (2018). A provision of the federal cyberstalking law makes it a crime “with an intent to kill, injure, harass, intimidate” to place a person or a family member, or specified animals belonging to that person “in reasonable fear of the death of, or serious bodily injury.” 18 U.S.C. § 2261A(2)(A); *see United States v. Cassidy*, 814 F. Supp. 2d 574, 583 n.11 (D. Md. 2011).

⁷⁹ *See infra* Part III.C.2 (discussing how speech integral to criminal conduct is the exception to First Amendment protection against content discrimination typically invoked in lower court cases to uphold cyberstalking convictions).

⁸⁰ CITRON, *supra* note 6, at 36.

the speech be “directed to inciting or producing *imminent* lawless action” *and* that it be “likely to incite or produce such action.”⁸¹ Similarly, cyberharassment often contains ominous language that in everyday usage could fairly be characterized as threatening, as did the comment on Sierra’s blog warning her to “watch your back on the streets whore” because it would be “a pity if you turned up in the gutter where you belong, with a machete shoved in that self-righteous little cunt of yours.”⁸² But standing alone, this horrific blog comment would not seem to “communicate a serious expression of an intent to commit an act of unlawful violence,”⁸³ and thus would most likely not qualify as a true threat under First Amendment doctrine.⁸⁴

While cyberharassment might not typically involve a true threat or incitement to criminal activity, it does often involve expression constituting “extreme and outrageous conduct [that] intentionally or recklessly causes severe emotional distress.”⁸⁵ The federal cyberstalking statute homes in on this harm by making it a crime for anyone to intentionally harass another person by engaging in a course online conduct that “causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress” to that person.⁸⁶ Unlike true threats or incitement, however, expression intentionally inflicting emotional distress has never been listed in a Supreme Court decision, not even in a plurality opinion, as among the speech categorically exempted from the rule against content discrimination. Indeed, in two cases, first in *Hustler Magazine, Inc. v. Falwell*⁸⁷ and subsequently in *Snyder v. Phelps*,⁸⁸ the Court provided First Amendment immunity to speech constituting intentional infliction of emotional distress under state tort law. In *Hustler Magazine*, however, the expression targeted a public figure, and in *Snyder*, the speech was on a matter of public concern. Dicta in *Snyder*, moreover, left little doubt that the First Amendment would impose no obstacle to private

⁸¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (emphasis added).

⁸² CITRON, *supra* note 6, at 36.

⁸³ *Black*, 538 U.S. at 359.

⁸⁴ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902, 929 (1982) (finding the statement by a leader of a civil rights boycott, that “[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn neck,” was protected by the First Amendment).

⁸⁵ RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1977) (“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . .”).

⁸⁶ 18 U.S.C. § 2261A(2)(B) (2018).

⁸⁷ 485 U.S. 46 (1988).

⁸⁸ *Snyder v. Phelps*, 562 U.S. 443 (2011).

individuals recovering damages for speech intentionally inflicting emotional distress on matters of purely private concern.⁸⁹ The open question, then, is whether the First Amendment similarly allows *criminal* punishment for online expression inflicting intentional infliction of emotional distress on a private person concerning a purely private matter.

Snyder nullified on First Amendment grounds a large monetary judgment for intentional infliction of emotional distress. The defendants in *Snyder* were members of the Westboro Baptist Church, an organization which had for decades publicly expressed the view, often at military funerals, that God kills American soldiers as punishment for America's tolerance of homosexuality, particularly in the military.⁹⁰ In this case, church members picketed on public land near a Catholic church where the funeral of Matthew Snyder, a Marine corporal killed in the line of duty in Iraq, was being held. The picketers carried signs which included the following messages: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."⁹¹ Albert Snyder, Matthew's father, sued the protestors for intentional infliction of emotional distress. He claimed that because of this picketing, "he is unable to separate the thought of his dead son from his thoughts of Westboro's picketing" and as a result he "often becomes tearful, angry, and physically ill."⁹² At trial he presented evidence that this anguish resulted in "severe depression" which "exacerbated pre-existing health conditions."⁹³ Snyder won a five-million-dollar judgment in the trial court but the Court of Appeals reversed on First Amendment grounds.⁹⁴

In an opinion by Chief Justice Roberts joined by seven other Justices, the Court agreed with the appellate court. Noting that "[s]peech on matters of public concern . . . is at the heart of the First Amendment's protection," Roberts explained that whether "the First Amendment prohibits holding [the church] liable for its speech in this case turns largely on whether that speech is of public or private concern."⁹⁵ He found that the expression at issue "plainly relates to broad issues of

⁸⁹ See *infra* text accompanying notes 98–99.

⁹⁰ *Snyder*, 562 U.S. at 448.

⁹¹ *Id.*

⁹² *Id.* at 450.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ *Id.* at 451–52 (internal quotation marks omitted).

interest to society at large,” such as homosexuality in the military and the moral conduct of the United States, “rather than matters of purely private concern.”⁹⁶

But what would have been the result if the expression in that case was not a matter of public concern? For instance, what if a family involved in a bitter business dispute with Albert Snyder had carried signs on the public street near Matthew’s funeral reading “Thank God for Killing Matthew, Son of a Swindler,” and “Just Deserts for a Cheat: Albert Snyder’s Son is Going to Hell.”⁹⁷ The Court in *Snyder* indicated that such expression would likely not be entitled to First Amendment immunity in a suit for intentional infliction of emotional distress. It noted that “[n]ot all speech is of equal First Amendment importance,” and that “where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”⁹⁸ This is because restricting speech on “on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest,” and in particular, poses “no threat to the free and robust debate of public issues” or “interference with a meaningful dialogue of ideas.”⁹⁹ Consistent with this view, lower courts have uniformly

⁹⁶ *Id.* at 454.

⁹⁷ In the actual case, Snyder argued that the church members invoked opposition to tolerance of homosexuality in the armed services to “immunize” what was “in fact . . . a personal attack on Snyder and his family.” *Id.* at 455. In rejecting this argument, the Court noted that there “was no pre-existing relationship or conflict between Westboro and Snyder that might suggest that Westboro’s speech was intended to mask an attack on Snyder over a personal matter.” *Id.*

⁹⁸ *Id.* at 452 (internal quotation marks omitted).

⁹⁹ *Id.* In *Bartnicki v. Vopper*, the Court similarly strongly suggested that the First Amendment immunity it extended in that case to the publication of the contents of an illegally intercepted cellular telephone call involving a matter of public concern would likely not apply to the publication of an illegally intercepted transmission on a matter of private concern. See *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001). In accord with the dicta in *Snyder* and *Bartnicki* in several cases the Court has refused to provide First Amendment protection on matters of private concern despite having done so for expression of the same ilk on matters of public concern. Compare *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426-28 (1990) (holding the First Amendment does not protect boycott by lawyers aimed at increasing their own compensation), with *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911-12 (1982) (holding that the First Amendment protects speech related to a boycott seeking to bring about racial integration); compare *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (declining to impose First Amendment limitation on damages in libel case involving speech on a matter not of public concern), with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (providing First Amendment limitations on liability and damages in libel action against a private person on matter of public concern); compare *Ohrlik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978) (finding no First Amendment obstacle to discipline of lawyer for in-person solicitation of clients in

rejected First Amendment defenses in intentional infliction of emotional distress suits involving speech on matters of private concern.¹⁰⁰

Precisely because expression intentionally inflicting emotional distress on an individual is not one of the “recognized First Amendment exceptions” to the rule against content discrimination, Professor Volokh believes such expression involving one-to-many speech *should* be constitutionally protected even from civil liability.¹⁰¹ He acknowledges, however, that the Court in *Snyder* “suggested that statements on matters of purely private concern could lead to liability under the intentional infliction of emotional distress tort.”¹⁰² The crucial First Amendment question thus raised by the federal cyberstalking statute is whether imposing criminal liability on one-to-many speech that inflicts emotional distress on another concerning a matter of purely private concern similarly comports with the First Amendment. According to Volokh, the answer is an emphatic “no.”

Invoking decisions concerning discipline of government workers, civil liability for defamation, and civil liability for intentional infliction of emotional distress for speech on private concern,¹⁰³ Volokh declares that “the Court has long resisted the notion that such speech can be criminally punished.”¹⁰⁴ I disagree with Volokh’s assertion that the Court has resisted the notion that “such speech” may not be criminally punished. To begin with, as Volokh acknowledges,¹⁰⁵ the Court has held that defamation can constitutionally be subject to criminal

ordinary personal injury case), *with* *In re Primus*, 436 U.S. 412, 414, 434 (1978) (holding that First Amendment prohibits discipline of a lawyer for soliciting a client for public interest litigation).

¹⁰⁰ See, e.g., *Armstrong v. Shirvell*, 596 F. App’x 433, 453 (6th Cir. 2015) (rejecting First Amendment defense to intentional infliction of emotional distress (“IIED”) claim based on speech about “matters of private concern”); *Gersh v. Anglin*, 353 F. Supp. 3d 958, 966 (D. Mont. 2018) (rejecting alt-right personality’s First Amendment defense to IIED claim based on “strictly private” speech even where posted on news blog); *Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1262-63 (N.D. Ala. 2013) (rejecting tabloid’s First Amendment defense to IIED based on speech on a “private matter” causing emotional distress to “a particular victim”); *Esposito-Hilder v. SFX Broad., Inc.*, 665 N.Y.S.2d 697, 700-01 (App. Div. 1997) (rejecting radio personalities’ First Amendment defense to IIED claim based on speech toward a “private individual” on issues of private concern).

¹⁰¹ See Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 751, 789, 790.

¹⁰² *Id.* at 783.

¹⁰³ See *id.* at 783-86.

¹⁰⁴ *Id.* at 783.

¹⁰⁵ *Id.* at 752-53.

penalties.¹⁰⁶ And crucially for this discussion, the Court has never suggested that the First Amendment bars the imposition of criminal liability for speech on purely private matters inflicting severe emotional distress.

Among the *mélange* of cases that Volokh invokes,¹⁰⁷ *Connick v. Myers*¹⁰⁸ is the sole instance in which the Court suggested that the First Amendment would not permit imposition of criminal liability for expression it found unprotected against civil sanction. In *Connick*, the Court rebuffed a First Amendment challenge by a government employee fired for insubordinate speech on matters “only of personal interest.”¹⁰⁹ In doing so, the Court explained that in so holding “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.”¹¹⁰ But the Court’s admonition that just because speech is on a private matter does not, like obscenity, render it liable to criminal punishment hardly “resisted the notion” that there may be *other types* of speech on private matters subject to civil sanction that are subject to criminal punishment. More specifically, dicta suggesting that there are First Amendment limitations on criminal sanctions for insubordinate workplace speech cannot be fairly read as “resisting the notion” that tortious speech *causing harm to others*, such as the case with speech constituting the intentional infliction of emotional distress, is constitutionally immune from criminal punishment.

Similarly contrary to Volokh’s bold assertion, no such resistance is to be found in *United States v. Stevens*,¹¹¹ which invalidated on overbreadth grounds a law criminalizing depictions of animal cruelty even though it contained an exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value;”¹¹² or in *Sable Communications v. FCC*,¹¹³ which struck down a ban on customer initiated “dial-a-porn” telephone calls, involving sexually explicit by non-obscene speech. These cases merely show that it is not a *sine qua non* for First Amendment protection from criminal

¹⁰⁶ See *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

¹⁰⁷ See Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 783-86.

¹⁰⁸ 461 U.S. 138 (1983).

¹⁰⁹ *Id.* at 147.

¹¹⁰ *Id.*

¹¹¹ 559 U.S. 460 (2010).

¹¹² *Id.* at 477-78.

¹¹³ 492 U.S. 115 (1989).

prosecution that speech involve a matter of public concern. Neither case, however, deals with expression such as speech constituting the intentional infliction of emotional distress that the Court has strongly suggested may be subject to tort liability consistent with the First Amendment.

Volokh emphasizes that *Sable Communications* applied strict scrutiny to a ban on speech not of public concern and that other pornography cases have done the same.¹¹⁴ But this just serves to spotlight the corner that the Court has painted itself into with the All-Inclusive Approach. The Court has never suggested that expression constituting intentional infliction of emotional distress is one of the exceptions to the rule against content discrimination. To the contrary, the Court in *Snyder* noted that “there is ‘no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment protections’”¹¹⁵ Accordingly, the All-Inclusive Approach would seem to require that sanctions on speech constituting the intentional infliction of emotional distress be subject to strict scrutiny. Significantly, however, the Court does not even mention, let alone apply, strict scrutiny in its First Amendment analysis in that case.¹¹⁶ Having observed in that case “where matters of purely private significance are at issue, First Amendment protections are often less rigorous,”¹¹⁷ it would be incongruous for it to apply strict scrutiny to intentional infliction of emotional distress cases involving speech on a matter of purely private concern. This is not to deny that the Court might agree with Professor Volokh that although civil liability for such expression comports with the First Amendment, criminal punishment does not. But in light of the Court eschewing strict scrutiny in civil intentional infliction of emotional distress cases, it seems unlikely that it will reverse course and apply strict scrutiny just because criminal rather than civil sanctions are at issue.¹¹⁸

¹¹⁴ Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 784 (first citing *United States v. Playboy Entm’t Grp. Inc.*, 529 U.S. 803, 826-27 (2000); and then citing *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004)).

¹¹⁵ *Snyder v. Phelps*, 562 U.S. 443, 451 n.3 (2011) (citing *Snyder v. Phelps*, 580 F.3d 206, 218 n.12 (4th Cir. 2009)).

¹¹⁶ Similarly, the Court in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) did not apply strict scrutiny in its First Amendment analysis.

¹¹⁷ *Snyder*, 562 U.S. at 452.

¹¹⁸ Finally, it is interesting to note in agreeing that government may constitutionally proscribe unwanted one-to-one speech on the basis of its content, such as harassing emails or telephone calls directed to a particular person, see Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 742, Volokh partially abandons the All-Inclusive Approach he endorses. See Eugene Volokh, *The Trouble with “Public*

III. THE FEDERAL CYBERSTALKING STATUTE AND THE DEMOCRATIC SELF-GOVERNANCE MODEL

As discussed above in Part I.A, in a recent opinion Justice Breyer provided a sketch of the Democratic Self-Governance Model.¹¹⁹ In doing so, he cites to a work by Robert Post, who for decades has powerfully advocated for such an approach. Building on Post's pioneering work but adding a few variations of my own, I will begin this Part by giving a fuller account of the Democratic Self-Governance Model. Applying this model, I will then discuss how prosecutions under § 2261A(2)(B) should be decided. I will then conclude this Part by demonstrating how the cases decided under this provision, while paying lip service to the All-Inclusive Approach, actually conform to the Democratic Self-Governance Model.

A. *An Elaboration and Defense of the Democratic Self-Governance Model*

The Democratic Self-Governance Model postulates that the rigid prohibition against content regulation should be confined to expression essential to democratic self-governance, expression which the Court and commentators often refer to as “public discourse.”¹²⁰ However,

Discourse” as a Limitation on Free Speech Rights, 97 VA. L. REV. 567, 584-94 (2011). As with intentional infliction of emotional distress, there is no recognized First Amendment exception under the All-Inclusive Approach for “unwanted one-to-one” speech. And, ironically, in justifying the lack of protection for “unwanted one-to-one” expression Volokh eschews the formalism of the All-Inclusive Approach and adopts a value-oriented methodology reminiscent of the Democratic Self-Governance Model. He thus correctly observes that unwanted one-to-one speech “does little to promote” any free speech value. Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 744. But the same is true of at least some one-to-many speech about a person that is “very likely to be seen by that person,” *id.* at 743, such as the comment on Kathy Sierra’s blog that would be “a pity if you turned up in the gutter where you belong, with a machete shoved in the self-righteous little cunt of yours.” CITRON, *supra* note 6, at 36. Like “unwanted one-to-one” speech, this expression hardly promotes “search for truth, marketplace of ideas, or self-government.” Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 744.

¹¹⁹ See *supra* text accompanying notes 32–37.

¹²⁰ See, e.g., *Snyder*, 562 U.S. at 460-61 (“Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials.”); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802-03 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”); *Cohen v. California*, 403 U.S. 15, 24 (1971) (stating that the issue in that the case “is whether California can excise,

because this democratic expression is not always aimed at the public but also includes informal conversations between two friends or a small group of individuals,¹²¹ I prefer to use the term “democratic discourse.”¹²² There is no simple algorithm for determining whether expression qualifies as democratic discourse entitled to rigorous protection from content discrimination. It is possible, nonetheless, to identify two crucial criteria: (1) whether the speech is about a matter of public concern and (2) whether the expression occurs in settings dedicated or essential to democratic self-governance, such as books, magazines, films, the Internet, or in public forums such as the speaker’s corner of the park. This two-step process is in accord with the approach the Court took in holding that the expression involved in *Snyder v. Phelps* “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”¹²³

As to the first criterion, the Court has explained that speech is on a matter of public concern “when it can be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it is “a subject of legitimate news interests; that is, a subject of general interest and of value and concern to the public.”¹²⁴ With respect

as ‘offensive conduct,’ one particular scurrilous epithet from the public discourse”); Joseph Blocher, *Public Discourse, Expert Knowledge, and the Press*, 87 WASH. L. REV. 409 (2012); Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135 (1994); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990). Forms of expression having little to do with democratic self-governance but promoting other free speech values are properly afforded some though not rigid protection against content discrimination. For instance, content-based regulation of commercial speech that is neither false or misleading, expression which primarily vindicates the substantive autonomy of listeners, triggers intermediate rather than strict scrutiny. In contrast, because false or misleading commercial speech does not promote any significant free speech value, it is categorically devoid of any First Amendment protection. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

¹²¹ See *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (“The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be [eligible for constitutional protection in the government workplace].” (citing *Rankin v. McPherson*, 483 U.S. 378 (1987))).

¹²² See James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 642-43 (2011). For discussion of the methodology by which the Court has drawn the boundaries of public discourse, see *id.* at 639-41.

¹²³ *Snyder*, 562 U.S. at 452; see *supra* text accompanying notes 95-96.

¹²⁴ *Snyder*, 562 U.S. at 453 (internal quotation marks and citations omitted). Somewhat confusingly, after offering a definition of speech on a matter of public concern that turns entirely on the content of the expression, the Court stated that in addition to examining the “content” of the speech, determination of whether speech is

to the second criterion, in modern democratic societies certain modes of communication form in Post's helpful metaphor "a structural skeleton that is necessary . . . for public discourse to serve the constitutional value of democracy."¹²⁵ For this reason, if speech occurs in a setting essential to democratic self-governance, then regardless of the content the expression, it will be presumed that the expression is protected.¹²⁶ This presumption explains, for instance, why nudity is

on public or private concern requires examination of the "form and context" of the speech. Beginning with the "content" of Westboro's signs, the Court concluded that although hardly "refined social or political commentary," the "issues they highlight — the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy — are matters of public import." *Id.* at 454. The Court then summarily rejected Snyder's contention that the "context of the speech — its connection with his son's funeral — makes the speech a matter of private rather than public concern." *Id.* The Court explained that Westboro's speech is "fairly characterized as constituting speech on a matter of public concern" and that "the funeral setting does not alter that conclusion." *Id.* at 455 (quotation marks and citations omitted). It then addressed Snyder's argument that Westboro "exploited the funeral as a platform to bring their message to a broader audience." *Id.* (quotation marks and citations omitted). The Court agreed that Westboro choose to picket the funeral in part to "increase the publicity for its views," *id.*, but emphasized that the public land adjacent to a public street on which Westboro conducted its picketing was a "traditional public forum" that "occupies a 'special position in terms of First Amendment protection.'" *Id.* at 456 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). Though not entirely clear, it appears that the Court's observation that the speech having occurred on a traditional public forum was not part of its analysis of the "context" of the expression. The Court had previously referred to Westboro as peacefully conducting its picketing "*on matters of public concern* at a public place adjacent to a public street." *Id.* (emphasis added). This would seem to indicate that at this point in its opinion the Court had completed its analysis of the "context" of the speech (it never discusses the "form" of the expression) and had already concluded that the speech was, indeed, on a matter of public concern. If so, then like the second part of my two-criteria analysis, the Court's discussion that the picketing had occurred in a place that "time out of mind" had been used "for public assembly and debate," *id.* (internal quotation marks and citation omitted), focuses on whether the setting of the speech is one dedicated to democratic self-governance *separately and in addition* to whether the speech is on a matter of public concern. This view is supported by the phrasing of the Court's conclusion that because Westboro's speech "was at a public place on a matter of public concern," it was entitled to "special protection" under the First Amendment. *Id.* at 458.

¹²⁵ Post, *Recuperating First Amendment Doctrine*, *supra* note 24, at 1276.

¹²⁶ I think Post overstates matters somewhat in concluding that it is "assumed that if a medium [is] constitutionally protected by the First Amendment, each instance of the medium would also be protected." *Id.* at 1253 (emphasis added). The lack of protection for profanity on broadcast radio and television, for instance, belies any such absolute conclusion. See *FCC v. Pacifica Found.*, 438 U.S. 726, 737-38 (1978). For this reason, I think it is more accurate to say that it is "presumed" rather than "assumed" that each instance of speech in a constitutionally protected medium is protected. See James

protected in film, cable television and the Internet — media which the Court conceives as essential to democratic self-governance — but is not in live performances by erotic dancers on the stage of a “strip club,” a setting lacking such manifest democratic importance.¹²⁷ Since the Court has expressly deemed the Internet to be a medium essential to democratic self-governance,¹²⁸ the presumption of protection afforded any instance of expression in that medium is particularly significant to our ultimate inquiry whether the federal cyberharassment law comports with the First Amendment.

B. The Democratic Self-Governance Model and § 2261A(2)(B)

If speech is on a matter of public concern, then, unless the impugned expression constitutes a true threat, unprotected defamation, or incitement to lawless conduct, the application of § 2261A(B)(2) to such speech should be deemed to violate the First Amendment. If, however, the speech is on matters of “purely private concern,”¹²⁹ then there should ordinarily be no First Amendment immunity from criminal liability available to someone who with “the intent to . . . harass . . . another person” has engaged “in a course of conduct that . . . causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress.”¹³⁰ This is because in stark contrast to content-based punishment of Internet speech on matters of public concern — regulation that implicates the core democratic value underlying the First Amendment — criminalizing cyberharassment of former lovers

Weinstein, *Democracy, Sex and the First Amendment*, 31 N.Y.U. REV. L. & SOC. CHANGE 865, 874 (2007).

¹²⁷ Compare *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 827 (2000) (holding that a federal statute requiring cable television operators to fully scramble or otherwise limit sexually oriented programming violated the First Amendment), with *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301-02 (2000) (finding that the application of a city ordinance banning public nudity to a nude dancing establishment did not violate the First Amendment). It is also in my view why the Supreme Court, though certain that dog fighting was not an activity entitled to First Amendment protection, seemed unsure whether videos depicting this activity were similarly unprotected. It thus invoked the overbreadth doctrine to avoid the issue. See *United States v. Stevens*, 559 U.S. 460, 481-82 (2010).

¹²⁸ See, e.g., *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (referring to the Internet in general and social media in particular as “the most important places . . . for the exchange of views”); *Reno v. ACLU*, 521 U.S. 844, 868, 870 (1997) (noting “the vast democratic forums of the Internet” and explaining that anyone with an Internet connection “can become a town crier with a voice that resonates farther than it could from any soapbox”).

¹²⁹ *Snyder*, 562 U.S. at 454.

¹³⁰ 18 U.S.C. § 2261A(2)(B) (2018).

such as typified by Christopher Osinger's attack on V.B. does not implicate any significant free speech value.¹³¹ More difficult are cases involving speech essentially on private matters but with elements of public concern.

Expression such as Osinger's could not be farther afield from the speech by which people in a democracy govern themselves. Nor does such speech make contribution to the advancement of truth or knowledge in the "marketplace of ideas."¹³² The only conceivable free speech value that such expression might advance is the autonomy of the harasser. But as Professor R. George Wright has explained, if the typical instance of cyberharassment is conceived as involving "meaningful autonomous self-realization by the harasser," then "virtually any human behavior, however pathological, destructive, or felonious, would become speech for constitutional free speech purposes."¹³³ Moreover, whatever autonomy interests of the speaker are promoted by cyberharassment will typically be more than offset by the impairment of the victim's autonomy resulting from the harassing expression.

Still, while cyberharassment on matters of private concern might not ordinarily promote any significant free speech value, such expression occurs in a medium essential to democratic self-governance. Caution is therefore called for when punishing in this medium even expression of no significant free speech value. To this end, § 2261A(2)(B) contains three requirements that constrain prosecutions under this provision from impairing the "vast democratic forums of the Internet."¹³⁴ First, the defendant must intend to "harass" or "intimidate" the victim. As the United States Court of Appeals for the Fourth Circuit has observed: "'Harass' and 'intimidate' are not obscure words." Rather, most people would readily understand harass "to mean 'to disturb persistently; torment, as with troubles or cares; bother continually; pester;

¹³¹ See R. George Wright, *Cyber Harassment and the Scope of Free Speech*, 53 UC DAVIS L. REV. ONLINE 187, 188 (2020):

In most typical cases of cyber harassment, the harassing language in question should not be classified as speech, in the constitutionally relevant sense, at all. Simply put, such literal speech does not implicate any of the consensually or commonly cited basic reasons, values, or purposes underlying the constitutional protection of speech.

¹³² See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (referring to "the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail'" (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984))).

¹³³ Wright, *supra* note 131, at 192 n.37.

¹³⁴ *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

persecute,” while intimidate “to mean ‘to make timid; fill with fear.’”¹³⁵ In addition, the defendant must have engaged in a “course of conduct,” which is defined as “a pattern of conduct composed of 2 or more acts, evidencing a continuity of purpose.”¹³⁶ Finally, the emotional distress that this course of conduct “causes, attempts to cause, or would be reasonably expected to cause,” must be “substantial.”¹³⁷ These requirements would, for instance, bar prosecution of “Rev Ed’s” wish for “open season” on Kathy Sierra for her to be beaten with a foam bat, or even “Hitler’s” exceedingly gruesome statement that it would be “a pity if you turned up in the gutter where you belong, with a machete shoved in the self-righteous little cunt of yours,”¹³⁸ if these were the only such statements from each speaker. In contrast, the notorious Internet troll “weev” could have been prosecuted for his repeated harassing comments.¹³⁹

Professor Volokh objects that the distinction between public and private concern, while “perhaps” acceptable for imposition of civil liability for intentional infliction of emotional distress,¹⁴⁰ is too vague to be used in criminal cases. I agree with Volokh that in the civil context the “public concern/private concern line” has “never [been] defined

¹³⁵ *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 870 (2d ed. 1987)).

¹³⁶ 18 U.S.C. § 2266(2) (2018).

¹³⁷ *Id.* § 2261A(2)(B) (2018). In light of these requirements and those of § 2261A(2)(B)’s predecessor provisions, courts have uniformly rejected challenges asserting that § 2261A is facially unconstitutionally vague or overbroad. See *United States v. Gonzalez*, 905 F.3d 165, 190 n.10 (3d Cir. 2018); *United States v. Conlan*, 786 F.3d 380, 385-86 (5th Cir. 2015); *United States v. Osinger*, 753 F.3d 939, 944-45 (9th Cir. 2014); *United States v. Sayer*, 748 F.3d 425, 436 (1st Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 854-56 (8th Cir. 2012); *Shrader*, 675 F.3d at 310; *United States v. Bowker*, 372 F.3d 365, 379-83 (6th Cir. 2004); *United States v. Fanyo-Patchou*, No. CR19-0146, 2020 WL 4816296, at *2-4 (W.D. Wash. Aug. 19, 2020); *United States v. Oury*, No. 4:19-cr-080, 2020 WL 555377, at *2-3 (S.D. Ga. Feb. 4, 2020); *United States v. Banks*, No. 2:15-cr-168, 2019 WL 6205088, at *1-2 (W.D. Pa. Nov. 1, 2019); *United States v. Moreland*, 207 F. Supp. 3d 1222, 1226-31 (N.D. Okla. 2016); *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 367-68, 373-75 (D. Del. 2015).

¹³⁸ See *supra* text accompanying note 6. The inclusion of these statutory safeguards means, however, that in the absence of “true threats” or incitement to unlawful activity, the federal cyberstalking statute would not provide a remedy to the “cybermob” phenomenon in cases in which no single individual is guilty of a “course of conduct” constituting harassment.

¹³⁹ See CITRON, *supra* note 6, at 37; *supra* text accompanying note 9.

¹⁴⁰ See Volokh, *One-to-One Speech vs. One-to-Many Speech*, *supra* note 2, at 788.

clearly” by Court and “has often been applied in surprising ways.”¹⁴¹ But the appropriate solution to this problem is not to entirely disallow criminal prosecutions for all cyberharassment involving one-to-many speech that inflicts serious emotional distress. Rather, in accord with the description that the expression be “purely” of private concern, the better approach is to narrowly confine the type of speech which can be criminally prosecuted. This approach would, for instance, bar imposition of criminal liability on a blogger for inflicting emotional distress on a feminist media critic he attacked online because she had complained about sexist stereotypes in video games.¹⁴² At the same time, this approach would leave open the availability of criminal prosecution for expression whose suppression would not implicate any significant free speech values, as would usually be the case, for instance, in prosecutions for egregious cases of cyberharassment targeting former lovers as exemplified in the *Osinger* case.

The Supreme Court has taken a similar approach towards First Amendment constraints on criminal law. The Court has held that the First Amendment protects the publication of the content of cellular telephone calls on matters of public concern that have been illegally intercepted in violation of a federal criminal law¹⁴³ prohibiting such disclosure.¹⁴⁴ But in doing so, the Court strongly indicated that no such protection from this law would be applicable if the call were on a matter of purely private concern.¹⁴⁵ And in limiting the operation of the law punishing threats against the President, the Court explicitly adopted the prophylactic approach it had adopted in *New York Times v. Sullivan*, explaining that “we must interpret the language Congress chose ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”¹⁴⁶ In extending such protection to “political hyperbole” to protect First Amendment values, the Court made clear, however, that this did not prevent the punishment of “true threats.”¹⁴⁷ Similarly, to

¹⁴¹ *Id.* at 785; *see also* *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (noting that “the boundaries of the public concern test are not well defined” (quoting *San Diego v. Roe*, 543 U.S. 77, 83 (2004))).

¹⁴² *See Anita Sarkeesian*, WIKIPEDIA, https://en.wikipedia.org/wiki/Anita_Sarkeesian (last modified Jan. 6, 2021, 3:08 UTC) [<https://perma.cc/XWQ6-WWBU>].

¹⁴³ *See* 18 U.S.C. § 2511(1)(c) (2018).

¹⁴⁴ *See* *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001).

¹⁴⁵ *Id.* at 533.

¹⁴⁶ *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹⁴⁷ *Id.*

protect First Amendment values, the Supreme Court has sharply curtailed the government's ability to outlaw sexually explicit material by affording First Amendment protection to sexually graphic expression that, taken as a whole, has "serious literary, artistic, political, or scientific value."¹⁴⁸ Yet, the Court has afforded no First Amendment protection to "hard core" pornography lacking such value.¹⁴⁹

C. Section 2261A(2)(B) Caselaw

Examination of the lower court decisions reveals an interesting phenomenon: Despite frequently paying lip service to the All-Inclusive Approach,¹⁵⁰ decisions under § 2261A(2)(B), or prior versions of this provision dealing with harassing speech inflicting emotional distress, have barred on First Amendment grounds prosecutions for speech on matters of public concern¹⁵¹ while uniformly rejecting First Amendment challenges to prosecutions for speech on purely private concern.¹⁵² The cases decided under § 2261A(2)(B) and its predecessor provisions thus form a clear pattern firmly supporting the Democratic Self-Governance Model.

1. Prosecutions for Speech on Matters of Public Concern

Doubtless because federal prosecutors are aware that prosecutions under § 2261A(2)(B) or its predecessor provision for speech on matters of public concern would face major First Amendment obstacles, there are few cases dealing with such expression. I have been able to find only

¹⁴⁸ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹⁴⁹ *Id.* at 27.

¹⁵⁰ *See, e.g., United States v. Gonzales*, 905 F.3d 165, 191 (3d Cir. 2018); *United States v. Hobgood*, 868 F.3d 744, 747 (8th Cir. 2017); *United States v. Osinger*, 753 F.3d 939, 946 (9th Cir. 2014); *United States v. Petrovic*, 701 F.3d 849, 854-55 (8th Cir. 2012).

¹⁵¹ *United States v. Cook*, 472 F. Supp. 3d 326, 335-36 (N.D. Miss. 2020); *United States v. Cassidy*, 814 F. Supp. 2d 574, 582-87 (D. Md. 2011).

¹⁵² In addition to the cases cited in note 150, *supra*, the following decisions all reject First Amendment challenges to prosecutions for expression on matters of private concern: *United States v. Ackell*, 907 F.3d 67, 83 (1st Cir. 2018); *United States v. Conlan*, 786 F.3d 380, 386 (5th Cir. 2015); *United States v. Sayer*, 748 F.3d 425, 433 (1st Cir. 2014); *United States v. Shrader*, 675 F.3d 300, 312 (4th Cir. 2012); *United States v. Fanyo-Patchou*, No. CR19-0146, 2020 WL 4816296, at *4 (W.D. Wash. Aug. 19, 2020); *United States v. Cardozo*, No. 1:18-CR-10251, 2019 WL 2603096, at *4 (D. Mass. June 24, 2019); *United States v. Sergentakakis*, No. 15 Cr. 33, 2015 WL 3763988, at *6 (S.D.N.Y. June 15, 2015); *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 371-72 (D. Del. 2015); *see United States v. Bowker*, 372 F.3d 365, 378-79 (6th Cir. 2004).

two cases, *United States v. Cassidy*¹⁵³ and *United States v. Cook*,¹⁵⁴ that squarely address the constitutionality of the application of this provision to expression that the court finds to be on a matter of public concern. Both of these decisions held that the application of the federal cyberstalking statute to speech on matters of public concern violated the First Amendment. A third case, *United States v. Moreland*,¹⁵⁵ involved the application of § 2261A(2)(B) to communications attacking a public figure, some of which were of public concern but many others that were of private concern. The court found that because speech at issue constituted a true threat the prosecution did not offend the First Amendment. I will begin by discussing *Cassidy*, a decision on which *Cook* heavily relies.

After being fired as an employee of a Buddhist sect, William Cassidy engaged in a barrage of often extremely vulgar, and in some instances menacing, statements on pseudonymous Twitter and blog accounts viciously attacking Alyce Zeoli¹⁵⁶ (referred to in the court's opinion as A.Z.), a well-known and controversial leader of the sect.¹⁵⁷ Examples of the dozens of tweets and blog posts constituting this cyberattack include: “[Y]a like haiku? Here’s one for ya: ‘Long, Limb, Sharp Saw, Hard Drop’ ROFLMAO”,¹⁵⁸ “(A.Z.) you are a liar & a fraud & you corrupt Buddhism by your very presence: go kill yourself”,¹⁵⁹ and “(A.Z.) is like a waterfront whore: her price goes down as the night wears on.”¹⁶⁰

Cassidy was indicted under the then-applicable provision of § 2261A prohibiting harassing speech causing emotional distress.¹⁶¹ United States District Judge Roger Titus dismissed the indictment, finding that the application of § 2261A to Cassidy’s cyberattack on Zeoli violated the First Amendment. Titus began the First Amendment analysis by noting that from the founding of our nation “there has been a tradition of protecting anonymous speech, particularly anonymous political or

¹⁵³ *Cassidy*, 814 F. Supp. 2d 574.

¹⁵⁴ 472 F. Supp. 3d 326 (N.D. Miss. 2020).

¹⁵⁵ 207 F. Supp. 3d 1222 (N.D. Okla. 2016).

¹⁵⁶ See *Jetsunma Ahkon Lhamo*, WIKIPEDIA, http://en.wikipedia.org/wiki/Jetsunma_Ahkon_Lhamo (last visited Jan. 24, 2021) [<http://perma.cc/D8DP-Z8RA>].

¹⁵⁷ See *Cassidy*, 814 F. Supp. 2d at 578.

¹⁵⁸ *Id.* at 588.

¹⁵⁹ *Id.* at 589.

¹⁶⁰ *Id.* at 590.

¹⁶¹ 18 U.S.C. § 2261A(2)(A) (2006). This provision made it a crime to “with the intent to . . . harass . . . [to use] any interactive computer service . . . to engage in a course of conduct that cause[s] substantial emotional distress” to another person. *Id.*

religious speech.”¹⁶² He agreed that the tweets and blog posts may have inflicted substantial emotional distress on Zeoli, but emphasized the indictment was “directed squarely at protected speech: anonymous, uncomfortable Internet speech addressing religions matters.”¹⁶³ Continuing with the First Amendment analysis, Titus found it telling that “the Government’s indictment is not limited to categories of speech that fall outside of First Amendment protection — obscenity, fraud, defamation, true threats,¹⁶⁴ incitement or speech integral to criminal conduct.”¹⁶⁵ Because the provisions of § 2261A alleged in the indictment constituted a content-based restriction of speech, Titus held that the indictment was valid only if these provisions could survive strict scrutiny. Because in his view protecting people from emotional distress inflicted by online expression was not a compelling state interest, the application of the statute to Cassidy’s speech failed strict scrutiny.¹⁶⁶

Returning to the specially protected nature of Cassidy’s speech, Titus emphasized that “A.Z. is not merely a private individual but rather an easily identifiable public figure that leads a religious sect and that many of the [Cassidy’s] statements related to [the sect’s] beliefs and A.Z.’s qualifications as a leader.”¹⁶⁷ Citing *New York Times v. Sullivan*, he found that this is “the type of expression that the Supreme Court has consistently tried to protect.”¹⁶⁸ For this reason, the application of § 2261A would in Titus’ view be unconstitutional even if intermediate scrutiny applicable to restrictions on expressive conduct rather than strict scrutiny were the proper standard. Under intermediate scrutiny, he explained, the speech restriction must be “no greater than is essential

¹⁶² *Cassidy*, 814 F. Supp. 3d at 581.

¹⁶³ *Id.* at 583.

¹⁶⁴ In response to the government’s argument that some of the statements were arguably unprotected “true threats,” Titus wrote that the indictment is based on the portion of § 2261A dealing with the infliction of emotional distress, not the provision prohibiting intentionally putting another in reasonable fear of death or serious bodily injury. *See id.* at 583 n.11. This reasoning is dubious. If the speech in question was categorically unprotected, then its punishment under a facially valid law would not violate the First Amendment.

¹⁶⁵ *Id.* at 583.

¹⁶⁶ *Id.* at 585. It is not at all certain Judge Titus is correct that protecting people from substantial emotional distress inflicted by online harassment is a not a compelling state interest. But his holding that this interest is not compelling because those subject to cyberharassment can avoid such injury by “simply averting [their] eyes” by not looking at blogs or blocking tweets, *id.*, is doubtful as a general matter, and is simply wrong to the extent the harassing speech consists of comments on the victim’s blog.

¹⁶⁷ *Id.* at 586 (citation omitted).

¹⁶⁸ *Id.*

to the furtherance” of an important government interest.¹⁶⁹ Titus found that there were no grounds for concluding that the government interest in preventing the infliction of emotional distress by online communications “would no longer be furthered if the statute did not apply to individuals engaging in political debate or critiques of religious leaders.”¹⁷⁰

In *Cook*, the District Court relied heavily on *Cassidy* in dismissing on First Amendment grounds an indictment under § 2261A(2)(B) for a cyberattack on law enforcement officials. After being acquitted in Mississippi state court on a charge of selling a controlled substance, Christopher Cook posted on the Internet highly disparaging and vaguely threatening remarks aimed at various officials involved in the failed prosecution.¹⁷¹ For instance, in a Facebook post Cook wrote:

Cowards [District Attorney] Creekmore and [Assistant District Attorney] Mueller and cowardly judges. Cowardly crooked public defenders. Step down. Dixie Mafia likes to talk about making the wrong people mad. Well congratulations. You did. God gave me a good jury. Now I’m gonna give you what you’ve been giving my brothers and sisters Because I’m coming and hell is coming with me. And I’m not just quoting a movie.¹⁷²

Cook’s ire, however, was particularly focused on Mississippi Bureau of Narcotics Agent Jon Lepicier, the undercover officer who arrested him. In one Facebook post, Cook revealed information he found on the Internet about Lepicier, including an address and potential aliases.¹⁷³ And as part of a very lengthy and rambling post, which among many other things decried “the corruption in this state” and “the scapegoating and unsolved murders,” Cook stated that:

¹⁶⁹ *Id.* at 585 (quoting *Satellite Broad. & Comm’ns Ass’n v. Fed. Comm’ns Comm.*, 275 F.3d 337, 355 (4th Cir. 2001)).

¹⁷⁰ *Id.* at 586-87. Having found the portions of § 2261A invoked in the indictment to be unconstitutional as applied, Titus did not reach *Cassidy*’s claim that these portions of the law were facially invalid because vague and overbroad. *Id.* at 587.

¹⁷¹ *United States v. Cook*, 472 F. Supp. 3d 326, 328 (N.D. Miss. 2020).

¹⁷² *Id.* The reference is to dialogue spoken by the Wyatt Earp character in the film, *Tombstone*: “From now on I see a red sash, I kill the man wearing it. So run you cur. And tell the other curs the law is coming. You tell ‘em I’m coming! And Hell’s coming with me you hear! Hell’s coming with me!” *Tombstone*, QUOTEGEEK (May 16, 2012), <http://quotegeek.com/quotes-from-movies/tombstone/5184/> [http://perma.cc/HX6M-5E7D].

¹⁷³ *See Cook*, 472 F. Supp. 3d at 328. The opinion does not make clear, however, if this was a home address.

I uncovered the family of the arresting person. His real name, parents, grandparents, sisters, wife, nephew, properties owned, past phone numbers, aliases of the whole family, in laws . . . which had him very puzzled as to how I did it. But I was nice enough to use poetry that only he would understand when posting what I knew. This guy has had affairs and paid numerous people to get something on me since early 2017, including his only witness, a real meth dealer. How ironic (sigh).¹⁷⁴

Cook ended this tirade by declaring: “And God willing I’m going to take them out. With or without the help of the people. So far he has been willing and all credit be to him.”¹⁷⁵

A federal grand jury found that these posts “threatened . . . Lepicier by ‘revealing the address of, and names of family members’ and ‘did threaten him and his family.’”¹⁷⁶ Cook was indicted under § 2261A(2)(B) for Internet harassment that “caused and would reasonably be expected to cause substantial emotional distress to a person, a spouse of that person or immediate family member of that person.”¹⁷⁷ Judge Michael Mills began the First Amendment analysis by quoting the observations in *Cassidy* that “the First Amendment protects speech even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste” and that “the Supreme Court has ‘consistently classified emotionally distressing or outrageous speech as protected, especially where the speech touches on matters of political, religious or public concern.’”¹⁷⁸

Again quoting from *Cassidy*, Judge Mills acknowledged that “there are certain well-defined and narrowly limited classes of speech that remain unprotected by the First Amendment,” including “true threats.”¹⁷⁹ With respect to Cook’s posts, Mills found that “when read in context,” the posts “lack entirely the specificity required to bring them under the umbrella of a true threat.”¹⁸⁰ He emphasized that

¹⁷⁴ *Id.* at 330.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 339.

¹⁷⁸ *Id.* at 332 (quoting *United States v. Cassidy*, 814 F. Supp. 2d 574, 582 (D. Md. 2011)).

¹⁷⁹ *Id.* Along with obscenity, defamation, fraud and incitement, Mills also lists speech integral to criminal conduct categories of unprotected speech. His opinion does not refer again any of these other exceptions to First Amendment protection.

¹⁸⁰ *Id.* at 335.

nowhere in any of the posts “does Cook explicitly state the he plans to physically harm Lepicier, or any other named public official.”¹⁸¹ In addition, while acknowledging that “sharing public information, while potentially offensive and disagreeable,” such expression does not “rise to the level of a true threat.”¹⁸²

Mills then held that because Cook’s posts discuss matters of public concern, they are protected by the First Amendment. Quoting from *Snyder v. Phelps*, he explained speech on public concern is that “which can ‘be fairly considered as relating to any matter of political, social, or other concern to the community.’”¹⁸³ He then held that Cook’s posts were on matters of public concern because when viewed in their entirety, they were “an attempt by Mr. Cook to expose what he viewed to be misconduct with the Mississippi Bureau of Narcotics, the District Attorney’s Office and the Calhoun County Court System.”¹⁸⁴ Mills next found that because the indictment charged that Cook’s posts “caused and would be expected to cause substantial emotional distress” to others, § 2261A(2)(B) constitutes a content-based restriction as applied to this expression.¹⁸⁵ As such, the indictment of Cook’s under this provision was unconstitutional unless “necessary to service a compelling state interest.”¹⁸⁶ The court held that “the benefit of the content based restriction to shield sensibilities is *just not enough* to supplant a citizen’s right to uncomfortable public discourse.”¹⁸⁷

As framed by the courts in both *Cassidy* and *Cook*, the central issue was whether the application of § 2261A(2)(B) to expression on matters of public concern comported with the First Amendment. In contrast, the court in *Moreland* cursorily dealt with this issue, accepting without discussion the defendant’s argument that the victim of the cyberharassment was a public figure but leaving ambiguous whether it considered the speech at issue a matter of public concern. Charles Moreland was indicted under § 226A(2)(B) for sending hundreds of communications to CP, an author and journalist, through email, social media and correspondence delivered to CP’s office.¹⁸⁸ CP did not

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)).

¹⁸⁴ *Id.* at 336.

¹⁸⁵ *Id.* at 339.

¹⁸⁶ *Id.* (quoting *United States v. Cassidy*, 814 F. Supp. 2d 574, 585 (D. Md. 2011)).

¹⁸⁷ *Id.* at 339-40. As did the court in *Cassidy*, Judge Mills declined to rule on the facial validity of § 2261A(2)(B). *Id.* at 340.

¹⁸⁸ *United States v. Moreland*, 207 F. Supp. 3d 1222, 1225 (N.D. Okla. 2016).

respond to any of these communications.¹⁸⁹ Many of Moreland's communications were "nonsensical or strange," but others "referenced violence" such as Moreland's belief that CP had threatened him or was trying to harm or kill him and he was therefore "ready for a 'fight to the death.'"¹⁹⁰ Moreland claimed that his emails to CP, "taken together or alone," did not constitute a true threat because CP "is a public figure 'who involved herself in the most contentious arenas of the public fray'" and because the bulk of the emails "concerned politics."¹⁹¹ Under these circumstances, he argued, § 2261A(2)(B) violated the First Amendment as applied to his communications with CP.¹⁹²

In rejecting this argument, District Judge John E. Dowdell acknowledged that many of Moreland's emails to CP "referenced topics that concern matters at least touching on politics or similar issues of public concern."¹⁹³ Dowdell found, however, that Moreland's "communications to CP went well beyond political statements or comments about issues of public concern."¹⁹⁴ Finding that Moreland's "words are in the nature of a true threat and speech integral to criminal conduct,"¹⁹⁵ he denied Moreland's motion to dismiss the indictment.¹⁹⁶

Although *Moreland* allowed the prosecution to proceed, it is nonetheless generally consistent with *Cassidy* and *Cook*, both of which dismissed the indictment. To begin with, it is not at all clear that Judge Dowdell found the communications involved in that case to be speech on a matter of public concern rather than, taken as a whole, on a matter of private concern threatening a public figure. In addition, *Cassidy* and *Cook* acknowledged even if the speech was on a matter of public

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1230.

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*; *see also id.* at 1228 n.2 ("While many of Mr. Moreland's 394 emails referenced matters of arguable public concern or political interest, numerous other emails had nothing to do with any issue of political or public concern.")

¹⁹⁵ *Id.* at 1231. In accord with every other court that has ruled on the issue, Judge Dowdell rejected the claim that § 2261A(2)(B) was facially overbroad. *See id.* at 1226-29. In the course of this discussion, Judge Dowdell addressed Moreland's claim that by failing to limit prosecutions to private figures, "Congress ignored the citizen's right to freely communicate under the First Amendment." *Id.* at 1228 (internal quotation marks omitted). Dowdell acknowledged that a "heightened standard generally applies to speech about public officials" and public figures. *Id.* But this, he explained, "does not render public officials unprotected from true threats or speech integral to criminal conduct," or mean that "public figures cannot be victims of cyberstalking or any other criminal behavior." *Id.*

¹⁹⁶ *See id.* at 1233.

concern it could be constitutionally prosecuted if a true threat,¹⁹⁷ while *Moreland* allowed that speech might well be immune from prosecution under this provision if it had not constituted a true threat.¹⁹⁸

Cassidy, *Cook*, and arguably *Moreland* are the only cases that I have been able to find that actually rule on the constitutionality of the application of § 2221A(2)(B) or its predecessor provision to its expression on a matter of public concern. Consistent with these decisions, dicta in a United States Court of Appeals decision suggest that such an application would violate the First Amendment. In *United States v. Ackell*,¹⁹⁹ the defendant argued that § 2221A(2)(B) was unconstitutionally overbroad because it applied to “discourse on matters of public concern.”²⁰⁰ In response the court acknowledged that the provision “could have an unconstitutional application,”²⁰¹ mentioning *Cassidy* as the sole example in which § 2221A(2)(B) or its previous version was “actually . . . applied to protected conduct.”²⁰² It declined, however, to “administer the ‘strong medicine’” of holding the statute facially overbroad, expressing confidence that “as-applied challenges will properly safeguard the rights that the First Amendment

¹⁹⁷ See *United States v. Cook*, 472 F. Supp. 3d 326, 332-37 (N.D. Miss. 2020); *United States v. Cassidy*, 814 F. Supp. 2d 574, 582-83 (D. Md. 2011) (citing *Watts v. United States*, 394 U.S. 705 (1969)). As noted earlier, *Cassidy* dubiously held that the government could not rely on the unprotected status of speech constituting true threats in a prosecution under the predecessor of § 2261A(2)(B) because the prosecution should have been brought under provision of § 2261A prohibiting putting a person in reasonable fear of death or bodily injury. See *supra* note 164.

¹⁹⁸ See *Moreland*, 207 F. Supp. 3d at 1228-31. A possible point of inconsistency between *Moreland*, on the one hand, and *Cassidy* and *Cook*, on the other, is *Moreland*'s holding that the speech involved in that case was unprotected because it constituted both a threat and “speech integral to criminal conduct.” *Id.* at 1231. If Judge Dowdell meant that *Moreland*'s expression met the latter exception to the All-Inclusive Approach because it constituted threatening expression that independently could constitutionally be criminally punished, then there is redundancy though no inconsistency. If, however, he meant that *Moreland*'s expression constituted speech integral to criminal conduct because it violated § 2261A(2)(B), this would render the decision contrary to *Cassidy* and *Cook*. For on this view, all expression, be it on private or public concern, could be prosecuted consistent with the First Amendment so long as it met the elements of that provision. See *infra* note 278 and accompanying text. Because Dowdell offers no explanation of how *Moreland*'s expression was integral to criminal conduct, it is not possible to know what he had in mind regarding this highly problematic exception to the All-Inclusive Approach.

¹⁹⁹ 907 F.3d 67 (1st Cir. 2018).

²⁰⁰ *Id.* at 76.

²⁰¹ *Id.* at 77.

²⁰² *Id.* at 76 (citing *Cassidy*, 814 F. Supp. 2d 574).

enshrines.”²⁰³ In addition, consistent with the cyberstalking cases, courts have held unconstitutional prosecutions under 47 U.S.C. § 223(a)(1)(C)²⁰⁴ for anonymous harassing use of a telecommunications device when applied to speech on matters of public concern.²⁰⁵

2. Prosecutions of Speech on Matters of Private Concern

In sharp contrast to the cases just discussed, courts have uniformly rebuffed First Amendment challenges to convictions under § 2261A(2)(B) and its predecessor provisions for speech on private matters. For purposes of analysis, these cases can be usefully divided into two categories: cases dealing with speech on “purely” private matters and those deeming the speech at issue to be on matters of private concern despite having elements that are arguably of public concern.

Cases involving harassment of a former amorous partner typically involve speech confined to purely private matters. An example of such expression is provided by the Ninth Circuit decision in *Osinger v. United States*²⁰⁶ which upheld the conviction for the cyberharassment described in the Introduction.²⁰⁷ Dutifully reciting the All-Inclusive Approach, Judge Johnnie Rawlinson’s majority opinion explained that “[t]he First Amendment prohibits any law abridging the freedom of speech,” with the exception of “some limited categories of unprotected

²⁰³ *Id.* at 77 (citing *United States v. Williams*, 553 U.S. 285, 293 (2008)).

²⁰⁴ 47 U.S.C. § 223(a)(1)(C) (2018). This provision makes it a crime to use “a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to abuse, threaten, or harass any specific person.” *Id.*

²⁰⁵ See, e.g., *United States v. Popa*, 187 F.3d 672, 677-78 (D.C. Cir. 1999) (holding the statute unconstitutional because it “could have been drawn more narrowly . . . by excluding from its scope those who intend to engage in public or political discourse”); *United States v. Weiss*, 475 F. Supp. 3d 1015, 1031-32 (N.D. Cal. 2020) (following *Popa* and finding § 233(a)(1)(c) unconstitutional as applied to political speech); see also *United States v. Bowker*, 372 U.S. 365, 379-80 (6th Cir. 2004) (“[I]f [the defendant] had been charged with placing anonymous telephone calls to a public official with the intent to annoy him or her about a political issue, the telephone harassment statute might have been unconstitutional as applied to him.” (citing *Popa*, 187 F.3d at 677-78)).

²⁰⁶ *United States v. Osinger*, 753 F.3d 939 (9th Cir. 2013).

²⁰⁷ As was Cassidy, *Osinger* was indicted under 18 U.S.C. § 261A(2)(A). *Id.* at 941. 18 U.S.C. § 2261A(2)(A) was the then-applicable section of the federal cyberstalking law aimed at online communication causing substantial emotional distress. See *supra* note 161 and accompanying text. *Osinger* was convicted and sentenced to forty-six months’ imprisonment. *Osinger*, 753 F.3d at 942.

speech” including “speech integral to criminal conduct.”²⁰⁸ Judge Rawlinson then held that “[a]ny expressive aspects of Osinger’s speech were not protected under the First Amendment because they were ‘integral to criminal conduct’ in intentionally harassing, intimidating or causing substantial emotional distress to V.B.”²⁰⁹

A concurring opinion by Judge Paul Watford also relied on the speech integral to criminal conduct exception, though with considerable reservation.²¹⁰ Watford acknowledged that Osinger’s “text messages, emails, and Facebook page constitute speech that, considered in isolation, might have been entitled to First Amendment protection.”²¹¹ This is because “there is no categorical exception to the First Amendment harassing or offensive speech” and because “it’s hard to say that the text messages rise to the level of ‘true threats.’”²¹² He concluded, however, that none of this expression was entitled to First Amendment protection because Osinger used it as part of “his ongoing campaign to harass V.B. through repeated unwanted contacts.” As such, this expression fell within the exception for speech that is “an integral part of conduct in violation of valid criminal statute,”²¹³ namely, § 2261A.

Watford recognized that the speech integral to criminal conduct exception “has been and remains controversial; its boundaries and underlying rationale have not been clearly defined, leaving the precise scope of the exception unsettled.”²¹⁴ But what made this “a straight forward case” for the concurring judge is that in addition to this expression, Osinger subjected V.B. to numerous unwanted in-person contacts, including knocking on her door or window late at night.²¹⁵ As such, Osinger “committed the offense by engaging in both speech and unprotected non-speech conduct.”²¹⁶ In contrast, cases in which “the defendant’s harassing ‘course of conduct’ consists entirely of speech that would otherwise be entitled to First Amendment” are “less straight forward.”²¹⁷ It was therefore in Watford’s view “unclear” whether the

²⁰⁸ *Osinger*, 753 F.3d at 946 (internal quotation marks omitted) (citing *United States v. Meredith*, 685 F.3d 814, 819 (9th Cir. 2012)).

²⁰⁹ *Id.* at 947 (quoting *United States v. Meredith*, 685 F.3d 814, 819-20 (9th Cir. 2012)).

²¹⁰ *See id.* at 950 (Watford, J., concurring).

²¹¹ *Id.* at 953.

²¹² *Id.* (citing *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010)).

²¹³ *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

²¹⁴ *Id.* at 950 (citing *Volokh, Speech as Conduct*, *supra* note 75, at 1311-26).

²¹⁵ *See id.* at 953.

²¹⁶ *Id.*

²¹⁷ *Id.* at 954.

integral to criminal conduct would be applicable “in a § 2261A prosecution for the defendant caused someone substantial emotional distress by engaging in otherwise protected speech.”²¹⁸

An Eighth Circuit case, *United States v. Hobgood*,²¹⁹ provides an example of a somewhat different tack employed by courts to uphold § 2261A convictions under the speech integral to criminal conduct exception in prosecutions involving speech on matters of purely private concern. This case involved a campaign of online harassment by James Hobgood against KB, a woman with whom Hobgood had had a brief romantic relationship. After KB rebuffed further advances from Hobgood, he sent KB email, Facebook and text messages demanding that she apologize for the way she treated him. After KB refused to apologize, Hobgood portrayed KB as an exotic dancer and a prostitute on publicly available social media. He also sent KB’s employer email and postal mail claiming that KB was an exotic dancer and prostitute. Hobgood then sent KB and her family emails stating that unless KB apologized to him, he would continue to make these claims about her. According to KB, these communications caused her substantial emotional distress which contributed to her need for short-term hospitalization.²²⁰

When contacted by law enforcement investigators, Hobgood admitted sending the communications to KB, her family and employer.²²¹ He told the investigators that he would continue to do so until he caused KB to lose her job or until she repented for an

²¹⁸ *Id.* “Revenge porn,” such as Osinger’s posting of sexually-explicit photographs of V.B., see *supra* text accompanying note 15, is a staple of cyberharassment. See CITRON, *supra* note 6, at 45-50. Such expression would likely constitute invasion of privacy under state tort law. See Weinstein, *Cyber Harassment and Free Speech*, *supra* note 1, at 60-61. Because the harm § 2261A(2)(B) focuses on is infliction of emotional distress not invasion of privacy, however, any extended discussion on whether sanctions on expression constituting invasion of privacy comports with the First Amendment is beyond the scope of this Article. I will therefore limit my discussion of the subject to a few brief points. As with expression constituting intentional infliction of emotional distress, the Supreme Court has never recognized a categorical exception from First Amendment protection for speech constituting invasion of privacy. Nonetheless, to the extent that revenge porn and other extreme cases of invasion of privacy involve purely a matter of private concern, such expression is in my view subject to civil liability consistent with the First Amendment. *Id.* Moreover, for the reasons discussed *supra* text accompanying notes 103–118 with respect to expression on purely private matters constituting the intentional infliction of emotional distress, I believe that “revenge porn” and certain other extreme cases of invasion of privacy bereft of any legitimate public interest could constitutionally be subject to criminal liability as well.

²¹⁹ *United States v. Hobgood*, 868 F.3d 744 (8th Cir. 2017).

²²⁰ *Id.* at 746.

²²¹ *Id.*

unspecified wrong she had committed against him. The investigators also corroborated that Hobgood was responsible for portraying KB as an exotic dancer and prostitute on social media. Hobgood was indicted for violating § 2261A.²²² After the district court denied his motion to dismiss on First Amendment grounds, Hobgood then conditionally pleaded guilty, reserving the right to appeal the denial of his motion to dismiss. The district court sentenced him to a term of imprisonment of twelve months and one day.²²³

On appeal, Hobgood contended that the communications for which he was convicted constituted speech protected by the First Amendment and that application of § 2261A to these communications represented an impermissible content-based restriction of speech.²²⁴ Writing for a unanimous panel, Circuit Judge Steven Colloton dutifully began the First Amendment analysis by invoking the All-Inclusive Approach. “Generally speaking,” Colloton declared, “the First Amendment forbids the government from restricting speech because of its content.” “But,” he continued, “content-based restrictions are permitted in ‘a few limited areas.’”²²⁵ Like virtually every other decision dealing with a conviction under § 2261A for speech on a private matter,²²⁶ this one invoked the speech integral to criminal conduct to affirm the conviction. But unlike the court in *Osinger*, which found the expression integral to the violation of the § 2261A itself, Colloton found that Hobgood’s speech was integral to violation of another statute, the federal extortion statute, 18 U.S.C. § 875 (d), which prohibits threats to injure a person’s reputation to extort a “thing of value” from that person.²²⁷ Colloton held that the apology that Hobgood tried to extort from KB was a “thing of value” under this provision.²²⁸ Nor did it matter that Hopgood was not charged with extortion. “Insofar as the interstate stalking statute overlaps with the extortion statute,” he reasoned, “the court may consider that circumstance in determining whether the speech is protected.”²²⁹

Significantly, courts have rejected every other First Amendment challenge to § 2261A for expression on matters of purely private

²²² *Id.* Hobgood was indicted under § 2261A(2)(A), the predecessor to current § 2261A(2)(B). *See supra* note 161.

²²³ *Hobgood*, 868 F.3d at 746.

²²⁴ *Id.* at 747.

²²⁵ *Id.*

²²⁶ *See cases cited supra* note 150.

²²⁷ *Hobgood*, 868 F.3d at 747.

²²⁸ *Id.*

²²⁹ *Id.*

concern.²³⁰ And like the two exemplars just discussed, these decisions typically invoke the All-Inclusive Approach, but then find the impugned expression falls into the integral to criminal conduct exception.²³¹ As *Osinger* and *Hobgood* bear witness, however, this approach serves only to obfuscate what should have been a much more straightforward analysis, namely, that punishment of the palpably harmful speech would not have imperiled any significant First Amendment value. In contrast, several cases involve the more difficult situation in which the defendant's communications considered in their entirety are on a matter of private concern but which contains some statements of public concern.

In *United States v. Sergentakis*,²³² the court helpfully attempts to disentangle the private and public elements of the expression at issue. The defendant in that case, Kris Sergentakis, had previously been convicted of engaging in a kickback scheme while employed there as a purchasing manager with the Leukemia and Lymphoma Society ("LLS"), a charitable non-profit organization that funds blood cancer research.²³³ John Walter, LLS's Chief Financial Officer at the time Sergentakis was engaged in the kickback scheme and later its Chief Executive Officer, had provided information to law enforcement officers concerning Sergentakis' role in the scheme.²³⁴ While in prison Sergentakis mailed numerous letters to Walter and other LLS executives falsely claiming that Walter had been arrested for molesting his six-year-old daughter.²³⁵ After being released from prison, Sergentakis posted this allegation on his websites along with the charge he had been "railroaded" into prison for speaking out about Walter's crimes.²³⁶ These websites also contained statements such as Walter can "rape your wife, molest your children and burn down your house" and an image of a guillotine with the title "THE CURE FOR PEDOPHILIA."²³⁷ In addition, Sergentakis posted similar statements on other websites, including one that provides information about charities to prospective donors, including the false statement that Walter been imprisoned.²³⁸

²³⁰ See cases cited *supra* note 152.

²³¹ See cases cited *supra* note 150.

²³² *United States v. Sergentakis*, No. 15 Cr. 33, 2015 WL 3763988 (S.D.N.Y. June 15, 2015).

²³³ *Id.* at *1.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at *1-2.

²³⁷ *Id.* at *2 (quoting the complaint).

²³⁸ *Id.*

He also sent emails to, among others, the principal of the school that Walter's children attended stating that there is "something u need to know about" Walter²³⁹ with a link to one of Sergentakis websites and the *New York Post* that Walter was being held in federal prison.²⁴⁰

As a result of these website posts and emails, Sergantakis was indicted under § 2261A(2).²⁴¹ He moved to dismiss the indictment arguing that his statements about Walter were on matters of public concern and therefore protected by the First Amendment.²⁴² In response, the government argued these communications were not protected because integral to criminal conduct, namely, harassment alleged in the indictment.²⁴³ In support of this contention, the government primarily relied on three cases that had adopted this rationale to uphold a federal cyberstalking conviction,²⁴⁴ including *United States v. Osinger*.²⁴⁵ In ruling on these arguments, United States District Judge Nelson Roman aptly noted that the cases the government relied on "deal exclusively with *purely private information*, to wit, the dissemination of information related to each victim's sexual experiences," but do not, as in this case, raise "any issues related to speech purportedly made about a public figure on matters of public concern."²⁴⁶

In Judge Roman's view, the case presented "a close question" with facts that "walk the line" between cases like *Osinger* and *Cassidy*, a case involving a public figure on which defendant heavily relied.²⁴⁷ He noted that "speech concerning the operations of a major public charity" and its Chief Executive Officer "weigh in favor" of finding the speech protected and dismissing the indictment.²⁴⁸ But after closely examining the issue,²⁴⁹ Roman concluded that unlike the victim in *Cassidy*, Walter was not a public figure.²⁵⁰ Crucially, he added that even if Walter were

²³⁹ *Id.* (quoting the complaint).

²⁴⁰ *Id.*

²⁴¹ *Id.* He was also charged with witness retaliation in violation of 18 U.S.C. § 1513(e). *Id.*

²⁴² *Id.* at *3.

²⁴³ *Id.* at *4.

²⁴⁴ *Id.*

²⁴⁵ 753 F.3d 939 (9th Cir. 2014). *Osinger* is discussed in detail *supra* text accompanying notes 206–218. The other two cases relied on by the government were *United States v. Sayer*, 748 F.3d 425 (1st Cir. 2014), and *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012).

²⁴⁶ *Sergentakis*, 2015 WL 3763988, at *4 (emphasis added).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.* at *5-6.

²⁵⁰ *Id.* at *6.

a public figure, the speech for which Sergentakis was indicted was not a matter of public concern. Rather, Roman found to the extent that Sergentakis' speech concerned matters related to the management of LLS, they did not form the basis of the indictment and at most were "a thinly veiled attempt to immunize the defendant's personal attacks on Walter by claiming to speak of public issues."²⁵¹ Having found the speech for which the defendant was indicted to be of private concern, he decided to follow the cases dealing with speech on purely rather than *Cassidy* and therefore to apply the speech integral criminal conduct exception. Finding Sergentakis' communications "integral to criminal conduct in intentionally harassing, intimidating, or causing emotional distress"²⁵² to Walter, he denied the motion to dismiss.²⁵³

Other hybrid cases are ones in which, like the cases involving speech on purely private matters, the victim and the defendant were former amorous partners. *United States v. Cardozo*²⁵⁴ involved cyberharassment of a writer, referred to in the case as, Jane Doe I, arising out of an essay she had written for Online Magazine.²⁵⁵ In this essay, Jane Doe I described a sexual encounter she had when she was thirteen years old with Byron Cardozo, then age seventeen, which she had found coercive and traumatic.²⁵⁶ In response, Cardozo used several Internet platforms, including Facebook, Twitter, the comment section of Online Magazine A, and Jane Doe I's own website "to engage in a cyberstalking and interstate threats campaign targeting Jane Doe I."²⁵⁷ Typical of Cardozo's harassing communications were the following posts on Jane Doe I's website:

"You fucking bitch keep it up and you will know what it means to be assaulted." "You are fucking done I dare you to keep pulling this shit I FUCKING DARE YOU BITCH YOU WILL KNOW FEAR TRUST ME BY THE THIS SHIT IS OVER YOULL [sic] BE WISHING YOU JUST IGNORED IT." "You will fucking find out what happens when you cry wolf bitch."²⁵⁸

²⁵¹ *Id.*

²⁵² *Id.* (quoting *United States v. Osinger*, 753 F.3d 939, 947 (9th Cir. 2014)). Judge Roman also found the speech at issue to unprotected defamation. *Id.* at *7.

²⁵³ *Id.* at *8.

²⁵⁴ No. 1:18-CR-10251, 2019 U.S. Dist. LEXIS 105672 (D. Mass. June 24, 2019).

²⁵⁵ *Id.* at *2.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at *3-4.

Cardozo was indicted for cyberstalking in violation of § 2261A(2)(B).²⁵⁹ He moved to dismiss the cyberstalking count on First Amendment grounds. He argued that Jane Doe I is a public figure writing on matters of public concern and therefore, particularly in light of the MeToo movement, his comments were of “public interest” and thus protected by the First Amendment.²⁶⁰ In support of this argument, Cardozo relied on *Cassidy*.²⁶¹

United States District Judge Allison Burroughs rejected Cardozo’s First Amendment argument. In contrast to Judge Roman’s thorough discussion of whether the victim in *Sargentakis* was a public figure, Burroughs summarily concluded the Jane Doe I was not.²⁶² She cites no authority for this holding but merely notes that the victim in *Cassidy* was a “religious leader.”²⁶³ And unlike Judge Roman, Judge Burroughs does not separately consider whether, even if the victim were deemed a public figure, the defendant’s speech was not on a matter of public concern. However, in her explanation of why “*Cassidy* [is] not controlling”²⁶⁴ Burroughs does note that the defendant in that case “challenged the target’s ‘character and qualifications as a religious leader.’”²⁶⁵ Despite the shortcomings of her First Amendment analysis, Judge Burroughs was correct that Cardozo’s speech was not on a matter of public concern.²⁶⁶ For at least as described in the case,²⁶⁷ Cardozo’s communications consisted solely of personal, often menacing, attacks on the victim with nary a mention of the MeToo movement or any other matter of public concern.²⁶⁸

²⁵⁹ *Id.* at *1. He was also indicted for making interstate threats in violation of 18 U.S.C. § 875(c). *Id.*

²⁶⁰ *Id.* at *6.

²⁶¹ *Id.* at *10.

²⁶² *See id.* at *10-11.

²⁶³ *Id.* at *10.

²⁶⁴ *Id.* at *11.

²⁶⁵ *Id.* (quoting *United States v. Cassidy*, 814 F. Supp. 2d 574, 583 (D. Md. 2011)). Because the indictment alleged that the defendant’s speech was integral to criminal conduct, Burroughs found the count alleging violation of § 2261A(2)(B) comported with the First Amendment. *Id.* She also rejected Cardozo’s argument that the count of the indictment alleging interstate threats violated the First Amendment, ruling that whether his expression constituted a true threat was a question to be decided by the jury. *Id.* at *13. She therefore denied Cardozo’s motion to dismiss the indictment. *Id.* at *15.

²⁶⁶ Or as Judge Burroughs put it, “of public interest.” *Id.* at *6.

²⁶⁷ *Id.* at *3.

²⁶⁸ *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 371 (D. Del. 2015), is another case involving a former amorous relationship in which it was claimed that some of the impugned speech had a “legitimate public purpose.” In that case, the defendants, David

All of the mixed cases just discussed involved a “pre-existing relationship or conflict”²⁶⁹ between the defendant and the victim of the cyberharassment. This fact weighed heavily in categorizing the impugned expression as on a matter of private concern, just as its absence was a significant factor in the Court’s finding the expression in *Snyder v. Phelps* to be a matter of public concern.²⁷⁰ Which brings full circle back to the vicious cyberharassment of software design blogger Kathy Sierra described at the beginning of this Article.²⁷¹ There was no preexisting relationship or controversy between Sierra and any of her harassers, including her primary persecutor, the notorious Internet troll, “weev.” Nor unlike with the harassment of blogger Anita Sarkeesian for complaining about what she saw as the sexist nature of videogames,²⁷² there wasn’t any obvious comment on a matter of public concern that Sierra made on her blog that caused the harassment.²⁷³ Sierra believes that the reason for her harassment was that she was a woman who dared to express opinion on tech issues.²⁷⁴

How then should the cyberharassment of Sierra be categorized in terms of public or private concern? It could be argued that because bloggers are involved in public discourse, cyberharassment of bloggers should be considered a matter of public concern. On this view, harassers could not be punished under § 2261A(2)(B) unless the expression

Matusiewicz and members of his family engaged in an online campaign to harass Matusiewicz’s former wife, Christine Belford, including by accusing her of sexually molesting her children. *Id.* at 366. In denying the defendants’ motion to dismiss the indictment on First Amendment grounds, United States District Judge Gerald McHugh noted that depending on the defendants’ “intentions and the context” of the speech, “at least some of the speech in question would likely be protected” due to its legitimate public purpose. *Id.* at 371. Judge McHugh noted that defendants’ failure to report this alleged abuse to the authorities supported the government’s charge that the defendants’ “true objective was not the children’s welfare, but rather harassing and causing substantial distress to Belford.” *Id.* at 373. McHugh allowed that the defendants might argue to the jury at trial that this was not their intent. But for purposes of First Amendment analysis, he found it decisive that the defendants had “alternative methods” to raise concerns about the children’s welfare. *Id.* at 373 n.8. In the appellate decision affirming defendants’ conviction, there is no mention of an argument that the allegations of child abuse were protected by the First Amendment because made for a legitimate public purpose. *See United States v. Gonzales*, 905 F.3d 165, 190-94 (3d Cir. 2018).

²⁶⁹ *Snyder v. Phelps*, 562 U.S. 443, 455 (2011).

²⁷⁰ *See id.*

²⁷¹ *See supra* notes 6–9 and accompanying text.

²⁷² *See supra* note 142 and accompanying text.

²⁷³ *See CITRON, supra* note 6, at 37-38.

²⁷⁴ *See* Kathy Sierra, *Why the Trolls Always Win*, WIRED (Oct. 8, 2014, 4:49 PM), <https://www.wired.com/2014/10/trolls-will-always-win/> [https://perma.cc/Rf25-8VSS].

constituted a true threat, unprotected defamation or incitement to violence or other lawless conduct against the victim. But if democratic self-governance or search for the truth in the marketplace of ideas are to be the touchstone, this position would seem too broad. Carte blanche to harass bloggers short of true threats or incitement would deter people, particularly women, from expressing their ideas on the Internet. Given the tight requirements for prosecutions under § 2261A(2)(B), any chilling effect that any application of this provision to cyber harassers might have on expression with any significant free speech value would seem far less than the chilling effect that cyberharassment has on such expression by bloggers. The court in *Cardozo* was thus correct in holding that the mere fact that the victim of harassment is a blogger is not sufficient to make the expression a matter of public concern.²⁷⁵ Although this may be a relevant factor, *Snyder* teaches that the focus must be on the “content” as well as the “form and context,” of the impugned speech.²⁷⁶

IV. THE PERILS OF THE SPEECH INTEGRAL TO CRIMINAL CONDUCT EXCEPTION

As discussed in the preceding Part, in cases involving speech on private concern, courts frequently invoke the speech integral to criminal conduct exception to the All-Inclusive rule to uphold the constitutionality of prosecutions and convictions under § 2261A(2)(B)

²⁷⁵ See *supra* notes 262–268 and accompanying text.

²⁷⁶ *Snyder v. Phelps*, 562 U.S. 443, 453–54 (2011). Nor would the mere fact that the harasser objects to woman being in the tech industry be sufficient to make the harassment a matter of public concern. Expression objecting to the presence of women in the technology industry would qualify as being on a matter of public concern. But harassing communications directed to a person because of the speaker’s opposition to that person’s sex, race, sexual orientation, or similar characteristics is not alone sufficient to make these communications a matter of public concern. In this regard, it is instructive to consider *United States v. Fanyo-Patchou*, No. CR19-0146, 2020 WL 4816296 (W.D. Wash. Aug. 19, 2020). In that case, the defendants were charged under § 2261A(2)(A)-(B) with Internet harassment of a gay man from Cameron living in Seattle, Washington, by disseminating private information about his sexual orientation, including nude pictures of him and his husband, to the Cameroonian community. *Id.* at *1-2. The defendants argued that their communications were “constitutionally protected” because they were evidence that the putative marriage between victim and his alleged husband was fraudulent and part of a criminal conspiracy to commit immigration fraud. Because the government disputed that the marriage was fraudulent, United States District Judge John Coughenour held it was a disputed fact for the jury to decide. *Id.* at *4. Significantly, and correctly in my view, neither the defendants nor the court suggested that the communications were protected just because the defendants objected to the victim’s sexual orientation or to same-sex marriage.

and its predecessor provisions. But not only does using the speech integral to criminal conduct exception to uphold cyberharassment prosecutions of speech on matters of private concern obscure analysis, it threatens to undermine the protection of speech on matters of public concern. Professor Volokh has aptly condemned the speech integral to criminal conduct exception as “indeterminate, dangerous, and inconsistent with more recent cases.”²⁷⁷ Others have similarly denounced this dubious exception to First Amendment protection.²⁷⁸ Such criticism is well founded.

The speech integral to criminal conduct rationale would allow the government vast authority to punish speech that must be allowed in a free and democratic society. It would, for instance, allow punishment of an anti-war protestor whose passionate anti-war rhetoric persuaded people to resist the draft, on the theory grounds that such expression was “integral to the crime” of draft resistance. The remarkably rigorous protection of dissent that is the hallmark contemporary doctrine, including the key rule against content discrimination, is in large part a reaction to the Court’s failure during World War I to provide adequate First Amendment protection to anti-war protestors whose speech the government alleged constituted willful attempts to cause “refusal of duty, in the military or naval forces of the United States” in violation of a federal law punishing draft resistance.²⁷⁹ It would be a tragic irony if

²⁷⁷ Volokh, *Speech as Conduct*, *supra* note 75, at 1285; *see also* Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 CORNELL L. REV. 981, 987 (2016) (arguing that the speech integral to criminal conduct exception “can’t justify treating speech as ‘integral to illegal conduct’ under the law being challenged . . . since the whole point of modern First Amendment doctrine is to protect speech against many laws that make such speech illegal”).

²⁷⁸ *See, e.g., King v. Governor of N.J.*, 767 F.3d 216, 225 (3d Cir. 2014) (stating that this exception “has been the subject of much confusion”); *United States v. Weiss*, No. 20-cr-00013, 2020 U.S. Dist. LEXIS 133617, at *33 (N.D. Cal. July 28, 2020) (condemning as “fatally circular” the argument that the speech integral to criminal conduct rationale means that “Congress can make a law criminalizing otherwise-protected speech, and then because a defendant’s speech violates the law, deem the speech to be ‘speech integral to criminal conduct’”); *United States v. Matusiewicz*, 84 F. Supp. 3d 363, 369 (D. Del. 2015) (“Under the broadest interpretation [of the exception], if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense.”); Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 300 (referring to “the logical flaws” of the “speech integral to criminal conduct” exception).

²⁷⁹ Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (codified as amended at 18 U.S.C. § 2388(a)). *See* James Weinstein, *Learned Hand’s Masses Decision: Vindication and Influence*, 50 ARIZ. ST. L.J. 927, 941 (2018). The government prosecuted 2,168 people under the Espionage Act of 1917 and its 1918 Amendment, and obtained

an exception to the All-Inclusive Approach's misguided goal of broadly extending First Amendment protect to most human expression were to undermine the core right of political dissent in this country.

Less catastrophic but particularly pertinent to First Amendment limitations on § 2261A, the speech integral to criminal conduct is just as applicable to speech on matters of public concern as it is to speech on matters of purely private concern. Thus, under the reasoning of the *Osinger* majority, Cassidy's online attack on Zeoli was "integral to criminal conduct' in intentionally harassing, intimidating or causing substantial emotional distress to [Zeoli]."²⁸⁰ The same is true of Cook's cyberattack on Lepicier.

Concurring in *Osinger*, Judge Watford was correct to be chary of the speech integral to criminal conduct exception. But his limiting this rationale to situations where the speech is combined with "unprotected non-speech conduct,"²⁸¹ does not remedy the problem. Assume that Mary, a prominent advocate of the legalization of marijuana, has in the course of persuasively describing to a large audience the joys and benefits of smoking pot, distributed a few "joints" to her audience. Just as *Osinger* would have had no valid First Amendment objection if he had been charged under state law for trespass or harassment for his unwanted late-night visits to V.B.'s house, so could Mary be constitutionally charged with distribution of an illegal substance. But in neither case would the existence of such "unprotected non-speech conduct" justify punishing what is otherwise protected speech.

CONCLUSION

Lower courts faced with challenges to § 2261A(2)(B) are in a tough position. On the one hand, they intuitively realize that punishing harmful expression on matters of purely private concern does not threaten any significant free speech values and thus should not be protected by the First Amendment. On the other hand, they feel bound to follow Supreme Court's frequent pronouncement of the All-Inclusive Approach. It is thus understandable that they would search for an exception to this general rule against content regulation and have alighted upon speech integral to criminal conduct. But although relying

1,055 convictions, many of which were against defendants for doing no more than vehemently protesting American involvement in World War I. See Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in War Time*, 2002 Sup. Ct. Rev. 411, 414 n.11.

²⁸⁰ *United States v. Osinger*, 753 F.3d 939, 947 (2014).

²⁸¹ *Id.* at 953 (Watford, J., concurring).

on this exception may be understandable, it is for the reasons discussed in Part IV of this Article very problematic.

How then should a court deal with a First Amendment challenge in a case like *Osinger*? One possibility is to uphold the challenge and let the government seek review in the Supreme Court, which would then have an opportunity to clean up the doctrinal mess it has created by its dicta endorsing the All-Inclusive Approach. But it is unlikely that courts will want to run the risk of letting cruel and destructive speech such as *Osinger*'s go unpunished if the Court denies review. Another possibility is to uphold the application of the law under the "strict scrutiny" standard applicable to content regulation of protected speech. The Supreme Court, however, has rarely found a speech regulation to pass this extremely rigorous test,²⁸² and it is not at all certain that it would do so in the case of cyberharassment. And as discussed above,²⁸³ such an approach would threaten to dilute the protective rigor of strict scrutiny.

The best approach in my view is for lower courts to follow the Supreme Court's lead in eschewing the All-Inclusive Approach in cases dealing with First Amendment limitations on intentional infliction of emotional distress claims. Then in light of the Court's dicta in *Snyder* and lower court holdings that intentional infliction of emotional distress civil actions on matter of private concern comport with the First Amendment, they should reject First Amendment challenges to § 2261A(2)(B). As discussed in Part IV.B, the requirement that the speech be on "purely" private concern together with the various statutory limitations should be sufficient to account for the ordinarily greater "chilling effect" from criminal as opposed to criminal penalties. Such a straightforward rationale would be far preferable than invoking the All-Inclusive Approach and then slipping out of it by invoking the mischievous speech integral to criminal conduct exception.

²⁸² See *supra* note 70 and accompanying text.

²⁸³ See *supra* notes 71–73 and accompanying text.