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ABSTRACT

Real-time information technology facilitates more efficient channels of communication. As communication becomes nearly instantaneous and further reaching, it seems probable that more expression will fall within the scope of cyberharassment and cyberstalking laws. Attorneys who represent clients indicted on such criminal charges need to familiarize themselves with possible defenses. This Article suggests invoking the overbreadth doctrine to exonerate a client who is charged with violating the federal cyberstalking statute.

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INTRODUCTION

Twitter is a real-time information network that allows people to receive and send news and information instantly.[2] These dispatches are termed "tweets" and are limited to 140 characters in length.[3] Persons with Twitter accounts may elect to receive tweets from other account holders.[4] This is known as "following" and effectively allows a user to subscribe to select releases of information.[5] Tweets are public but users can also send private messages amongst themselves.[6]

Twitter is a global phenomenon that provides its service in over twenty different languages and is expected to have over one billion registered users by the end of 2013.[7] With such an explosion in use, people may increasingly rely upon the legal system as recourse to halting harassment and stalking conducted through tweets. As with other forms of speech, one may incur criminal liability through the use of Twitter. Indeed, tweets have fallen and will continue to fall within the scope of state and federal cyberstalking statutes.[8]

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[2] https://twitter.com/about (last visited Oct. 22, 2012).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Dominic Rushe, *Icelandic MP Fights US Demand for her Twitter Account Details*, THE GUARD. (Jan. 8, 2011).

[7] https://twitter.com/about (last visited Oct. 22, 2012); Claire Miller & Brad Stone, *Hacker Exposes Private Twitter Documents*, BITS (July 15, 2009).

[8] *See, e.g.*, United States v. Sayer, Nos. 2:11-CR-113-DBH, 2:11-CR-47-DBH, 2012 WL 1714746 (D. Me. May 15, 2012); Johnson v. Arlotta, No. 27-cv-10-21534 (D. Minn. Dec. 12, 2011) (unpublished).

Interstate communication through an Internet service like Twitter may implicate on such statute in particular: the federal cyberstalking statute. When this occurs, substantial First Amendment issues may come into play. Subsection A of this Article discusses the federal cyberstalking statute in further detail. Section I provides a quick First Amendment refresher. Section II provides examples of the First Amendment overbreadth doctrine as a potential defense to the cyberstalking statute by examining two cases involving the use of Twitter.

I. TWITTER AND FEDERAL CRIMINAL LIABILITY

In response to the growing number of crimes against women, Congress enacted the Violence Against Women Act ("VAWA").[9] As the Sixth Circuit Court of Appeals discussed in *United States v. Page*,[10] Congress recognized the severe toll that such crimes impose upon society. VAWA provides, *inter alia*, funding for the investigation and prosecution of violent crimes against women. Congress reauthorized VAWA in 2000, 2005,[11] and 2013.[12]

A. The Cyberstalking Statute

In 1996, Congress passed the original interstate stalking statute—codifed as 18 U.S.C. § 2261A—as part of VAWA.[13] The statute criminalized the of use of the postal service, or any channel of interstate commerce, to engage in a course of conduct that purposefully placed another person in reasonable fear of death or serious injury.[14]

The rise of the Internet created a new medium for stalking behavior, and stalking became more common than ever before. According to Department of Justice statistics, victim reports of

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[9] Pub. L. No. 104-201, § 1069(a), 110 Stat. 2422, 2655 (1996).

[10] 167 F.3d 325 (6th Cir. 1999).

[11] Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006).

[12] Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (2013).

[13] *See* Pub. L. No. 104-201, § 1069(a), 110 Stat. 2422, 2655 (1996).

[14] Pub. L. No. 106-386, § 1107(b)(1), 114 Stat. 1464, 1498 (2000); *see, e.g.*, United States v. Fullmer, 584 F.3d 132 (3d Cir. 2009).

stalking increased from 1.4 million in 1998 to 3.4 million in 2009.[15] In response, Congress amended § 2261A in 2006, broadening the reach of the statute to encompass stalking behavior conducted through Internet computer services.[16] Congress also criminalized courses of conduct perpetrated with the intent to harass.[17] To violate the statute, the alleged cyberharassment need not cause a reasonable fear of death or serious injury, as was required under the original law. Instead, purposeful conduct that leads to another's substantial emotional distress is now sufficient to violate § 2261A.[18]

By lowering the threshold from purposeful conduct that leads to emotional distress, i.e., intent to harass, Congress has broadened the cyberstalking statute to ensnare simple expression that may be subjectively understood as purposeful conduct meant to harass. Consequently, a defense that relies upon the protections of the First Amendment may be compelling.

B. Applicable First Amendment Doctrine

The First Amendment issues involved in raising a cyberstalking defense include the level of review, the tension between conduct and speech, the captive audience doctrine, the distinction between public and private speech, and the nature of facial and as-applied challenges.

1. Standard of Review

The standard of review for laws restricting speech varies.[19] Courts often employ the term "heightened scrutiny" in reviewing

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[15] Melvin Huang, *Keeping Stalkers at Bay In Texas*, 15 TEX. J. C.L. & C.R. 53, 55 (2009).

[16] Pub. L. No. 109–162, § 114(a), 119 Stat. 2690, 2987 (2006) (making it a crime "to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another state or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States . . . .").

[17] *Id.*

[18] *Id.*

[19] *See, e.g.*, DAVID S. SCHWARTZ & LORI A. RINGHAND, CONSTITUTIONAL LAW: CONTEXT AND PRACTICE CASEBOOK 936 (2012).

content-based restrictions on speech.[20] Laws that restrict speech based on content deserve special scrutiny because such laws act as prior restraints, in effect, chilling freedom of expression—a constitutionally guaranteed right.[21]

Although freedom of expression is not unlimited, even content-neutral regulations must pass intermediate scrutiny.[22] For example, emotionally distressing speech may be entitled to "special protection" under the First Amendment.[23] This is important to note when considering the broad applications of the cyberstalking statute.

The Supreme Court has emphasized that the justification or the purpose of the statute will control whether such restrictions are content-based.[24] If a law restricts speech due to its content, a court will then determine whether the speech falls within the narrow exceptions to First Amendment Protection: obscenity,[25] defamation,[26] fraud,[27] incitement,[28] true threats,[29] or speech integral to criminal conduct.[30] If speech falls within these

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[20] United States v. Bell, 303 F.3d 1187 (9th Cir. 2002) (citing Byrne v. Rutledge, 623 F.3d 46, 58 (2d Cir. 2010)).

[21] U.S. CONST. amend. I.

[22] *See* United States v. O'Brien, 391 U.S. 367, 3776–77 (1968). Even though the law at issue in *O'Brien* did not restrict speech based on content, the Court nevertheless asked whether the government could establish that: (1) the law was within the constitutional power of the Government, (2) it furthered an important or substantial governmental interest, (3) the governmental interest was unrelated to the suppression of free expression, and (4) that the incidental restriction on alleged First Amendment freedoms was no greater than required to further that interest.

[23] Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) ("[If such] speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.").

[24] RODNEY A. SMOLLER & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:5 (1989) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[25] Roth v. United States, 354 U.S. 476 (1957).

[26] Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952).

[27] Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 752 (1976).

[28] Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam).

[29] Watts v. United States, 394 U.S. 705, 708 (1969).

[30] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

categories, a court will inquire into whether the law that restricts such speech is substantially overbroad.[31]

2. Conduct and Speech

The Supreme Court's opinion in *United States v. O'Brien*[32] has set the standard for courts that review regulations that impact speech for reasons unrelated to the content of expression.[33] In applying *O'Brien*, the Supreme Court has rejected the argument that conduct could be interpreted as speech whenever the conduct is intended to convey a message.[34] First Amendment protection does extend, however, to conduct that is "inherently expressive"[35]—such as flag burning, which does not require accompanying speech to explain the message.[36]

3. Captive Audience

In public spaces—generally, most places outside of the home—the burden is on the viewer to avert her eyes from offensive protected speech.[37] For example, in *Erzonik v. Jacksonville*,[38] the Supreme Court struck down as facially invalid a regulation prohibiting drive-in movie theaters from displaying nudity on screens that were viewable to the public from sidewalks. This principle applies to billboard advertisements as well.[39] The rationale for this doctrine is that in a society committed to individual freedom, a certain amount of "expressive disorder" must be protected to ensure that a free society will continue.[40]

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[31] SCHWARTZ & RINGHAND, *supra* note 19.

[32] 391 U.S. 367 (1968).

[33] SMOLLA & NIMMER, *supra* note 24, § 9:1.

[34] Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 65-66 (2006).

[35] *Id.*

[36] *Id.* (distinguishing Texas v. Johnson, 491 U.S. 397, 406 (1989)).

[37] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 948 (2d ed. 1988).

[38] 422 U.S. 205 (1975).

[39] *See, e.g.*, New York Magazine v. Metro. Transp. Auth., 136 F.2d 123 (2d Cir. 1998).

[40] City of Houston, Texas v. Hill, 482 U.S. 451, 472 (1987).

4. Public and Private Speech

Another important consideration is the distinction between public and private speech.[41] Decades ago, Alexander Meiklejohn argued that absolute freedom of speech should apply only to matters relating to self-governance because such speech is directed at the common good.[42] By contrast, speech conveyed for individual benefit should not necessarily enjoy the absolute protections of the First Amendment.[43]

5. Facial and As-Applied Challenges

To avoid a chilling effect upon speech, courts have invalidated laws held to be overly broad.[44] A statute may be overbroad on its face if there are a substantial number of applications that are unconstitutional as judged in relation to the statute's legitimate purpose.[45] In essence, a facial overbreadth challenge is a forward-looking argument that seeks to prevent enforcement of the statute in the future. Facial challenges are disfavored because they rest on mere predictions and run counter to the theory of judicial restraint.[46]

By contrast, an "as-applied" challenge seeks only to redress a specific constitutional violation. Accordingly, an as-applied challenge is appropriate when a person's constitutional rights have been violated by the enforcement of a facially constitutional law or regulation. As a practical matter, it may be expedient to first argue

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[41] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 94 (1948).

[42] *Id.* at 88-89.

[43] *Id*.

[44] The "'overbreadth doctrine' is derived in part from the elemental proposition that 'a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law.'" 1 SMOLLA & NIMMER, *supra* note 24, § 6.4 (quoting Henry Paul Monaghan, *Overbreadth*, SUP. CT. REV. 1, 3 (1981)).

[45] *See, e.g.*, Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008).

[46] *See* United States v. Raines, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.").

facial overbreadth and then raise an as-applied challenge in the alternative.

II. EXAMPLES OF RECENT OVERBREADTH CHALLENGES INVOLVING TWITTER

Heightened scrutiny, in its various forms, operates to ensure that if speech is to be restricted based on its content, such restrictions are narrowly tailored to restrict only unprotected speech.[47] Courts demand that laws restricting speech refrain from unnecessarily proscribing protected speech[48] because "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[49] Courts have insisted that this rationale applies not only to traditional forms of expression, but to Internet communication as well.[50] Thus, the constitutional protections available to other forms of communication are also applicable to Twitter.

Because § 2261A may be construed as a content-based restriction on speech insofar as the statute acts to limit persons from broadcasting harassing expression, a solid defense should begin with an argument that the statute is subject to heightened scrutiny. A court may hold the statute unconstitutional if it is not narrowly tailored to restrict only unprotected speech. Alternately, the court may invalidate the statute as applied to the defendant if the defense can show that its application violated the defendant's constitutional right to free speech.

A. Cassidy and *Sayer*

Two recent cases demonstrate the divergent results of overbreadth attacks. The first case, *United States v. Cassidy*,[51]

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[47] SMOLLA & NIMMER, *supra* note 24, § 2:66 .

[48] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[49] NAACP v. Button, 371 U.S. 415, 438 (1963).

[50] *See, e.g.*, United States v. Cassidy, 814 F. Supp. 2d 574, 582 (D. Md. 2011) (quoting in part Reno v. ACLU, 521 U.S. 844, 870 (1997)) ("Online speech is equally protected under the First Amendment as there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech.").

[51] Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011).

demonstrates a successful overbreadth attack. The second, *United States v. Sayer*,[52] illustrates an unsuccessful attempt.

1. *Cassidy*: A Successful Overbreadth Argument

In 2011, the District Court of Maryland, in *United States v. Cassidy*, granted a defendant's motion to dismiss, holding that §2261A, as applied to the defendant, criminalized protected speech.[53]

According to an affidavit submitted to the district court: the defendant ("Cassidy"), under an assumed name, befriended a female Buddhist leader named Alyce Zeoli ("A.Z.") at her Buddhist retreat.[54] Cassidy received end-of-life care from the Buddhist monks who were led to believe that he was succumbing to stage IV lung cancer.[55] Cassidy proposed to A.Z. and was rebuffed.[56] He also asked A.Z. "if she wanted him to kill her ex-husband," in response to which "A.Z. requested that her ex-husband not be harmed."[57] When A.Z. discovered that Cassidy was not in fact suffering from terminal cancer, she confronted him.[58] Subsequently, Cassidy left the retreat with a Buddhist nun.[59] He then set up a fake Twitter account titled "Vajragul" through which he directed over 350 tweets at A.Z. and her center.[60]

Cassidy contended, inter alia, that § 2261A(2)(A)[61] "violates

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[52] Nos. 2:11-CR-113-DBH, 2:11-CR-47-DBH, 2012 WL 1714746 (D. Me. May 15, 2012).

[53] *Cassidy*, 814 F. Supp. 2d at 578 ("an enthroned tulku or reincarnate master who was enthroned in 1988 as a reincarnate llama. . . the only American-born female tulku"); *see also* MARTHA SHERRILL, THE BUDDHA FROM BROOKLYN (Random House 1st ed., 2000).

[54] *Cassidy*, 814 F. Supp. 2d at 578.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 579 n.6.

[61] Which, again, makes it a crime "to kill, injure, harass, or place under surveillance with intent to kill, injure, harass, or intimidate, or cause substantial emotional distress to a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States." Pub. L. No. 109-62, § 114(a), 119 Stat. 2690, 2987 (2006).

the Free Speech Clause of the First Amendment because it is overbroad and implicates a broad range of otherwise constitutionally protected speech."[62]

The government argued that § 2261A regulates conduct and not speech.[63] The court dismissed the government's argument, citing *United States v. O'Brien*[64] for the proposition that even content-neutral laws that proscribe a combination of speech and conduct must still survive intermediate scrutiny.[65] Such a restriction survives intermediate scrutiny if (1) it furthers an important governmental interest, (2) such an interest is unrelated to restricting speech, and (3) the restriction is no greater than necessary to further such an interest.[66]

The *Cassidy* court conceded that preventing tweets and blog posts from inflicting emotional distress serves an important interest; however, the court questioned whether such an interest persists when the expression is conveyed in a public forum. The tweets were not directed at a captive audience because the victims may choose to ignore the blog posts or "unfollow" the offending Twitter accounts.[67]

The court noted too that emotionally distressing speech enjoys constitutional protection when it touches upon political, religious, or other matters of public concern.[68] "This is because 'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'"[69]

The court reasoned that the defendant's tweets did not fall within any of the exceptions to First Amendment protection.[70] The tweets were not integral to criminal conduct because they directly related to a public figure; they challenged her efficacy as a religious leader; and such speech—uncomfortable, anonymous,

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[62] *Cassidy*, 814 F. Supp. 2d at 581.
[63] *Id.* at 585.
[64] United States v. O'Brien, 391 U.S. 367 (1968).
[65] *Cassidy*, 814 F. Supp. 2d at 585.
[66] *Id.* (citing *O'Brien*, 391 U.S. at 377) (omitting the first factor that the *O'Brien* opinion listed).
[67] *Id.* at 585-86 n.13.
[68] *Id.*, at 582.
[69] *Id.* (internal quotation marks omitted).
[70] *Id.* at 583.

Internet speech addressing religious matters—is protected by the First Amendment.[71] Nor were the tweets "true threats," because the government's indictment failed to allege that the defendant had threatened to inflict death or serious bodily harm.[72]

The court held that § 2261A(2)(A) "sweeps in the type of expression that the Supreme Court has consistently tried to protect."[73] Because the court concluded that the statute was unconstitutional as applied to the defendant, it refrained from determining whether § 2261A was invalid on its face.[74]

2. *Sayer*: An Unsuccessful Overbreadth Argument

In 2012, the District Court of Maine, in *United States v. Sayer*, faced a similar challenge to the interstate stalking statute.[75] In *Sayer*, the defendant mounted an unsuccessful challenge to § 2261A. Of particular importance to this Article, the defendant's overbreadth argument failed.[76]

The defendant ("Sayer") was charged, *inter alia*, with violating the interstate stalking statute because of alleged conduct that was intended to "injure, harass, and cause substantial emotional distress to a person in another state . . . ."[77] After his ex-girlfriend moved out of state, Sayer allegedly used her name and personal information in creating Internet advertisements and fake social media accounts.[78] The advertisements implored men to visit the victim for sex.[79] The advertisements were given an air of authenticity by the defendant's inclusion of sexual home videos he had recorded of himself and the victim when they were dating.[80] As a result of the defendant's actions, a number of strangers

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[71] *Id.*

[72] *Id.*

[73] *Id.* at 586 (citing New York Times v. Sullivan, 376 U.S. 254, 271 (1964); Boos v. Barry, 485 U.S. 312, 322 (1988)).

[74] *Id.* at 587.

[75] Nos. 2:11-CR-113-DBH, 2:11-CR-47-DBH, 2012 WL 1714746 (D. Me. May 15, 2012).

[76] *Id.* at *6–7.

[77] *Id.* at *1.

[78] *Id.* at *2.

[79] *Id.*

[80] *Id.*

presented themselves at the victim's door seeking sexual intercourse, causing the victim terror and fear that she would be raped.[81]

The court explicitly distinguished *Cassidy* for its emphasis on the public, religious nature of the tweets: "In *Cassidy*, the victim was 'not merely a private individual but rather an easily identifiable public figure that leads a religious sect, and . . . many of the Defendant's statements relate to [the sect's] beliefs and [the victim]'s qualifications as a leader.'"[82] In contrast, Sayer's alleged conduct lacked the protective cloak of political or religious speech.[83] Moreover, because Sayer's speech was "integral to criminal conduct," the statute that criminalized such speech was not unconstitutional as applied to him.[84]

With respect to the facial overbreadth challenge, the court explained that the first task must be to construe the statute in question. The second task is to determine whether the statute reaches too much protected speech.[85]

After considering the text of § 2261A, the *Sayer* court explained that the Supreme Court's test for whether a statute criminalizes a substantial amount of protected communicative activity is based upon whether the statute, as applied to a number of cases, reaches valid conduct more often than is necessary in light of its legitimate purpose.[86]

In applying this test, the *Sayer* court concluded that §2261A covered constitutionally unprotected conduct and speech.[87] The court noted that if the statute contained any overbreadth, such

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[81] *Id.*

[82] *Id.* at *3 (alterations in original) (quoting *Cassidy*, 814 F. Supp. 2d at 586).

[83] *Id.*

[84] *Id.*

[85] *Id.* at *4 (quoting United States v. Williams, 553 U.S. 285, 293 (2008)).

[86] *Id.* at *5 (quoting United States v. Stevens, 559 U.S. 460 (2010)).

[87] *Id.*; s*ee also, e.g.*, United States v. Bowker, 372 F.3d 365, 378-79 (2004) ("We fail to see how a law that prohibits interstate travel with the intent to kill, injure, harass or intimidate has a substantial sweep of constitutionally protected conduct. The same is true with respect to the prohibition of intentionally using the [I]nternet in a course of conduct that places a person in reasonable fear of death or seriously bodily injury. It is difficult to imagine what constitutionally-protected political or religious speech would fall under these statutory prohibitions.") (citations omitted)).

overbreadth was in criminalizing criminal conduct intended to cause substantial emotional distress.[88] The court conceded that such overbreadth, if any, is modest, not substantial, and that the specific intent requirement of § 2261A will "dispose of most concerns."[89] The court also reasoned that the substantial emotional distress precondition narrowed the statute's application further.[90]

Finally, the *Sayer* court reiterated that fears of a chilling effect upon protected speech should attenuate when behavior shifts "from pure speech toward conduct."[91] "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[92] In the *Sayer* court's opinion, no one familiar with the facts of the case could reasonably believe that the Constitution forecloses Congress from criminalizing such conduct.[93]

B. A Difficult Task

A defense that includes an overbreadth challenge to the federal cyberstalking statute must show that the statute is more than merely overbroad; legislation, to be invalid here, must be substantially overbroad compared to the legitimate functions it proposes to serve.[94]

A facial challenge is unlikely to succeed. The Supreme Court has established this stringent threshold showing in part because it deemed that any chilling effect upon speech, alone, should be

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[88] *Id.*

[89] *Id.* at *6.

[90] *Id.*

[91] *Id.* at *7 (quoting Virginia v. Hicks, 539 U.S. 113, 124 (2003)) (internal quotation marks omitted).

[92] *Id.* (quoting Virginia v. Hicks, 539 U.S. 113, 124) (internal quotation marks omitted).

[93] *Id.*

[94] SMOLLA & NIMMER, *supra* note 24, § 6:6 (citing Broaderick v. Oklahoma, 413 U.S. 601, 615 (1970)); *see also* Gibson v. Mayor of City of Wilmington, 355 F.3d 215, 228 (3d Cir. 2004) ("substantial overbreadth is determined first by comparing the number of valid applications to the likelihood and frequency of impermissible applications.").

insufficient to prohibit state action.[95]

Instead, under this framework, a court must compare legitimate and illegitimate applications of the law.[96] Accordingly, the overbreadth doctrine loses power when the statute in question forbids otherwise unprotected speech that the state has deemed criminal conduct.[97]

In *Cassidy*, the court held that the defendant's tweets and blog posts were speech addressing an issue of public concern—regardless of their threatening nature. The United States argued that Cassidy's allegedly threatening tweets comprised a course of criminal conduct. But in order to establish its burden of proof, the government must show that the expression at issue constituted a "true threat" or was "integral to criminal conduct."

Notwithstanding this requirement, *Sayer* suggests that statutes that criminalize true threats through the Internet are apt to be upheld regardless of any constitutional challenge.[98] The practitioner therefore must persuade the court that the defendant's speech failed to constitute a true threat. In the Ninth Circuit, this task involves distinguishing the defendant's speech from clear and unambiguous threatening statements.[99] Thus, two scholars have concluded, "[a] recurring theme in all of these cases is the heightened willingness of courts to find that statements made on the Internet are not protected when fiery rhetoric is conjoined with *specific identifying or instructional detail*."[100] One can understand further why the defendant's actions in *Sayer* were not afforded the

First Amendment protection—by disclosing the victim's personal information, Sayer all but led strangers to the victim's door.

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[95] SMOLLA & NIMMER, *supra* note 24, § 6:6 (citing Younger v. Harris, 401 U.S. 37 (1971)).

[96] *Id.*

[97] *Id.* (citing *Broaderick*, 413 U.S. at 615).

[98] *See, e.g.*, United States v. Sutcliffe, 505 F.3d 944 (9th Cir. 2007) (upholding a conviction against a computer technician for uttering true threats through his website).

[99] *Id.*

[100] SMOLLA & NIMMER, *supra* note 24, § 10:42 (emphasis in original).

CONCLUSION

An attorney should consider the conduct prohibited by the cyberstalking statute. Even if the court considers the restriction to be content-neutral—or if the conduct falls within a narrow class of unprotected speech—intermediate scrutiny should be applied.

The United States must, at the very least, show that (1) the restriction furthers an important governmental interest, (2) said governmental interest is unrelated to the suppression of speech, and (3) that any restriction on speech is no greater than necessary to further such an interest.

Finally, a defense attorney representing a person accused of violating the federal cyberstalking statute must persuade the court that the defendant's speech is protected: that it is public, political, or religious in nature; fails to comprise a true threat; and is not integral to criminal conduct.

PRACTICE POINTERS

When raising a First Amendment defense to a federal cyberstalking charge:

- Emphasize that traditional First Amendment jurisprudence applies even if the defendant utilized Twitter.
- Formulate a tightly constructed argument that the statute criminalizes protected speech.
- Persuade the court that the statute is unconstitutional as applied to the defendant.
- Compare and contrast the legitimate and illegitimate sweep of the statute to show that it is substantially overbroad on its face.